

Decision of the European Ombudsman closing the inquiry into complaint 2114/2011/KM against the European Aviation Safety Agency (EASA)

Decision

Case 2114/2011/KM - **Opened on** 24/11/2011 - **Decision on** 21/09/2015 - **Institution concerned** European Union Aviation Safety Agency (Critical remark) |

The complainant is a former EASA employee whose contract was terminated at the end of a six-month probationary period due to what EASA considered to be his poor team-work skills. The complainant argued that this finding was based on his insistence that EASA keep a promise that he could continue to give lectures outside EASA. This resulted in conflicts with his superiors. He also objected to a statement in the probationary period report that he adopted "a megalomaniac approach" at work. Furthermore, he complained that he had been treated unfairly, since EASA had not warned him, during the probationary period, about his performance.

Following her preliminary inquiries, the Ombudsman proposed to EASA that it apologise for using the term "megalomaniac"; and questioned EASA's use of the terms "stubborn and unaccommodating" to describe the complainant. Neither was the Ombudsman satisfied that EASA had given the complainant the opportunity to improve his performance during the probationary period.

EASA agreed to remove the term "megalomaniac approach" from the probationary period report and apologised for using it. However, it defended its use of the terms "stubborn and unaccommodating" and it insisted that the complainant was aware, during his probationary period, that his colleagues and superiors were unhappy with his performance. It also maintained that it had acted correctly as regards the complainant's insistence that he be allowed to give lectures outside EASA.

The Ombudsman considered that EASA's reply was on the whole reasonable. However, she did not find convincing EASA's argument that it had acted correctly as regards the complainant's insistence that he should be allowed to teach outside EASA. She therefore closed the case with a critical remark as regards this issue.

The background

1. The inquiry concerns the manner in which EASA terminated the employment of a member of its staff.



2. EASA terminated the employment of the complainant six months after he commenced working there on the basis of a probationary period report which recommended that he be dismissed. The report stated that, while the complainant's technical knowledge was " *above average* ", his conduct was not satisfactory. He was found to lack team-work skills and to be " *rather stubborn and unaccommodating* ". Moreover, the report noted, he had repeatedly asked to be allowed to carry out external activities which were either not in the interest of the service or potentially in conflict with the interest of the service.
3. The complainant was given the opportunity to comment on the report. He took the view that the report was unfair, unfounded and insulting.
4. A countersigning officer then approved the probationary period report. He added handwritten comments to the report, stating that the complainant had " *a megalomaniac approach and would not fit into a [...] team* ".
5. The complainant then complained to EASA under Article 90(2) of the Staff Regulations, repeating his views that the report was unfair, unfounded and insulting. He also noted that the official who had " *diagnosed* " him as a " *megalomaniac* " had met him twice or three times only. He felt that his dismissal was based on " *personal animosity* " that might have been caused by his insistence on continuing to teach a course related to his area of expertise. He stated that EASA had promised him, before he was recruited, that he could continue teaching that course.
6. EASA rejected the complaint. It maintained that the report contained a " *balanced, albeit overall negative, assessment of [the complainant's] efficiency, ability and conduct during the probationary period* " and it " *hence constitute [d] neither an insult nor a defamation* ". While the complainant accepted EASA's offer to provide him with a letter confirming his work at EASA, drafted in neutral terms, he insisted that he was not satisfied. After another attempt to resolve the matter with EASA, he turned to the Ombudsman, who opened an inquiry to determine if the decision to dismiss the complainant was justified, fair, and non-discriminatory. The Ombudsman also examined whether the report contained insulting statements.
7. Following her preliminary inquiries, the Ombudsman proposed that EASA should apologise to the complainant for certain errors it had made when dismissing him and that it should redact certain problematic statements from the probationary period report. However, the Ombudsman did not see grounds for believing that the complainant had been discriminated against [1] .

Allegation that EASA made insulting statements about the complainant

The Ombudsman's proposal for a solution

8. The Ombudsman agreed that the reference to " *a megalomaniac approach* ", in the



probationary report, was insulting. Thus, in a proposal for a solution, she asked EASA to remove it from the report and apologise to the complainant.

9. The Ombudsman questioned EASA's use of the terms "*stubborn and unaccommodating*" to describe the complainant. She stated that the term as such may not be considered to be insulting (there can clearly be cases in which it would be appropriate for an institution to use such words to describe the attitude of one of its employees). However, the use of such wording in this case seemed, at least to a considerable extent, to be due to the complainant's insistence on carrying out his teaching activities. In that case, the remarks would have to be considered inappropriate.

10. In its response, **EASA** explained that its use of the term "*megalomaniac*" could have caused "*a misunderstanding on the recipient side*". It therefore agreed to delete it from the report and apologised to the complainant for having used the term.

11. However, EASA argued that the use of the terms "*stubborn and unaccommodating*" in the report was "*in no way inappropriate*" and did not constitute maladministration. Probationary period reports, by their very nature, had to include negative remarks if the efficiency, ability or behaviour of the employee in question was not satisfactory. Their purpose was to justify why a contract should or should not be confirmed. EASA used the words to describe the complainant's behaviour at work and on missions. It could not take them out of the report because to do so would remove, at least partially, the reasons why it had decided to terminate the complainant's contract.

12. The complainant welcomed EASA's apology as regards the use of the term megalomaniac. As regards use of the terms "*stubborn and unaccommodating*", which EASA had not withdrawn, the complainant said they were clearly insulting and, moreover, factually wrong. This terminology and the insistence on it were not worthy of an EU body. Apart from the terminology, the content of the probationary period report was unacceptable and inappropriate. He thus claimed that it should be withdrawn in its entirety.

The Ombudsman's assessment after the proposal for a solution

13. The Ombudsman notes that EASA apologised to the complainant for having used the term "*megalomaniac*" and deleted the term from the report. The Ombudsman therefore considers that this aspect of the complaint has been settled.

14. As regards the use of the term "*stubborn and unaccommodating*", EASA now expressly states that it used the words to describe the complainant's behaviour **at work and on missions**.

15. This indicates that the statement at issue was not made because of the complainant's insistence that he should be allowed to continue his teaching activities (as will be shown in



paragraphs 41 to 44 below, the complainant could not have been faulted for carrying out and requesting permission to carry out such teaching activities). A careful review of the file supports this conclusion. The section of the probationary period report in which those terms appear (namely, the section on the complainant's "conduct") refers specifically and exclusively to the complainant's role. The section of the probationary period report relating to conduct notes that the complainant's attitude to team-work was a " *major concern* ". It states that he lacked the " *necessary diplomatic skills* ", all of which were " *crucial aspects* " for the work the complainant had been recruited to perform. That section of the report makes no reference to the complainant's teaching activities (reference to teaching activities is made in the section on "efficiency").

16. The relevant section of the probationary period report on the complainant's conduct reads as follows (deleted to protect the interests of the complainant):

17. The Ombudsman thus concludes, upon a careful examination of the file, that the use of the terms " *stubborn and unaccommodating* " was not in fact linked to the disagreement between the complainant and EASA in relation to the external teaching activities of the complainant. Rather, it was linked to specific aspects of his work. The Ombudsman thus agrees that EASA has justified why it does not need to remove the relevant statement from the report. The Ombudsman thus closes this aspect of the complaint with a finding of no maladministration.

Allegation that the decision to dismiss the complainant was unfair

18. The **complainant** alleged that the decision to dismiss him was **unfair** . In support of this allegation, he argued that it was not until he read his probationary period report that he learned about the comments made in it. His supervisor had never asked him to improve his efficiency or conduct, and he was not aware that his work ever had to be corrected.

19. In its opinion, **EASA** countered that there had been several conversations about the complainant's performance problems, such as in relation to two missions. These had also been discussed during other meetings which took place between the end of July and October 2009. However, the complainant did not alter his behaviour as a result of these conversations.

20. In his observations, the **complainant** maintained that it was not until he read his probationary period report that he learned of EASA's serious doubts about his performance. Moreover, it was not until more than two thirds of his probationary period had passed that he saw the report. He disputed EASA's claim that, during these conversations, it had alerted him to the problems it considered to exist. He had never been warned that his behaviour was inappropriate. According to him, during the missions, it was not he, but his colleagues and supervisors who had been criticised. He had in fact been praised for the mission. Moreover, according to the complainant, in the two meetings mentioned by EASA as evidence that he was informed of deficiencies in his performance, his manager never raised any issues relating to communication problems with his colleagues or asked him to change his behaviour. The



complainant stated that he doubted whether such matters had ever been raised during his time at EASA.

The Ombudsman's solution proposal

21. The Ombudsman first noted that EASA was under no legal obligation to formally warn an employee of the possible content of specific staff reports. The matter at issue here was not, however, whether the complainant's rights of defence had been respected. In fact, it was never in dispute that the complainant was given the opportunity to comment on the probationary period report. However, newly recruited members of staff can expect to be treated **fairly** during their probationary period. This includes being given the opportunity to show that they can perform the tasks of the post they were recruited for. This also means that that authority should alert the probationer, in good time, where it is not satisfied with his/her performance.

22. Since EASA did not produce any evidence to establish that the complainant's supervisors did in fact make it clear to the complainant that he had to improve his performance, the Ombudsman made the preliminary finding that EASA dismissed the complainant without having given him fair warning, in good time. Thus, taking into account the arguments and opinions put forward by the parties, the Ombudsman suggested, in a proposal for a solution, that EASA apologise to the complainant.

23. In its reply, **EASA** stated that the interpretation of principles, such as fairness, depends on the context in which they are applied. The relationship between an institution and an ordinary person requires that the term be given a different meaning from that given in the context of the relationship between an institution and an employee, or, in this case, between a manager and a subordinate. In the case under examination, what mattered was the legal framework – the Staff Regulations and Conditions of Employment of Other Servants – which did not oblige EASA to warn a staff member that his/her performance was not satisfactory.

24. In any event, EASA insisted, the complainant had indeed been warned about his behaviour: he had had several conversations about "*the performance problems*" with the manager who drafted his probationary period report. His statement that it was not until he read the report that he learnt of EASA's doubts was thus not true. EASA pointed to two debriefing sessions which followed practical inspections in relation to the two missions referred to above. A staff member who also took part in the mission to country A, wrote a report on it which describes a "*disturbing situation for the team members caused by the complainant*". Finally, EASA stated that the praise which the complainant received for his behaviour during the missions did not, as far as it could tell, come from EASA or one of its staff members.

25. It concluded that it applied the relevant rules correctly, and went beyond them by giving the complainant advance warning. There was no maladministration.

26. In his observations, the **complainant** expressed his surprise at EASA's comments. He disputed EASA's statement that he had received negative feedback in the course of inspection



visits; he stated that his performance was never discussed in that context. He could remember only one situation, following the visit to country B, in which his manager had told him that he had " *a problem* ", and that they would talk about it; however, that conversation never took place. As to the statement of a staff member who took part in the visit to country A, which referred to a " *disturbing situation for the team members caused by the complainant* ", the complainant claimed that this was in fact the fault of the team leader of that mission. The complainant stated that he was " *particularly knowledgeable* " about the matter, and had tried to correct a mistake (made by the team leader). He stated that his efforts were ignored. Finally, he stated, it was simply not true that he had never received positive feedback. At least one positive statement had been made in his regard which, if need be, he could submit as evidence.

The Ombudsman's assessment after the proposal for a solution

27. There is no issue as to whether or not EASA respected the complainant's rights of defence when issuing the probationary report at the end of the probationary period. It did respect his rights of defence, since it allowed him to comment on the report before it was finalised. Rather, the issue is whether EASA acted fairly, that is, whether it ensured that the complainant was aware of his unsatisfactory performance **during** his probationary period, in order to allow the complainant to improve his performance before the end of the probationary period.

28. In its response to the proposal for a solution, EASA again pointed to debriefing sessions at the end of inspection missions as examples of negative feedback given to the complainant. It also mentioned a report, written by a member of its staff, which criticised the complainant for having created " *a disturbing situation for the team members* ".

29. In his observations on EASA's response to the proposal for a solution, the complainant continued to deny that he ever received any negative feedback about his conduct before the probationary period report was issued.

30. However, the complainant then stated that he remembers one situation, following the mission to country B, in which his manager had told him that he had " *a problem* ". This establishes that the complainant was in fact aware of at least one instance of a negative assessment by his management.

31. More importantly, the complainant then addressed EASA's reference to the " *disturbing situation for the team members caused by the complainant* " during the visit to country A and explained that this " *disturbing situation* " was in fact attributable to the team leader of that mission. He stated that since he (the complainant) was " *particularly knowledgeable* " about the matter (which was the subject of the disagreement with his team leader), he had tried to correct the mistake (of the team leader), but his efforts were ignored.

32. The Ombudsman takes no view on who was right or wrong concerning the issue over which there was disagreement between the complainant and his superior during the mission.



However, the Ombudsman notes that the statements made by the complainant in an attempt to put the blame for a "*disturbing situation*" on his team leader, and in which he explains how he dealt with it at the time, incontrovertibly demonstrate that the complainant was fully aware that such a "*disturbing situation*" had arisen during that mission. The Ombudsman thus concludes, on the basis of the statements now made by the complainant, that the complainant was indeed aware that, at the very least, communication issues existed between him and some of his colleagues during the probationary period. His allegation that he was given no notice of any criticism of his performance or conduct before reading his probationary period report can therefore no longer stand.

33. The Ombudsman thus closes this aspect of the inquiry with a finding of no maladministration.

Allegation that the dismissal was not justified

34. The **complainant** alleged that his dismissal was not justified. He argued that EASA dismissed him, despite the fact that his performance was "*above average*", because he had insisted that EASA keep a promise given to him before he joined EASA, whereby he would be allowed to continue carrying out some "*external activities*" (such as lectures).

35. **EASA** denied that it had wrongly dismissed the complainant. It stated that it had assessed the complainant in accordance with the applicable rules. This assessment was positive as regards the complainant's technical knowledge, but less so in relation to his team-work skills and efficiency. It contended that the complainant's "*continuous requests*" for authorisation to "*perform external activities*" affected his efficiency at work.

The Ombudsman's solution proposal

36. Taking into account all the arguments put forward by the parties, the Ombudsman made the preliminary finding that, when assessing the complainant's efficiency at work, EASA unduly took into account the complainant's insistence on continuing his teaching activities.

37. The Ombudsman found evidence that the complainant was indeed promised that he could continue to teach certain courses outside EASA. EASA also admitted in its opinion that such an agreement had been reached. In this context, the Ombudsman found that EASA was wrong to take a negative view, when assessing the complainant's efficiency, of the complainant's insistence on carrying out such tasks. The Ombudsman thus asked EASA to apologise to the complainant for including, in the probationary period report, negative statements relating to the complainant's requests to teach certain courses outside EASA.

38. In reply, EASA insisted that it had correctly evaluated the complainant, taking into account all aspects of his performance. It contended that his external lecturing activities, and the effort and time these demanded from him, meant that he did not complete all the tasks assigned to



him. It pointed in particular to the fact that he missed an important meeting. In any event, EASA noted, the promise he had referred to was made in an e-mail by an HR Assistant. The e-mail also referred to the general possibility that he could continue teaching, but underlined that all external activities were subject to approval by the Executive Director. EASA thus concluded that there was no maladministration on its part.

39. In his observations, the complainant stated that the promises had not only been made by a HR assistant by e-mail, but also orally by both the HR department and his manager. He considered that the decision to terminate his contract after the probationary period was EASA's way of dealing with the problem that the promise did not comply with the Staff Regulations.

The Ombudsman's assessment after the proposal for a solution

40. The Ombudsman concludes that EASA has not accepted the Ombudsman's proposal for a solution to apologise to the complainant.

41. The Ombudsman notes that her preliminary finding was based on her view that there had indeed been an agreement between EASA and the complainant whereby he would be allowed to continue teaching once he joined EASA. The Ombudsman has, for example, seen minutes of meetings between the complainant and his superiors which referred to such an agreement. EASA's attitude also clearly shows that it believed that such an agreement existed (it allowed him to participate in two " *external activities* "). The Ombudsman's review of the file thus leads her to conclude that EASA indeed made such a promise.

42. The Ombudsman notes that the question to be assessed here is not whether the complainant had, from a strict legal perspective, a 'legitimate expectation' that he could continue to teach based on a promise made to him by EASA, but rather whether EASA was entitled to take a negative view, in the complainant's probationary period report, of the complainant's teaching activities and his efforts to continue those activities. Given the statements made by EASA, it was unfair to criticise the complainant in this regard. The Ombudsman also notes that there was nothing which would have prevented EASA from reviewing the promise it had made to the complainant, if it considered that the external activities were **no longer in the interests of the service** and informing the complainant of the reviewed position. The complainant would have had to take account of the position, following review, for the future. In other words, the complainant could not rely indefinitely on the promise made. However, if EASA wished to revoke the promise, it should have informed the complainant in good time of its changed position. Until such a reviewed position came into effect, it would have been unfair of EASA to take a negative view of the complainant's teaching activities.

43. In its response to the proposal for a solution, EASA stated that the complainant's external lecturing activities, and the effort and time these demanded from him, meant that he did not complete all the tasks required of him. In particular, EASA stated that he missed an important meeting. The Ombudsman notes that the probationary period report of the complainant does



not state that the complainant did not "*complete all the tasks required*". Instead, it states clearly that he had "*completed the assigned tasks and activities*". In any event, if the external activities that the complainant undertook negatively affected the complainant's work at EASA, EASA should and could have simply informed the complainant that it would not authorise such external activities in future [2] . It was, however, unfair to hold the complainant responsible for the negative effects, on the functioning of EASA, of those external activities while the promise made to him by EASA was still valid.

44. The Ombudsman therefore concludes that the maladministration she identified in her proposal for a solution has not been resolved. She will therefore make a corresponding critical remark.

45. The Ombudsman also reminds EASA that the error in this case originates from the fact that it made a promise to the complainant in the first place. EASA should thus review its recruitment procedures with a view to ensuring that any promises made to incoming staff are based on a clear evaluation of the potential impact of such promises on the functioning of EASA. The Ombudsman will thus make a further remark to this effect.

Conclusions

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following critical remark and further remark:

In the complainant's probationary period report, EASA considered unfavourably the complainant's efforts to honour his teaching engagements despite its relevant promise. However, the Ombudsman's inquiry showed that the complainant's insistence that the promise be kept was reasonable. EASA's approach thus constitutes maladministration.

The complainant and EASA will be informed of this decision.

Further remark

EASA should consider reviewing its recruitment procedures to ensure that any promises made to incoming staff are based on a clear evaluation of the potential impact of such promises on the functioning of EASA.

Strasbourg, 21/09/2015

Final English version of the decision on complaint **2114/2011/KM**



[1] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's solution proposal available at:

[2] Indeed, the Ombudsman notes that, once EASA brought to his attention the problems with his external activities in July 2009, the complainant was willing not to undertake any new training engagements. He stated, however, that he should be allowed to honour those training engagements he had already agreed to, provided that he give prior notice thereof to his manager. This position seems entirely reasonable.