

Decision of the European Ombudsman closing her inquiry into complaint 63/2013/LP against [an EU Agency] concerning allegations of harassment

Decision

Case 63/2013/LP - **Opened on** 12/02/2013 - **Decision on** 24/11/2015 - **Institution concerned** European Research Executive Agency (No maladministration found) |

The case concerned the investigation of an alleged case of psychological harassment in [an EU Agency] [1] and whether the complainant, as the alleged victim, was entitled to the full version of the confidential administrative investigation report. The Ombudsman inquired into the issue and found that the conclusion reached by [the Agency] that no such harassment could be established was reasonable. Moreover the Ombudsman found that the allegation that one of the members of the investigation panel had an actual or potential conflict of interest could not be established. The Ombudsman did however consider that disclosing to the complainant the parts of the investigation report that were treated at the time as confidential would not undermine the privacy of the persons heard and/or the working relationships and the smooth running of [the Agency's] services. The Ombudsman trusts that [the Agency] will disclose those parts to the complainant.

The background to the complaint

1. The complainant was a contractual agent of the [Agency] from 1 February 2009 until 31 January 2011. Her initial probationary period was to run until 31 October 2009. During that time, the complainant's team leaders were Mr F (1 February 2009 - 31 May 2009) and Ms M (1 June 2009 - 31 October 2009).
2. On 6 November 2009, the Director of [the Agency] decided to prolong the complainant's probationary period
3. The complainant's probationary period was extended for the period from 1 November 2009 until 30 April 2010. In the subsequent report on the probationary period, dated 11 May 2010 her then team leader, Ms A, proposed to keep the complainant in her function.
4. On 14 October 2010, Ms A informed the complainant that her contract would not be renewed and would thus expire on 31 January 2011. The complainant's employment relationship with [the Agency] ended at that date.



5. On 12 January 2011, the complainant submitted to [the Agency] a request for assistance under Article 24 of the Staff Regulations regarding alleged psychological harassment by Ms A. This request was rejected as unfounded on 11 May 2011. On 22 June 2011, the complainant made a complaint under Article 90(2) of the Staff Regulations about the rejection of her request for assistance.

6. By decision of 29 September 2011, the Director of the [Agency] decided to open an administrative inquiry and requested the Investigation and Disciplinary Office of the Commission (IDOC) to provide an independent expert to assist [the Agency's] administrative enquiry. [the Agency] also informed the complainant that her complaint under Article 90(2) was closed, and that the response to the request for assistance dated 11 May 2011 would be reviewed in the light of the result of the administrative enquiry.

7. The investigation panel had four members: one from the [an other organisation], one from IDOC and two from [the Agency], including a Ms. PI. On 28 November 2011, the investigation panel heard the complainant, as well as Ms A and Ms M.

8. On 28 March 2012, the investigation panel submitted its report to the Director of [the Agency]. A non-confidential version of this report was sent to the complainant. The investigation panel concluded that no harassment as defined in Article 12a of the Staff Regulations could be established. [2]

9. By letter dated 27 April 2012, the Director of [the Agency] informed the complainant that he concurred with the findings of the investigation report and had decided to close the case without further action.

10. The complainant asked IDOC and the Director of [the Agency] for a copy of the full and signed investigation report. In their replies, both IDOC and the Director of [the Agency] informed the complainant that she was entitled only to the non-confidential version of that report.

11. On 21 December 2012, the complainant turned to the European Ombudsman.

The inquiry

12. The Ombudsman opened an inquiry into the complaint and identified the following allegations and claim:

1) [the Agency] failed to deal properly with the psychological harassment the complainant alleged to have experienced, notably by failing to properly carry out an administrative inquiry following the complainant's request for assistance under Article 24 of the Staff Regulations, including the drawing up of the relevant investigation report

2) [the Agency] failed to take into account the fact that a member of the investigation panel had a potential conflict of interest.



3) [the Agency] acted wrongly by refusing to provide the complainant with a full and signed copy of the investigation report concerning the administrative inquiry which was initiated following the complainant's request for assistance under Article 24 of the Staff Regulations.

4) [the Agency] should pay the complainant compensation for the failure to deal properly with the psychological harassment suffered, or open a new administrative inquiry.

13. In the course of the inquiry, the Ombudsman received the opinion of [the Agency] on the complaint and, subsequently, the comments of the complainant in response to [the Agency]'s opinion. The Ombudsman also inspected [the Agency]'s file on the case. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties as well as further correspondence received by the complainant.

Allegation of having failed to take into account the fact that a member of the investigation panel had a potential conflict of interest

Arguments presented to the Ombudsman

14. The **complainant** alleged that Ms PI, a lawyer at [the Agency], was involved in her case before she became a member of the administrative inquiry team. According to the complainant, Ms PI was professionally too close to her superiors or [the Agency] to be independent. In particular, the complainant pointed out that Ms PI was in copy of the acknowledgement of receipt regarding her first Article 90(2) complaint and of the note of 29 September 2011 informing her of the opening of the administrative inquiry. Moreover, Ms PI had forwarded to the secretariat of the Director of [the Agency] confidential information that was exclusively meant for the administrative inquiry team [3] . Ms PI was also the Head of the Staff Committee of [the Agency].

15. [The Agency] pointed out that Ms PI was one of the Legal Officers in a unit attached to the Director of [the Agency]. The role of the unit was to ensure an adequate central internal control system and to provide legal advice and assistance on any aspect of the work. One of Ms PI's main tasks was to improve the quality and consistency of [the Agency]'s output from a legal point of view. Thus, Ms PI was informed of documents in order to monitor the regularity and timeliness of the relevant procedures. The Director of [the Agency] delegated to the relevant unit the handling of the request for assistance made by the complainant, and the head of that unit replied to the complainant on 11 May 2011, with a reasoned decision. Ms PI was copied in that correspondence, but she was not handling the request for assistance.

16. [The Agency] pointed out that during the entire investigation phase the complainant did not raise any objections as regards the independence of any member of the investigation team. Nothing in the work of the investigation team suggested that Ms PI might have been lacking impartiality. In the exercise of her duties, Ms PI neither received nor sought any instructions from [the Agency]'s management .



17. In her observations, the **complainant** maintained her views and stressed that [the Agency]'s management was involved in the prolongation of her probationary period, which was also the reason why she had requested the exclusion of two individuals whom [the Agency] had initially intended to appoint as members of the administrative inquiry.

The Ombudsman's assessment

18. The substantive handling of the complainant's request for assistance was carried out by [the Agency]'s Administration Unit.

19. The Ombudsman notes further that the complainant did not object to Ms PI's membership of the investigation panel when she was first nominated nor during the investigation. This is despite the fact that the complainant had been aware of the fact that Ms PI was in copy of the acknowledgement of receipt of her Article 90(2) complaint, and in copy of the note dated 29 September 2011 informing her of the opening of the administrative inquiry. The complainant must also have been aware, at that time, of Ms PI's position within [the Agency]. By contrast, the complainant did challenge the membership of two other persons whom [the Agency] had suggested and who were subsequently excluded from the investigation panel by decision of the Director of [the Agency].

20. This would imply that, as far as Ms PI's participation in the investigation panel is concerned, the complainant did not consider at the time any of the above-mentioned facts as relevant to justify her exclusion from the inquiry. In fact, it was only *after* the conclusion of the investigation that the complainant challenged the nomination of Ms PI. However, the only additional element on which the complainant relies in this context was that Ms PI had replied to her from a functional mailbox of [the Agency]. Whilst this might potentially raise issues of data protection, the Ombudsman does not consider that this circumstance, by itself or in conjunction with the other considerations put forward by the complainant, could justify the conclusion that Ms PI had an actual or potential conflict of interest.

21. Finally, the Ombudsman fails to see how Ms PI's position as Head of the Staff Committee would have, as such, prejudiced her impartiality towards the complainant, in particular, given that, pursuant to the Staff Regulations, the Staff Committees is bound to represent the interests of the staff. In any event, the complainant did not elaborate further on this aspect.

22. Thus, the Ombudsman finds no maladministration as regards this allegation.

Allegation of having failed to deal properly with the psychological harassment suffered by the complainant

Arguments presented to the Ombudsman

23. The **complainant** alleged that [the Agency] failed to deal properly with her complaint about psychological harassment. Apart from the hearing that took place on 28 November 2011, the investigation panel did not seek any further clarifications from her, nor did it seek to interview



other persons who had worked closely with her, such as Mr F, her first team leader who had considered that her conduct was exemplary, and Ms F, her last team leader.

24. The complainant further submitted that the non-confidential version of the investigation report did not mention any facts or investigation results.

25. The complainant questioned why the investigation panel did not seek to clarify Ms A's accusations, related to her first probationary period report, that she (the complainant) had had problems with her colleagues. Considering that the panel interviewed just two people, Ms. A and Ms. M., the complainant regarded this as a defect in the process.

26. [The Agency] argued that, as laid down in the jurisprudence, the investigation team had broad discretionary powers with regard to the conduct of the administrative inquiry, including a wide margin of discretion to assess and select the persons to be interviewed in the light of the relevance of such testimonies [4] . Consequently, the investigation team could decide to hear only some of the witnesses suggested by the complainant.

27. With regard to the establishment of the facts which led to the complainant's request for assistance, [the Agency] pointed out that the complainant had three opportunities to put forward her arguments: in the context of the request for assistance, in the context of the complaint under Article 90(2) of the Staff Regulations and during her hearing on 28 November 2011. The investigation panel was not obliged to apply any specific means to involve the complainant in the investigation to establish the facts and, in particular, the investigation panel was not required to invite the complainant to multiple hearings.

28. As to the content of the report, [the Agency] contended that the investigation team was able to correctly assess the complaint of alleged psychological harassment, even if the inquiry report did not individually address all the specific examples that the complainant had listed in her request for assistance [5] . Each allegation was analysed in its specific factual context in order to assess whether psychological harassment could have occurred. For each allegation a conclusion was reached by the investigation team specifying whether any obligations under the Staff Regulations had been breached or disregarded. The overall conclusion was that none of the alleged facts constituted evidence of psychological harassment by Ms A.

The Ombudsman's assessment

29. In her observations on [the Agency's] opinion, the complainant raised a number of further questions and made a number of additional remarks concerning various aspects of the overall conduct of the investigation carried out by [the Agency]. These were aimed at showing that the "tactics" and arguments put forward by [the Agency] were intended to shift responsibility on to the complainant for the incidents which she claimed were examples of psychological harassment. However, the Ombudsman finds that these further questions and remarks are not relevant for the purposes of this inquiry.

30. As laid down in the jurisprudence, the administrative inquiry report does not have to address



every single allegation of the complainant. The Ombudsman considers that the report in question did address the core issues that were raised in the complainant's request for assistance. Moreover, the investigation team heard as witnesses the two persons most concerned by the complainant's request for assistance, that is her last Head of Unit and Ms M.. In these circumstances, the Ombudsman is not convinced that, by failing to hear other persons as witnesses, the investigation team might have committed maladministration

31. Having duly examined all the arguments put forward by the complainant, and having carefully assessed the contents of the full version of the investigation report, the Ombudsman is satisfied that the investigation carried out by [the Agency] properly addressed the allegations of harassment raised by the complainant. She further takes the view that the conclusion reached, first by the investigation report and then by [the Agency], that no such harassment had been established, is reasonable.

32. Thus, the Ombudsman finds no maladministration as regards this allegation and the corresponding claim for compensation to be paid.

Allegation of having wrongly refused to provide the complainant with a full and signed copy of the investigation report

Arguments presented to the Ombudsman

33. The **complainant** claimed that she should have had access to the full and signed copy of the report of the administrative inquiry carried out following her request for assistance under to Article 24 of the Staff Regulations.

34. [The Agency] stated that the complainant had received a non-confidential version of this report. [The Agency] had explained to the complainant that there was only one report signed by the members of the investigation team who had carried out the enquiry. The version transmitted to the complainant was a non-signed and a non-confidential version of the original inquiry report (that is, the full report minus the confidential passages and the signatures). According to [the Agency], the disclosure of the original report would have undermined the privacy and integrity of the witnesses and would thus have been in breach of the legislation regarding the protection of personal data.

35. Referring to the Civil Service Tribunal's judgment in Case F-42/10, [the Agency] argued that, in order to protect the right to privacy of the persons involved, the complainant was entitled to have access only to a version of the report which does not contain material which could allow her to identify those person(s) interviewed in the course of the inquiry. [6] The version of the investigation report made available to her should thus enable the complainant to understand the outcome of the investigation, and summarise (i) the main factual elements with an indication of their sources, and (ii) the analysis of the investigation panel. [7]

36. As regards the alleged breach of the complainant's right of defence, [the Agency] noted that, according to the jurisprudence, the right of defence applies only to procedures which are



initiated against a person, and are liable to culminate in a measure adversely affecting that person. In this case, however, an inquiry initiated following a request for assistance from the complainant cannot be compared to an inquiry opened against her. Thus, the procedural rights that the complainant could claim in the present case did not include full access to the inquiry report or the evidence thus obtained, nor was there any obligation to hear the complainant on the content of those documents before the contested decision was taken. [8]

37. In her observations, the **complainant** argued that in Case F-42/10 only the personal data had been removed from the investigation report. The applicant in that case thus had a clear understanding of the outcome of the administrative enquiry, and could subsequently defend her interests before the Court.

38. The complainant said that the non-confidential version she had been given did not mention any facts, but merely rejected her request for assistance on the basis of a subjective interpretation of her hearing.

39. As regards [the Agency's] argument that the disclosure of the original report would have undermined the privacy and the integrity of the witnesses, the complainant pointed out that the names of the two persons heard were already known. Moreover, a summary of facts would not undermine the privacy or integrity of any witness. In any event, [the Agency] should provide her with a non-confidential version that is as detailed as the one that was released to the applicant in Case F-42/10.

The Ombudsman's assessment

40. [The Agency] justified its refusal to provide the complainant with the full version of the investigation report by reference to the judgment in Case F-42/10.

41. According to the relevant jurisprudence of the Court, the procedural right to be heard does not include the right for a person claiming to be the victim of psychological harassment to examine the whole of the completed inquiry report. This is because, in the context of an inquiry into a case of psychological harassment, unless there are special circumstances suggesting the contrary, it is reasonable to seek to protect witnesses by guaranteeing their anonymity and the confidentiality of any information likely to identify them. This is so, in order to enable neutral and objective inquiries to be held with the unreserved cooperation of members of staff, to prevent any risk of influence of the witnesses after the event by those incriminated, or even by the complainants, and in this way to protect working relationships which ensure the smooth running of services.

42. On the other hand, the Court has also ruled that where the appointing authority decides to reject a complaint of psychological harassment on the basis of the findings of an inquiry report, the complaining official is entitled to have disclosed to him the reasons underlying the findings of the inquiry report, which, "*in the event that those reasons do not appear in the appointing authority's decision, means that a non-confidential version of the inquiry report should be*



disclosed to him ". [9]

43. In this case, [the Agency] gave the complainant a non-confidential version of the report in which the names of the witnesses and their statements were omitted. In doing so the [the Agency] appears to have complied with the above mentioned requirements of the jurisprudence. In fact, as shown by the inspection carried out by the Ombudsman, the only difference between the confidential and the non-confidential versions of the administrative inquiry report was that the date when the two [Agency] officials were heard and their respective declarations were omitted from the latter.

44. Although the Ombudsman acknowledges and does not question the genuine efforts made by [the Agency] to comply with the principles laid down by the jurisprudence, she is not convinced that the approach followed in this case was justified. In fact, although according to the jurisprudence only "*the surname, first name, post and grade of the persons heard – allowing them to be identified*" should be omitted from an inquiry report, in the present case, apart from the complainant, the only persons heard were Ms A (the alleged perpetrator of harassment) and Ms M (a witness). As mentioned above, the names of those two witnesses were already disclosed to the complainant, and also contained in the non-confidential version of the investigation report. Thus, it is difficult to imagine how disclosing their testimonies, as set out in the investigation report, would further undermine their privacy.

45. Moreover, the Ombudsman does not believe that the kind of reasons, which in general could justify the withholding of the full report, actually apply in this specific case. The need to protect working relationships and the smooth running of the services is not so applicable in circumstances where the complainant no longer works for [the Agency].

46. Thus, in these circumstances, the Ombudsman believes that it would be appropriate for [the Agency] to make available to the complainant, if not the full version of the administrative inquiry report, at least one that contains the declarations made by Ms A and Ms M that will not jeopardise their integrity.

47. The Ombudsman has already concluded that there was no maladministration as regards the substantive finding, first by the panel and then by [the Agency], that no harassment had occurred. Equally, the Ombudsman is satisfied that there was no maladministration as regards the manner in which the panel conducted its business. On the issue of [the Agency] providing the complainant with a full copy of the panel's report, it is clear that, in the particular circumstances of this case, there is now no obstacle to this being done. What remains undisclosed is the content of the evidence of the two witnesses. The disclosure of this material has no negative consequences either for the privacy rights of the two witnesses or for the protection of the working environment within [the Agency]. In these circumstances, the Ombudsman trusts that [the Agency] will now provide this undisclosed material to the complainant.

Conclusion

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



The Ombudsman trusts that [the Agency] will disclose to the complainant, if not the full version of the administrative inquiry report, at least one that contains the declarations made by the witnesses heard by its investigation team. Subject to this, no maladministration is found.

The complainant and the [the Agency] will be informed of this decision.

Emily O'Reilly

Strasbourg, 24/11/2015

[1] For the purposes of complying with data protection rules and confidentiality certain parts of the decision have been redacted and anonymised. as indicated by the use of [...].

[2] *" Psychological harassment' means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person. "*

[3] An e-mail sent by the complainant on 5 December 2011 to Ms PL was answered from a functional mailbox of [the Agency], signed by "Secretariat to the [the Agency] Director" and on behalf of Ms PL.

[4] Case F-42/10, paragraphs 38-39

[5] Case F-42/10, paragraph 40.

[6] In particular, [the Agency] referred paragraph 18 of Case F-42/10) : *"... The Tribunal found, moreover, that [the inquiry] report contained confidential information in so far as, having been drawn up following an inquiry into harassment, it contained personal data – that is, the surname, first name, post and grade of the persons heard – allowing them to be identified. Consequently, the Tribunal decided to invite the Commission to forward to it a non-confidential version of the inquiry report, omitting the abovementioned personal data, and to deliver that non-confidential version to the applicant"*

[7] Case F-12/10, Petrus Kerstens v. Commission, paragraph 15.

[8] In this respect, [the Agency] referred to Case F-42/10, paragraphs 46, 48 and 50.

[9] See Case F-39/12, BQ v Court of Auditors of the European Union, paragraph 73, not yet published.