

Decision in case 1756/2013/ZA on the European Commission's decision to reject the complainant's post-secondary diploma as ineligible

Decision

Case 1756/2013/ZA - Opened on 16/10/2013 - Decision on 07/12/2015 - Institution concerned European Commission (Critical remark) |

The case concerned the European Commission's refusal to accept a national diploma the complainant submitted in order to be employed by the Commission, as proving the post-secondary nature of his education.

The Ombudsman inquired into the issue and disagreed with the Commission's stance. She thus proposed a solution to the Commission, which the latter rejected. The Ombudsman contacted the Permanent Representation of the relevant EU Member State and asked for its help to clarify the nature of the complainant's diploma. Even though the Representation's view reinforced the Ombudsman's initial assessment the Commission did not change its approach.

The Ombudsman thus closed this inquiry with a critical remark.

The background

1. The complainant, whose name was included in a reserve list for function group III contract agents in the EU Delegations, applied, in 2012, for a position at the Commission and was selected. However, the Commission refused to employ him. It argued that the diploma he had submitted to prove his post-secondary education was ineligible, and, therefore, he did not satisfy the requirements of the relevant call for expression of interest (the Call) and the legal provisions applicable to contract agents. [1]
2. The complainant holds a specific diploma awarded by an institute for continuous training and social development education in the Wallonia-Brussels Federation in Belgium, [2] which according to the Commission does not amount to a post-secondary diploma. While the Commission recognised that national diplomas need to be given the value which the applicable national law grants them, it, nevertheless, made its own assessment of the value of the complainant's diploma in light of the applicable national law and concluded that it was not of a post-secondary education level.



3. The complainant challenged this position and stated that, under Belgian law, his diploma was a post-secondary one. His position was supported by a certificate issued by the authorities of the Wallonia-Brussels Federation which unequivocally confirmed the post-secondary nature of the complainant's diploma.

4. The Ombudsman opened an inquiry into the complainant's allegation that the European Commission wrongly considered that the complainant's diploma was ineligible, and his claim that the Commission should (i) revoke its decision, declare the complainant eligible and either (ii) offer him an equivalent post or (iii) adequately compensate him for the damage he has sustained in terms of loss of income, loss of professional experience and moral damage. [3]

Alleged wrongful decision to declare the diploma ineligible and related claim

The Ombudsman's solution proposal

5. On 29 November 2014, the Ombudsman made a proposal for a solution. When proposing the solution, the Ombudsman took into account the arguments and opinions put forward by the parties.

6. The Ombudsman referred to the relevant case-law of the EU courts according to which the requirement of possessing a degree is construed in light of how such a degree is defined in the legislation of the Member State in which the candidate completed the studies. [4] She argued, therefore, that the certificate issued by the competent authorities of the Wallonia-Brussels Federation, which stated that "[t] he [complainant's] *diploma corresponds to a post-secondary level of education*, should suffice to prove the post-secondary nature of the complainant's diploma.

7. The Conditions of Employment of Other Servants of the EU ('CEOS'), as well as the Commission's General Implementing Provisions concerning the procedures of employment of contract agents and the relevant Call required, for the advertised post, at least "*a level of post-secondary education attested by a diploma*". There was no requirement about a particular type of post-secondary studies (whether undertaken at a traditional institution or at an institution for social development) or a particular category of diploma attesting to them (equivalent or specific).

8. In light of the above, the Ombudsman proposed to the Commission that it revoke "*its decision and expressly declare the complainant eligible for positions which holders of post-secondary diplomas normally qualify for and either (i) offer him an equivalent position to the one of which he was wrongly deprived, if one becomes available or, if that is not possible (ii) adequately compensate him for the damage he has sustained in terms of loss of income, loss of professional experience and moral damage*". "



9. In reply to the Ombudsman's solution proposal, the Commission maintained its initial view. It claimed that as regards the diplomas awarded by institutions for social development, as in the complainant's case, Belgian law distinguishes those which are equivalent to those awarded by traditional institutions from those which are specific, namely, offered by social development institutions only. Since the complainant's diploma was not equivalent to a traditional post-secondary one, it did not fulfil, according to the Commission, the conditions laid down in the CEOS and the Call, and thus the complainant could not be recruited.

10. The Commission also argued that it has applied this approach in other similar cases, and that in spite of other candidates having challenged this interpretation through the Article 90(2) Staff Regulation complaint mechanism, there was no case-law of the Court of Justice up to that point which contradicted the Commission's understanding.

11. The Ombudsman noted that, whereas the Commission recognised that national diplomas need to be given the value which the applicable national law grants them, it, nevertheless, made its own assessment of the value of the complainant's diploma in light of the applicable national law. She therefore contacted the Belgian Permanent Representation to the EU and asked it to clarify the matter. She put the following question to the Representation: "(i) [F] *rom the point of view of Belgian law, does the complainant's diploma attest to post-secondary studies?* [and](ii) [I] *f the answer is affirmative, does the fact that this is a specific diploma call into question its post-secondary nature?* " [5]

12. The Representation's reply reinforced the Ombudsman's assessment as it confirmed the post-secondary nature of the complainant's diploma. [6] In view of this information, the Ombudsman decided to ask the Commission to reconsider its stance by making a further proposal for a solution. [7]

13. In reply to the Ombudsman's further solution proposal, the Commission maintained its view. First, it claimed that the information provided by the Belgian Permanent Representation did not bring new elements to the case. Second, the Commission argued that, although according to EU case law national authorities determine the value of national diplomas, it does not follow that national authorities can also determine whether a national diploma gives access to an EU competition or employment. The Commission argued, thirdly, that since the complainant's degree was not equivalent to a degree granted by traditional post-secondary educational institutions, it was not in a position to compare (number of hours, subjects, exams etc.) the complainant's diploma with diplomas acquired in other EU countries and, thus, ensure the equal treatment of candidates. Fourth, the Commission reiterated the argument that the well-established administrative practice which the Commission applies to all similar cases has not ever been challenged in the Court of Justice.

14. Finally, the Commission suggested that if the complainant satisfied the requirements of Article 82(2)(ii) of the CEOS, [8] he could participate in the on-going call for expression of interest, following which employment as a contact agent of function group III could be envisaged.



15. The complainant was informed of the Commission's reply and suggestion which he refused to accept.

The Ombudsman's assessment after the proposal for a solution

16. The Ombudsman regrets the Commission's rejection for a second time of her proposal for a solution by arguing that even if the complainant's diploma is post-secondary, it is not equivalent to one granted by a "traditional" post-secondary educational institution and, therefore, is not eligible. As confirmed by the Belgian Permanent Representation, although the Belgian relevant law may maintain a distinction between equivalent and specific diplomas depending on their source (issued by a traditional establishment or not) this does not change their nature in that they are both of post-secondary level in terms of the Call. [9]

17. The Ombudsman points out once again that the **only** requirement of the Call was that a candidate's diploma must be a post-secondary one, something that the Belgian authorities have confirmed in this case. Furthermore, the Call itself did not contain any specific provision or description as to the type of the post-secondary diploma required.

18. The Ombudsman recognises that the Staff Regulations confer a wide margin of discretion on the institutions regarding their recruitment procedures. [10] It is for the Commission alone, and not the Member State issuing a diploma, to decide whether that diploma qualifies the candidate in question for a EU post. However, if the Commission wished to limit its admissibility criteria to the post-secondary diplomas issued exclusively by the traditional educational establishments, it should have said so in the Call.

21. Furthermore, the Ombudsman points out again that, as EU law stands now, [11] the Commission has an obligation to respect the nature of diplomas as decided by the national authorities issuing them. Comparing hours, subjects, exams etc. of the studies attested to by a diploma from one type of national establishment with studies in other types in order to check the "real" nature of the diploma, would amount to calling into question the Member State's decision on the nature of the diploma.

22. In light of the foregoing analysis, the Ombudsman takes the view that by considering the complainant's diploma ineligible even though it complied with the requirements set out in the Call, the Commission committed maladministration. Given the Commission's persistent refusal to comply with her proposals for a solution, the Ombudsman does not see any prospect that a formal recommendation might be accepted by the Commission. She therefore closes the case with the critical remark set out below.



Conclusion

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

The Commission rejected the complainant's diploma on the basis of additional requirements that were not laid down in the Call or relevant EU law. This constitutes an instance of maladministration.

The complainant and the European Commission will be informed of this decision.

Emily O'Reilly

Strasbourg, 07/12/2015

Final English version of the decision on complaint 1756/2013/ZA

[1] According to the Call (CAST/RELEX/2008) which reproduced article 82(2)(b)(i) of the Conditions of Employment of Other Servants of the European Union (CEOS), the minimal educational requirements for applying for a Contract Agent position for function group III were "*a post-secondary education attested by a diploma, or a secondary education attested by a diploma giving access to post-secondary education and appropriate professional experience of at least three years*". In this case only the first requirement is relevant.

[2] The post-secondary education system of the Wallonia-Brussels Federation comprises 'full-time post-secondary educational institutions' (*établissements d'enseignement supérieur de plein exercice*) and 'educational institutions for social development' (*établissements d'enseignement de promotion sociale*). The former are the 'traditional' full-time post-secondary educational establishments, while the latter are meant to provide life-long education at secondary and post-secondary levels to individuals whose studies do not follow a traditional path because, for instance, they wish to combine work and studies. Studies undertaken at post-secondary level within an educational institution for social development may be attested to by diplomas which are either **equivalent** to those granted by traditional post-secondary educational institutions ('equivalent diplomas'), or **specific** to those studies ('specific diplomas'). Specific diplomas are issued when the studies they attest to either are not offered at traditional institutions or are different from those undertaken within traditional institutions.

[3] 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 proposal for a solution available at:

<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/61517/html.bookmark> [Link]



[4] See, by analogy, Judgement of the Court of Justice of 13 July 1989, *Jaenicke Cendoya v Commission*, C-108/88, ECLI:EU:C:1989:325, paragraphs 49, 50 and 51, and Judgement of the General Court of 7 February 1991, *Ferreira de Freitas v Commission*, T-2/90, ECLI:EU:T:1991:11.

[5] Article 3(3) of the Statute of the European Ombudsman stipulates that " *The Member States' authorities shall be obliged to provide the Ombudsman, whenever he may so request, via the Permanent Representations of the Member States to the European Communities, with any information that may help to clarify instances of maladministration by Community institutions or bodies unless such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated. Nonetheless, in the latter case, the Member State concerned may allow the Ombudsman to have this information provided that he undertakes not to divulge it*".

[6] The Belgian Permanent Representation's reply stated that " *from the point of view of Belgian law (...) the complainant's diploma indeed attests to post-secondary studies... [T]he fact that it is a specific diploma does not call into question its post-secondary nature* ." (translation from the original, in French). It also added that the distinction between "equivalent" and "specific" diplomas " *has no implication on the level* " of the titles or diplomas obtained.

[7] For further information on Ombudsman's further solution proposal, please refer to the full text of the Ombudsman's solution proposal available at:
<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/61518/html.bookmark> [Link]

[8] Article 82(2)(b)(i) of the CEOS stipulates that the minimal educational requirements for applying for a Contract Agent position for function group III are "[...] *or a secondary education attested by a diploma giving access to post-secondary education and appropriate professional experience of at least three years*". .

[9] See footnote 1

[10] Judgment of the Court of Justice of 3 April 2003, *Parliament v Samper*, C-277/01 P, ECLI:EU:C:2003:196, para. 42.

[11] See footnote 4.