

Draft recommendations of the European Ombudsman in the inquiry into complaint 52/2014/EIS against the European Personnel Selection Office (EPSO)

Recommendation

Case 52/2014/EIS - **Opened on** 03/02/2014 - **Recommendation on** 19/03/2015 - **Decision on** 17/11/2016 - **Institution concerned** European Personnel Selection Office (No further inquiries justified) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background

1. On 4 July 2013, the European Personnel Selection Office ('EPSO') published a notice of competition [2] to constitute a reserve list from which to recruit conference interpreters with French as their main language. The complainant, a qualified interpreter and EU staff member, intended to take part in this competition and completed the online application. The completed applications could be validated as from 4 July 2013 to **6 August 2013 at noon**. The complainant fell sick. She was on a drip in hospital from **5 to 6 August 2013**, for which reason she failed to validate her application within the said deadline. At the time when she fell ill, she was attending an Italian course at a language school in Sicily, Italy.
2. On 7 August 2013, as soon as the complainant recovered, she contacted EPSO in order to inform it about the situation. She explained that it was due to "*her perfectionism*" and her desire to improve her application that she had waited until the very last moment to validate it. She also asked whether her late application could be accepted in view of the medical certificate which documented her unforeseeable medical condition. According to the certificate dated 5 August 2013, the complainant needed two days of "*absolute rest in bed and of intensive therapy*" in order to mitigate the consequences of her sickness.
3. On 8 August 2013, EPSO replied that the deadline could not be extended for any personal reasons whatsoever. The complainant insisted on the importance of the matter, as the competition was allegedly the first one for conference interpreters with French as their main language in seven years. On 12 August 2013, the complainant's superior contacted EPSO to support her claim. However, in its reply, EPSO advised her superior to refrain from making contact with EPSO on behalf of candidates in order to guarantee equal treatment among



candidates. On 16 August 2013, the complainant contacted EPSO again and reiterated her request to be admitted to the competition. EPSO rejected her request on 19 August 2013. It argued that since all the applicants were informed of the procedures and were advised to strictly observe the relevant deadlines, the complainant had had sufficient time to complete and validate her application, which was her sole responsibility. Dissatisfied with this reply, the complainant contacted EPSO's Director, but to no avail.

4. On 30 August 2013, the complainant lodged a complaint in accordance with Article 90(2) of the Staff Regulations. In October 2013, EPSO informed her that she could expect a reply within the statutory timeframe, that is, four months after the submission of the complaint. She thereupon contacted EPSO's Legal Service, arguing that the decision should be taken as soon as possible, given that in her situation, a four-month deadline was unreasonable. In its reply, EPSO explained that it applies the same procedure to all complaints but would adopt appropriate measures in the event of a positive outcome.

5. Having received no reply from EPSO, on 3 January 2014, the complainant submitted her complaint to the European Ombudsman.

The inquiry

6. The Ombudsman initially identified the following allegations and claims:

- 1) EPSO failed to reply to the complainant's Article 90(2) complaint.
- 2) EPSO failed to recognise that the complainant was physically incapable of validating her online application on time and therefore was wrong not to admit her to the competition.
- 3) EPSO should reply to the complainant's Article 90(2) complaint.
- 4) EPSO should recognise that the complainant was physically incapable of validating her online application on time and admit her to the competition.

7. On the basis of her initial analysis of the complaint, the Ombudsman found that the complainant's first allegation and claim merited an inquiry, since it appeared that EPSO had not replied to her Article 90(2) complaint within the statutory timeframe. The Ombudsman's services thus contacted EPSO by telephone in that respect. On 3 February 2014, the Ombudsman received a copy of EPSO's reply dated 9 January 2014. On the same day, that reply was forwarded to the complainant for observations. The complainant submitted her observations on 21 February 2014. On the basis of EPSO's reply and the complainant's observations thereon, the Ombudsman subsequently invited EPSO to submit an opinion on the second allegation and related claim.

8. In the course of the inquiry, the Ombudsman received the opinion of EPSO on the complaint and, subsequently, gave the complainant the opportunity to submit observations on EPSO's



opinion. However, the complainant did not avail herself of this opportunity. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Alleged failure to reply to the Article 90(2) complaint and related claim

Arguments presented to the Ombudsman

9. In its decision of 9 January 2014, EPSO informed the complainant that her complaint had been rejected and that she could lodge an appeal with the Civil Service Tribunal, if she so wished. The complainant contested the legal validity of EPSO's decision on her Article 90(2) complaint, given the delay with which it was issued and communicated to her.

The Ombudsman's assessment

10. Given that EPSO replied to the complainant's Article 90(2) complaint, the Ombudsman considers that the first allegation and related claim have been addressed. As regards the complainant's argument that EPSO's delayed reply renders its decision invalid in substance, the Ombudsman points out that, in accordance with Article 90(2) of the Staff Regulations, the failure to reply within the statutory deadline of four months amounts to an implied negative decision and gives rise to the possibility of turning to the Civil Service Tribunal or to the Ombudsman. The complainant submitted her Article 90(2) complaint on 30 August 2013, which means that the four-month deadline expired on 30 December 2013. On that date, she could have considered that this amounted to an implied negative decision and turned to the Ombudsman (as she did) or to the Civil Service Tribunal within the following three months. EPSO issued its express negative decision on 9 January 2014, that is to say, a number of days after the deadline had expired. However, Article 91(3) of the Staff Regulations provides that if an explicit decision is adopted after the deadline set out in Article 90(2) has expired and before the deadline for bringing an action against the implied decision has lapsed, the time period for bringing an action begins to run afresh. It is thus clear that an institution's delay in issuing a decision on an Article 90(2) complaint does not render the decision that is subsequently taken invalid.

Allegation that EPSO was wrong not to admit the complainant to the competition and related claim

Arguments presented to the Ombudsman

11. Citing relevant case-law, EPSO said that it enjoys wide discretionary powers in determining



the details of each selection procedure. It stated that the notice of competition, which constitutes the legal basis for the applicable rules and which the selection board is bound to apply with a view to ensuring equal treatment of all candidates, clearly set out a specific deadline for the validation of applications, namely, 6 August 2013 at noon. EPSO's Guide to open competitions, which according to the relevant case-law constitutes an integral part of the notice of competition, advised candidates to take all the necessary measures to ensure that the online registration be completed within the set time limit and not to wait until the end of the registration period for validation. Furthermore, EPSO contended that it examines every complaint in compliance with the duty of care and the principles of good administration and takes into account exceptional circumstances put forward by candidates.

12. Moreover, EPSO contended that a particular medical circumstance may result in the postponement of the deadline, but it has to be informed of it in good time so as to enable it to make the necessary arrangements. It said that the complainant had had sufficient time to validate her application (more than a month following the date of publication of the notice of competition). However, it pointed out that the complainant herself stated that she had not done so until the very end, and thus accepted the risk of validating the application at the last moment and possibly missing the deadline.

13. EPSO stated that it sympathised with the complainant and never contested her declarations about her health condition, hospitalisation or medical certificate. However, it pointed out that the complainant missed a legal deadline formally laid down in the notice of competition. This precluded her from being considered for that competition.

14. EPSO claimed that it receives countless requests from candidates who, "*for one reason or another*", are unable to complete their applications within the deadline. EPSO argued that while some cases are more "*deserving than others*", it is extremely difficult to determine which cause for granting extensions among, for example, "*illness, accident, business travel or computer problems*" is more worthy. The verification of all requests would make EPSO's tasks unmanageable. Should a candidate be incapacitated for a longer period, the competition would not proceed on schedule, making an extremely complex logistical exercise more difficult. It could also expose EPSO to challenge by other candidates whose requests for a late validation are refused.

15. EPSO added that it is conscious of the need to be flexible where possible. However, it is above all bound by the legal obligation to treat all candidates equally and to respect the principles of proportionality and non-discrimination at all times.

16. Given that the complainant (i) had a full month to complete her online application, and (ii) did not communicate the existence of exceptional circumstances "*before*" the deadline for submitting applications had expired, EPSO upheld its decision. It added that, in the meantime, it had decided to provide even more explicit information to candidates and to urge them to register as soon as possible. Moreover, it noted that the General Rules Governing Open Competitions would be updated accordingly.



17. The complainant argued that she had informed EPSO about her illness " *in good time* " and had provided it with a medical certificate, but received a reply to the effect that " *no personal circumstances may be taken into account* ". EPSO recognised that a medical problem proven by a medical certificate constitutes exceptional circumstances, but reiterated that it needs to be brought to its knowledge in good time in order for it to be able to take appropriate measures.

The Ombudsman's assessment leading to draft recommendations

18. It is clear that the complainant's failure to validate her application was a direct consequence of an illness and hospitalisation which temporarily prevented her from being able to manage her affairs. It is equally clear that the legal doctrine of *force majeure* should have guided EPSO in its consideration of the complainant's request to have her application accepted. The fact that the complainant could have validated her application in the period prior to falling ill is of no relevance. The legal deadline for an action means that this action **can** be taken at any time within the prescribed timeframe. This means, in the case of the competition in question, that candidates were granted **a right** to validate their applications at any time starting from 4 July 2013 until the very last moment of the deadline, including at 11:59 a.m. on 6 August 2013.

19. The Ombudsman understands that setting a strict deadline serves the purpose of legal certainty. The Ombudsman also understands that EPSO is required to treat all candidates in the same competition equally. However, treating one candidate differently does not necessarily imply that other candidates are not being treated equally. As stated in The European Code of Good Administrative Behaviour, a difference in treatment is justifiable in a particular case where there is an objective basis to support that difference in treatment. The principles of good administration and, in particular, the principle of fairness require that the applications of candidates who fall seriously ill or who are victims of an accident before the deadline expires and are therefore objectively unable to validate their applications on time, should not be rejected simply because, as a result of their illness or accident, they were unable to meet the deadline [3]. There were objective grounds for treating the complainant in this case differently but EPSO chose not to do so. In fact, it appears to have relied on an inflexible rule that " *no personal circumstances may be taken into account* ".

20. In its opinion, EPSO took a position which is unclear, unconvincing and ambiguous. On the one hand, it appeared to admit that, " *in exceptional cases* ", it may grant extensions, adding that such requests need to be submitted " *in good time* ", that is, before the expiry of the deadline. On the other hand, it argued that it receives such a large number of requests for extensions that it does not have enough resources to examine them all and that examining them or granting extensions would delay competitions which have to follow a pre-established timetable. Finally, EPSO argued that candidates also need to be treated equally.

21. The Ombudsman points out that *force majeure* occurrences are, by their very nature, unpredictable and sudden. Requests for extensions based on *force majeure* occurrences (such as sickness or accident), happening at the very last moment before the expiry of the deadline



cannot, by definition, be submitted within the set deadline. She is thus unable to share EPSO's view that such requests need to be submitted " *in good time* " if this were to mean that they necessarily have to be sent before the expiry of the deadline.

22. As regards EPSO's argument that it receives such a large number of requests for extensions that it has not the resources or means to deal with them without delaying the competitions, the Ombudsman notes that EPSO did not substantiate its argument by providing any statistical data concerning the competition in question.

23. In any event, the Ombudsman does not consider that it would be an excessive administrative burden for EPSO to examine medical certificates supporting *force majeure* in order to decide whether to grant extensions **after** the deadline has expired, if such requests are submitted without delay. It is not difficult to distinguish requests for an extension based on business trips or computer problems from requests for an extension based on hospitalisation due to a sudden, serious illness or an accident.

24. While the Ombudsman understands EPSO's concerns that it cannot postpone an entire competition procedure because of one candidate, she believes that EPSO should be able to strike the right balance between accommodating persons in extremely difficult situations and not jeopardising the entire recruitment procedure. In fact, the very existence of computer-based test centres, assessment centres and professional selection boards should facilitate the organisation of special arrangements for candidates who are unable to validate their applications on time due to *force majeure* .

25. In light of the foregoing, the Ombudsman considers that there are good reasons for EPSO to accept, as a matter of principle, that derogations from deadlines in situations of *force majeure* , such as sudden hospitalisation due to serious illness or accident, should be granted. The potential risk of not complying with a deadline is not relevant in such situations.

26. In this particular case, EPSO did not contest the complainant's statement that she had been hospitalised and had to be put on a drip; nor did it contest her relevant medical certificate. The Ombudsman considers that the complainant's hospitalisation lends support to the view that her condition was exceptional and unforeseeable, thus amounting to a circumstance that would very likely qualify as *force majeure* . Since the complainant also communicated her condition to EPSO immediately upon being in a position to do so, the Ombudsman considers that it would have been fair for EPSO to have accepted her request or, at the very least, to have examined it seriously. The fact that it did not do so amounts to an instance of maladministration.

27. When the Ombudsman identifies an instance of maladministration, she will normally propose a solution, or make a recommendation, with a view to rectifying the situation. In this case, the selection procedure has been completed and the relevant reserve list has been published in the Official Journal [4] . At this stage, it is no longer possible to find a solution which rectifies matters for the complainant. However, it is important that such bad practice is not repeated and that EPSO changes its approach for the future. This is why the Ombudsman will make three draft recommendations below.



The draft recommendations

On the basis of the inquiry into this complaint, the Ombudsman makes the following draft recommendations to EPSO:

- 1. EPSO should acknowledge that there are cases where it is fair and proper to set a new deadline for validating applications of candidates who have failed to meet a deadline in circumstances of *force majeure*, for example because of illness or an accident.**
- 2. EPSO should clarify, in its General Rules Governing Open Competitions, the circumstances in which such a new deadline could be set.**
- 3. EPSO should inform candidates accordingly in its Guide to open competitions.**

EPSO and the complainant will be informed of these draft recommendations. In accordance with Article 3(6) of the Statute of the European Ombudsman, EPSO shall send a detailed opinion by 30 June 2015. The detailed opinion could consist of the acceptance of the draft recommendations and a description of how they have been implemented.

Strasbourg, 20/03/2015

Emily O'Reilly

European Ombudsman

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2013:193A:TOC> [Link]

[3] The Ombudsman has already taken the view that candidates should not be penalised, because of an adequately justified illness, in cases where exceptional and objective circumstances apply. See point 24 of the decision of the European Ombudsman closing own-initiative inquiry OI/9/2010/RT concerning the European Personnel Selection Office, available at: <http://www.ombudsman.europa.eu/cases/decision.faces/en/10428/html.bookmark> [Link].

[4] <http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=OJ:C:2014:270A:FULL&from=EN>



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