



Decision of the European Ombudsman closing the inquiry into complaint 1770/2013/JF against the European Economic and Social Committee

Decision

Case 1770/2013/JF - **Opened on** 18/10/2013 - **Decision on** 18/11/2015 - **Institution concerned** European Economic and Social Committee (Critical remark) |

The case concerned the reassignment of an official of the European Economic and Social Committee (EESC) from his post of Head of Unit to that of an administrator. After the official complained, the Ombudsman investigated the matter and concluded that the reassignment was a covert disciplinary sanction following the official's reaction to a 'Merry Christmas' e-mail from the President of one of the EESC political groups. Because no disciplinary proceedings had taken place, the reassignment was a misuse of power. Since the official had had no opportunity to defend himself, this action was also contrary to the Charter of Fundamental Rights of the European Union. The Ombudsman, therefore, found maladministration on the part of the EESC and put forward a number of proposals for a solution to the complaint.

The EESC agreed to reintegrate the official in a post similar to his former post once, and if, he becomes fit for work (the official had meanwhile been *recognised as suffering from invalidity*). *It also agreed to compensate him for the management allowance that he had lost because of his reassignment. The Ombudsman welcomed this. However, the EESC refused to accept that its decision to reassign the complainant was wrong. It also refused to annul the reassignment decision and to apologise to the complainant. The Ombudsman did not find EESC's explanations to be convincing and therefore made a critical remark as regards this aspect of the case.*

The background

1. The complainant was a Head of Unit at the European Economic and Social Committee (the 'EESC') who reacted to a 'Merry Christmas' e-mail, sent in December 2012, by the President of the Various Interests Group of the EESC (the 'President of Group III') to the EESC staff. The complainant replied, by e-mail, copied also to the heads of EU institutions with which the EESC has institutional relations, that it was inappropriate for an EU institution to circulate messages of a religious and political nature. Following this event, the complainant was informed that he could be subject to sanctions. Subsequently, in February 2013, the Secretary-General of the EESC issued two decisions concerning the complainant, one reassigning him, in the interest of the service, to a post of administrator, and the other removing his management allowance due to the fact that he would no longer be performing his duties of Head of Unit. The complainant considered these decisions to be covert sanctions for his e-mail. He filed a complaint against the decisions under Article 90(2) of the



Staff Regulations of Officials of the European Union (the 'SR') with the EESC. The EESC replied that it had lost trust in the complainant and that the reassignment had been made in accordance with the applicable rules and the case law of the Court of Justice of the European Union (the 'CJEU'). The complainant then turned to the European Ombudsman, who opened an inquiry to assess whether the decisions were fair, or whether they should be annulled and compensation should be paid to the complainant [1].

Allegation of unfairness

The Ombudsman's solution proposal

2. The Ombudsman noted that the complainant had been informed that the EESC administration could sanction him for what it considered to be a failure on his part to respect the SR [2]. The reason for the complainant's reassignment was, therefore, clear: he had allegedly failed to respect the applicable rules. The complainant's reassignment was thus a measure similar to a disciplinary measure. In addition, the Ombudsman considered the reassignment to be unfair and unlawful, for the reasons set out below.

3. First, the EESC failed to respect the principle of equivalence of posts. The EESC reassigned the complainant from a post of Head of Unit to that of administrator. Because the complainant no longer performed management duties in his new position, he lost his management allowance. However, according to the applicable case-law of the CJEU, it is only when a reassignment, in addition to having been made in the interest of the service, also respects the principle of equivalence of posts, that there can be no case of covert disciplinary sanction or misuse of powers [3]. The complainant's reassignment was, therefore, a covert disciplinary sanction. Because no disciplinary proceedings had been initiated, the disciplinary sanction was a misuse of power.

4. Second, the EESC failed to respect the complainant's right to be heard. According to the CJEU's case-law, failing to hear a person before taking any individual measure that would affect that person adversely constitutes a violation of the right to good administration enshrined in the Charter of Fundamental Rights of the European Union [4]. In the present case, no disciplinary proceedings took place and the complainant could not defend himself before the decisions were adopted.

5. Finally, the fact that the complainant copied his e-mail to the heads of EU institutions with which the EESC has institutional relations, and which fell under the scope of his responsibilities, was not such that it could have reasonably justified the EESC to lose trust in him. While the Ombudsman agreed that loss of trust may, in certain circumstances [5], be a valid ground for dismissal from certain posts, she also emphasised that breach of trust is a very serious allegation which may be established only after serious and formal disciplinary proceedings in which the rights of the defence of the person charged are fully respected. Such proceedings had not taken place in the present case. In addition, the EESC was sufficiently aware of the complainant's and his colleagues' feelings about previous similar messages from the President of Group III but it had not acted upon its staff's concerns. In such circumstances, arguing breach of trust to justify the complainant's reassignment was clearly unfair.



6. The Ombudsman therefore concluded that the decisions reassigning the complainant and stripping him of his management allowance were unfair and unlawful, and their adoption was maladministration. The Ombudsman therefore made a proposal for a friendly solution to the EESC that it

" (i) annul the complainant's reassignment;

(ii) reinstate the complainant in his former post, or agree with him on another HoU post, and reinstate his management allowance;

(iii) pay to the complainant compensation equivalent to the management allowance lost because of the reassignment; and

(iv) apologise to the complainant. "

7. In its reply, the EESC informed the Ombudsman that, in the meantime, the complainant had undergone an invalidity procedure and was recognised as suffering from invalidity for a period of one year, starting on 1 November 2014 [6] . The EESC enclosed a decision, adopted by the Director on 14 October 2014, granting the complainant an invalidity allowance and providing that he should undergo a new medical examination in October 2015 [7] . The EESC took the view that, because of the complainant's invalidity, it could not reinstate him in his former Head of Unit post or in any other post. The EESC was, nevertheless, willing to reinstate the complainant " *in a different HoU position or an equivalent post* ", once his medical situation would so allow. In the meantime, it offered him " *a lump sum* " of EUR 3 000 " *in order to conclude a friendly settlement* ".

8. In his observations, the complainant stated that he fully adhered to the Ombudsman's proposals for a solution and that he wished those proposals to be implemented by the EESC. He also pointed out that the decision granting him an invalidity allowance makes it clear that his invalidity is permanent and total. This was also the conclusion reached by the panel of doctors who examined him (consisting of one doctor appointed by the EESC, one by the complainant, and a third independent doctor). It followed that, in his view, the invalidity was not limited to one year only, as the EESC put forward.

9. The complainant also questioned how the EESC arrived at the amount of EUR 3 000 in compensation and what it was supposed to compensate.

The Ombudsman's assessment after the proposal for a solution

10. The EESC did not contest, or even comment on, the Ombudsman's analysis of the case and her ensuing conclusions, set out in her proposal for a solution.

11. The EESC merely stated that it was willing to reinstate the complainant to a Head of Unit



post in the event of his being found fit for work in November 2015 [8] . The Ombudsman acknowledged that the complainant could not, in practice, be reinstated unless his health condition were to improve to such an extent that he would be declared able to work [9] . While it is true that the decision granting the complainant the invalidity allowance states that his invalidity is permanent and total to the point of it being impossible for him to perform his duties [10] , it could not be entirely excluded that his health could improve. The Ombudsman noted the EESC's commitment to reinstate the complainant as Head of Unit once his medical situation would so allow. She also noted that the complainant had recognised that his reinstatement was necessarily dependent on his health condition [11] . The Ombudsman thus concluded that the EESC had accepted point (ii) of her solution proposal.

12. However, as regards the remainder of the solution proposal, the Ombudsman considered the EESC's reply to leave a great deal to be desired.

13. Contrary to the Ombudsman's proposal for a solution, the EESC had not proceeded to annulling its decision to reassign the complainant. However, it had not offered any explanations in this regard, such as, for instance, that the post has been filled by another person, and that the annulment of the decision to reassign the complainant would thus have undesirable negative effects on a third party. The fact that the complainant could effectively be reinstated only once his health would so permit (and the EESC had committed to do so) did not imply that the decision to reassign him could not be annulled. It was, therefore, unclear why the EESC had chosen not to annul the decision in question.

14. In response to the Ombudsman's solution proposal, the EESC proposed to pay the complainant EUR 3 000. The Ombudsman had proposed that the EESC pay the complainant compensation equivalent to the management allowance he lost because of the reassignment. It was unclear whether the sum of EUR 3 000 was, indeed, equivalent to the management allowance that the complainant had lost.

15. Finally, the EESC had not apologised to the complainant and it did not explain why it would not do so.

The Ombudsman's further inquiries

16. In light of the above, and particularly on the basis of the fact that the EESC had not questioned the Ombudsman's analysis and conclusions but expressed its willingness to find a friendly settlement, the Ombudsman informed the EESC about her conclusions set out in Paragraphs 13 to 15 above and asked it to:

(i) clearly explain why it had not annulled the reassignment decision or, alternatively, consider doing so without further delay;

(ii) explain whether the proposed sum of EUR 3 000 was equivalent to the management allowance that the complainant had lost and, if this was not so, pay an amount



corresponding to the lost allowance, explaining the relevant calculations; and

(iii) consider apologising to the complainant without further delay.

17. The EESC replied that it was willing to find an amicable settlement. However, it maintained its decision to reassign the complainant, on the grounds already communicated to the Ombudsman in its opinion. It explained that the complainant's former post was now occupied by another person.

18. The EESC further explained that the proposed EUR 3 000 compensation was not an amount equivalent to the management allowance that the complainant had lost. It was simply a lump sum intended to settle the matter amicably and to compensate the complainant for "*the lack of communication perceived*". The EESC stated that it would endeavour to be more direct and thorough in its communications in similar situations in the future. It regretted not having been more attentive towards the complainant's "*perception of the situation*" and raised the amount proposed to EUR 7 600, approximately corresponding to the amount of the management allowance that the complainant would have been entitled to had he remained in his post of Head of Unit until he was declared unable to work.

19. With the above reply, the EESC hoped to settle the matter. It emphasised that it had never had any intention to cause the complainant any upset.

20. In his observations on the EESC's reply, the complainant took the view that the EESC had ignored the Ombudsman's proposal for a solution to his complaint. Not only had the EESC refused to annul its decision to reassign him, but it had also remained completely silent on the Ombudsman's detailed analysis leading to the solution proposal. This clearly demonstrated a lack of willingness by the EESC to cooperate with the Ombudsman.

21. As regards the updated amount of compensation proposed by the EESC, the complainant put forward that he should also be entitled to compensation for moral damages. The EESC had acted inconsiderately towards him and brought prejudice to his career, which had had serious effects also on his health.

22. In addition, the complainant noted that, contrary to the Ombudsman's proposal, the EESC had not apologised to him. He was, nevertheless, willing to let this claim go, as long as the EESC were to comply with his remaining claims.

23. Finally, the complainant informed the Ombudsman that, following his latest medical checks, his illness has been declared to be an occupational disease [12] and, having regard to his overall health condition, he has been declared unfit to return to the EESC.

The Ombudsman's assessment after further inquiries

24. The Ombudsman welcomes the fact that the EESC has agreed to increase the amount of compensation to be paid to the complainant to an amount equivalent to the management



allowance that he lost because of his reassignment. The Ombudsman finds that the EESC has now accepted point (iii) of her proposal [13] .

25. However, the EESC maintained its view that the reassignment decision should not be annulled. In order to support this view, the EESC referred to the considerations it had already provided in its opinion on the complaint.

26. The Ombudsman notes that she had already explained to the EESC, in her proposal, why the reasons on which it had relied were not convincing. She further notes that the EESC, whilst maintaining its position, has not commented on, let alone contested, that analysis. The Ombudsman therefore has to conclude that there was maladministration on the part of the EESC and that, even though the EESC has taken some steps to alleviate the negative consequences of its decision for the complainant, it continues to refuse to accept that there was maladministration.

27. As regards, more specifically, the two aspects of her proposal that the EESC refuses to accept, the Ombudsman makes the following comments.

28. As regards the Ombudsman's proposal to annul the complainant's reassignment, the EESC limited itself to stating that "*the post from which the complainant was reassigned is currently occupied by another person*". The Ombudsman considers, as matters now stand, that there is no need to pursue this issue any further. First, annulling the decision to reassign the complainant would inevitably affect the interests of the person who succeeded the complainant. This person should therefore be given the possibility to be heard before any further steps are taken. Second, on the basis of the information provided by the complainant there would not appear to be a realistic prospect that the complainant will work for the EESC again in the foreseeable future. Annuling the relevant decision would thus affect the person currently holding the post, without conferring a concrete advantage on the complainant.

29. As regards the Ombudsman's proposal that the EESC should apologise to the complainant, the Ombudsman considers that an apology would only be credible if the EESC were to acknowledge that it had committed maladministration. However, the EESC continues to dispute this.

30. Having regard to the position adopted by the EESC in its opinion and reply to her further inquiries, the Ombudsman concludes that prolonging the inquiry by turning her remaining proposals into a recommendation to the EESC would be unlikely to produce any positive result. The Ombudsman, therefore, considers it appropriate to close the case with a critical remark to the EESC [14] .

Conclusion

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

The EESC has accepted part of the proposal that the Ombudsman submitted to it with a view to remedying the maladministration that has occurred. To that extent, the case has been settled.



However, the EESC continues to refuse to accept that the decision to reassign the complainant was wrong. The decision to reassign the complainant constituted maladministration. Furthermore, the EESC's refusal to recognise its own wrongdoing is very regrettable.

The complainant and the President of the EESC will be informed of this decision.

Emily O'Reilly

Strasbourg, 18/11/2015

[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 friendly solution proposal available at:
<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61352/html.bookmark>

[2] Article 11 of the SR: "[a] n official shall carry out his duties and conduct himself solely with the interests of the Union in mind..." and Article 12 of the SR: "[a] n official shall refrain from any action or behaviour which might reflect adversely on his position. "

[3] See the Judgment of the Civil Service Tribunal (Second Chamber) of 8 May 2008 in Case F-119/06 *Kerstens v Commission* [2008] ECR-SC-I-A-1-147 and II-A-1-787, paragraph 103 (in the original French): "[d] ès lors que la décision du 8 décembre 2005 [modifiant les fonctions attribuées à un fonctionnaire] n'a pas été jugée contraire à l'intérêt du service ou à l'équivalence des emplois, il ne saurait être question de sanction disciplinaire déguisée... ou de détournement de pouvoir... Il s'ensuit que le requérant ne saurait reprocher à la Commission de ne pas avoir ouvert une procédure disciplinaire à son égard, laquelle lui aurait permis de bénéficier des garanties procédurales prévues à l'annexe IX du statut. " Case F-119/06 *Kerstens* was subject to an appeal to the General Court, which rejected the appeal on 2 July 2010 (Case T-266/08 P, *Kerstens v Commission*) in its entirety.

[4] See the Judgment of the Civil Service Tribunal (Third Chamber) of 5 December 2012 Joint Cases F-88/09 and F-48/10 *Z v Court of Justice of the European Union*, not yet published in the ECR, paragraph 146 (in the original French): "[l] es droits de la défense recouvrent assurément, tout en étant plus étendus, le droit procédural pour toute personne d'être entendue avant qu'une mesure individuelle qui l'affecterait défavorablement ne soit prise à son égard, tel qu'il est énoncé à l'article 41, paragraphe 2, sous a), de la Charte... ".

[5] See the Judgment of the General Court (Second Chamber) of 17 October 2006 in Case T-406/04, *Bonnet v Court of Justice*, [2006] ECR-SC-I-A-2-213 and II-A-2-1097, paragraphs 74 and 79 (in the original French): "[c] 'est le silence gardé sur ses activités extrajudiciaires qui a



compromis la confiance du président de la Cour... Cependant, la Cour a jugé que, lorsque la confiance mutuelle est rompue pour quelque raison que ce soit, il est de bonne administration de mettre fin à la relation de travail fondée sur cette confiance mutuelle... ".

[6] Article 59(4) of the SR: "[t] he Appointing Authority may refer to the Invalidity Committee the case of any official whose sick leave totals more than 12 months in any period of three years. "

[7] Article 15(3) of Annex VIII to the SR: "[w] hile a former official drawing invalidity allowance is aged less than the pensionable age, the institution may have him medically examined periodically to ascertain that he still satisfies the requirements for payment of the pension. "

[8] According to the Decision granting the complainant the invalidity allowance (in the original French): the complainant "[d] oit se soumettre à un examen médical de révision... à l'expiration d'une période de un an, soit en octobre 2015. "

[9] See Article 14, second paragraph, of Annex VIII to the SR: "[w] hen the former official ceases to satisfy the requirements for payment of the [invalidity] allowance he must be reinstated... "

[10] According to the decision (in the original French): "[l] e rapport de la Commission d'invalidité en date du 8 Octobre 2014, d'où il résulte que [the complainant] est atteint d'une invalidité permanente considérée comme totale et le mettant dans impossibilité d'exercer des fonctions correspondant à un emploi de son groupe de fonctions. " (emphasis added)

[11] The complainant claimed, in his observations on the EESC's reply to the Ombudsman's proposal for a solution, that he wished (in the original French): "[l] a réintégration dans mon ancien poste ou dans un poste équivalent, à la suite d'un accord mutuel, si lors de mon examen médical annuel en Octobre 2015, je suis reconnu capable de réintégrer l'administration du CESE ". This is compatible with the rule set out in footnote 10 above.

[12] Article 73 of the SR: " 1. An official is, from the date of his entry into the service, insured against the risk of occupational disease or accidents... 2. The benefits payable shall be as follows:... (b) in the event of total permanent invalidity: Payment to the official of lump sum equal to eight times his annual basic salary calculated on the basis of the amounts of salary received during the twelve months before the accident... "

[13] Having regard to the fact that the complainant's permanent invalidity has been confirmed and that, as a result, he was declared unfit to return to work to the EESC, the Ombudsman's proposal made during the inquiry that the EESC reinstate the complainant in a position similar to that of a Head of Unit and the EESC's acceptance of that proposal are no longer relevant.

[14] The Ombudsman notes the complainant's new claim for additional compensation put forward in his observations on the EESC's reply to her further inquiries. Such a claim does not fall within the scope of the present inquiry and may not be pursued by the Ombudsman. According to Article 2(4) of the Ombudsman's Statute: "[a] complaint... must be preceded by the appropriate administrative approaches to the institutions and bodies concerned. " The



complainant ought to have thus first addressed his claim to the EESC before the Ombudsman could possibly pursue the issue.