

Decision in case 45/2015/PMC concerning the European Anti-Fraud Office's (OLAF) actions following the receipt of a whistleblowing report

Decision

Case 45/2015/PMC - Opened on 10/02/2015 - Decision on 11/08/2015 - Institution concerned European Anti-Fraud Office (No maladministration found) |

The case concerned OLAF's actions following the receipt of a whistleblowing report linking the European Aviation Safety Authority (EASA) to the alleged manipulation of an aviation security inspection report. Following a preliminary assessment, the Ombudsman was concerned about what appeared to be OLAF's decision to dismiss the case and to refer the matter back to EASA despite the fact that the whistleblower had consciously chosen to make his report to OLAF rather than to EASA. The Ombudsman took the preliminary view that such a decision might impact negatively on the effectiveness of the whistleblowing provisions in general. She therefore decided to inquire into the matter.

Following an inspection of OLAF's files, the Ombudsman found that OLAF had appropriately considered whether to open an investigation. It also emerged that OLAF had not in fact closed the case but had asked EASA to examine the matter and to report back on the results of its investigation. Furthermore, OLAF had reserved the right to open a formal inquiry at a later stage. Against this background, the Ombudsman found that OLAF had dealt appropriately with the complainant's whistleblowing report. The Ombudsman noted that OLAF should have informed the complainant more explicitly that its referral of the matter to EASA did not mean that OLAF would not be taking any further action on the matter. She made a further remark in this regard.

The background to the complaint

1. The complainant is a staff member of the European Aviation Safety Authority (EASA). In 2014, two of his colleagues went for an inspection in a Member State to monitor that State's compliance with EU aviation safety legislation. The inspectors allegedly identified two shortcomings. However, only one of the shortcomings led to a finding in the final inspection report. According to the complainant, an EASA manager removed the second finding for political reasons. In the complainant's view, this amounted to a serious abuse of power. He therefore submitted, in early August 2014, a whistleblowing report to OLAF [1] . Using this



procedure, the complainant was entitled to expect to be protected against any retaliation or other negative consequences arising from his whistleblower report.

2. After requesting various clarifications from the complainant, OLAF informed the complainant, in mid-December 2014, that in arriving at its decision whether to open an investigation it had considered whether the matter fell within one of the areas of investigative priority. It stated that it had dismissed the case on the grounds that OLAF was not the only body with the authority to deal with this matter; as disciplinary issues within EASA appeared to arise, this was a matter within the authority of the EASA Executive Director. OLAF thus considered it appropriate to give the EASA Executive Director the opportunity to inquire into the matter. Finally, OLAF informed the complainant that it had forwarded a copy of its decision to the European Commission's Directorate-General for transport (DG MOVE) for information.

3. The complainant then turned to the Ombudsman and to the President of the Commission for help in relation to his grievance concerning OLAF. [2] Subsequently, in late January 2015, the complainant also addressed his grievance to EASA in accordance with the whistleblowing provisions. [3]

The Ombudsman's inspection of OLAF's file

4. The Ombudsman identified the following allegations and claims put forward by the complainant.

Allegations

1. OLAF wrongly decided not to investigate the complainant's whistleblowing report;
2. OLAF took an excessive amount of time in deciding whether to investigate the whistleblowing report.

Claims

OLAF should:

- (i) open an investigation into the matter raised by the complainant; and
- (ii) grant him protection as a whistleblower.

5. The Ombudsman opened an inquiry into the complaint by carrying out an inspection of OLAF's file as regards the handling of the complainant's whistleblowing report. [4] The report of this inspection was forwarded to the complainant. He made no comments.

Allegation that OLAF wrongly decided not to



investigate the complainant's whistleblowing report

The Ombudsman's preliminary assessment before the inspection

6. In her opening letter informing OLAF of the inspection, the Ombudsman noted that Regulation 883/2013 [5] grants OLAF a wide discretion in deciding whether to open an investigation. OLAF had informed the complainant that it had decided not to open an investigation into the matter reported, essentially because (a) the matter did not fall within OLAF's priorities, and because (b) OLAF does not have sole authority to investigate a matter, which may involve disciplinary issues.

7. The Ombudsman expressed the view that OLAF's position appeared, in principle, to be in line with OLAF's discretionary powers.

8. However, the Ombudsman also expressed the preliminary view that OLAF's decision not to investigate the matter and to refer the complaint to EASA raised - possibly systemic - concerns in respect of OLAF's handling of whistleblowing cases. Article 22a of the Staff Regulations provides that a whistleblower must report an instance of serious irregularities *either* to his own institution *or* to OLAF. Consequently, Article 22a of the Staff Regulations provides *a choice* as to where a whistleblower can turn. In the present case, the complainant appeared to have deliberately chosen to contact OLAF, seemingly assuming that one of his superiors at EASA had instructed his colleagues to manipulate a technical report for political reasons. Moreover, the complainant raised doubts as to whether this was an isolated instance, arguing that the matter may be a general problem. He also argued that the instructions may have come from EASA's senior management. However, OLAF's decision not to open an investigation into the complainant's whistleblowing report implied that the complainant should raise the matter in the first place with the very persons he thought were responsible for the alleged serious misconduct.

9. It appeared that such an approach might discourage whistleblowers and hence risked weakening the effectiveness of the whistleblowing provisions. For these reasons, the Ombudsman decided to open an inquiry into this case.

The Ombudsman's final assessment

10. This case does not concern the *substance* of the complainant's grievance but, rather, the way it was handled by OLAF.

11. While OLAF has discretion in deciding not to open an investigation in relation to a particular case, it is however clear that it should provide reasons for any such decision it takes.

12. During the Ombudsman's inspection, it became clear that OLAF had carefully considered



whether to open an investigation in relation to the complainant's whistleblowing report and had based its conclusion on objective criteria. OLAF did identify the matter as a potentially serious one falling within its own mandate. It further concluded that, as the report possibly involved a disciplinary matter, it was not the only body with the authority to deal with it. Considering that the manipulation by a manager of an inspection report arguably amounts to a serious abuse of power, OLAF's position in this regard is reasonable.

13. More importantly, from the documents inspected, it became obvious that the Ombudsman's concern as regards the existence of a potential systemic problem was unsubstantiated.

14. The Ombudsman's preliminary analysis had focused primarily on OLAF's decision to *dismiss* the case. It emerged, however, that OLAF did not *close* the case, but *transmitted* the matter to EASA for assessment. Moreover, OLAF requested EASA to inform it of its analysis of the underlying matter and also reserved the right to open its own investigation later on. Consequently, even though OLAF had informed the complainant that it would not deal with the matter, in fact it took appropriate steps for the matter to be pursued and properly investigated.

15. In addition, it has now been established that OLAF never requested or invited the complainant to turn to EASA with his whistleblowing report; the information which OLAF transmitted to EASA was properly anonymised and did not allow EASA to identify the source of the whistleblowing report.

16. The Ombudsman notes that while the complainant alleged that one or more of his superiors were involved in manipulating the relevant inspection report, there was nothing to suggest that the Executive Director of EASA, to whom OLAF referred the matter, was involved in the alleged irregularity. Consequently, the Ombudsman believes that OLAF acted appropriately in deciding to transfer the matter to EASA's Executive Director for consideration and to require the latter to report back to it.

17. In view of the above, the Ombudsman concludes that OLAF acted properly when dealing with the complainant's whistleblowing report. However, the Ombudsman finds it most unfortunate that, in its response to the complainant, OLAF failed to explain in a sufficiently explicit way that, while it had transferred the case to EASA, it had not definitively decided not to pursue the matter. The complainant might not have found it necessary to complain to the Ombudsman had he understood that OLAF had not merely dismissed the case, but in fact reserved the right to become directly involved depending on the response it would receive from the EASA Executive Director.

Allegation that OLAF took an excessive amount of time in deciding whether to investigate the whistleblowing report

The Ombudsman's preliminary assessment before the



inspection

18. In the Ombudsman's opening letter informing OLAF of an inspection in this case, she noted that Regulation 883/2013 does not provide for any specific time-limit within which OLAF needs to inform a whistleblower about its decision on whether or not to open an investigation. However, Article 22b of the Staff Regulations provides that OLAF must, within 60 days of receipt of a report, inform a whistleblower of the time needed to take appropriate action. Reference to this time-limit is also made under Point 5.2 of OLAF's Guidelines on Investigation Procedures for OLAF Staff, dated 1 October 2013.

19. In this case, there appears to have been a misunderstanding as to the exact nature of the complainant's report of early August 2014. It appeared that the cover sheet which the complainant had sent together with his report made explicit reference to Article 22 c of the Staff Regulations [6] . Although this fact needed to be clarified, OLAF appeared to have asked for clarifications in this regard only in mid-October 2014, that is, more than 60 days after receiving the complainant's report. A few days later, OLAF finally informed the complainant that he should receive its decision on the possible opening of an investigation by mid-November 2014. The 60 days' time-limit was thus respected following the clarifications.

20. In mid-November 2014, OLAF contacted the complainant again to inform him that it was finalising its opinion. OLAF also requested further clarifications. According to the applicable procedures, the opinion prepared by OLAF's services is then transmitted to its Director-General, who decides whether to approve or change it. The Ombudsman took the view that the fact that this additional step took approximately another month to complete did not appear excessive. Nevertheless, the Ombudsman informed OLAF that the time it took for OLAF to determine that it needed to ask for clarifications appeared overly long at first sight.

The Ombudsman's final assessment

21. In respect of the alleged delay in dealing with the complainant's whistleblowing report, the OLAF representatives explained during the inspection that the complainant's report was registered in early August 2014. However, due to an administrative delay caused by the summer holiday period, it was assigned to a case handler only in late August 2014.

22. The OLAF representatives apologised for any inconvenience caused to the complainant in this regard and asked the Ombudsman's services to inform the complainant accordingly, which they did.

23. Given that OLAF has acknowledged that there was a delay and has apologised for this delay, and that the complainant has not made any observations, the Ombudsman finds no grounds which would justify pursuing the matter further.

Conclusion



On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

By forwarding the issue raised by the complainant to EASA for a first assessment, OLAF dealt appropriately with the complainant's whistleblowing report. Moreover, there are no grounds justifying further inquiries as regards the delay incurred by OLAF in investigating the matter.

The complainant and OLAF will be informed of this decision.

Further remark

As regards future similar cases, OLAF could consider informing whistleblowers in a more explicit way that its decision not to take immediate action, but to transmit a case first to another EU institution or body for their assessment, does not imply that OLAF has dismissed the matter altogether, but should rather be considered as constituting an appropriate first step in assessing the grievance reported by the whistleblower.

Emily O'Reilly

Strasbourg, 11/08/2015

[1] In fact, under Article 22a of the Staff Regulations, a whistleblower can report the suspected irregularities either to the institution where he or she is working, or to OLAF.

[2] In his complaint to the Ombudsman, the complainant also complained against EASA. He alleged that, contrary to the Agency's internal procedures, EASA manipulated the results of a technical inspection by removing a finding in the final report. However, given that EASA subsequently started dealing with his whistleblowing report, the complainant informed the Ombudsman that he wished to drop his complaint against EASA for the time being. Nevertheless, he reserved the right to turn to the Ombudsman again in the future should EASA's follow-up to his report prove unsatisfactory.

[3] Article 22a of the Staff Regulations.

[4] This was done in accordance with Article 3(2) of the Statute of the European Ombudsman.

[5] Regulation 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L248, p. 1).



[6] Article 22c of the Staff Regulations provides for, among other things, a complaint procedure for whistleblowers who are dissatisfied with the way in which their whistleblowing report was handled, or they themselves were treated as a result of their whistleblowing report.