

## **Decision in case 629/2015/ANA concerning the decision of the European Centre for Disease Prevention and Control (ECDC) not to establish a temporary agent at the end of the probationary period**

Decision

**Case 629/2015/ANA - Opened on 26/05/2015 - Decision on 11/07/2016 - Institution concerned** European Centre for Disease Prevention and Control ( Critical remark ) |

The case concerned the decision of the ECDC to terminate the contract of a temporary agent at the end of a probationary period.

The Ombudsman conducted an inquiry into the matter and took the view that, in general terms, the explanations given by the ECDC about its decision not to retain the complainant in employment at the end of the probationary period were reasonable.

However, the Ombudsman considered that the ECDC had failed to make clear to the complainant, in good time, (a) that the problems identified in the Newcomers' Evaluation Dialogue were so serious as to warrant the termination of the complainant's contract, (b) the areas in which he needed to improve, through a specific and clear Action Plan. The failure to do so constituted maladministration. Moreover, the Ombudsman considers that, in circumstances in which an EU body does not have enough time to evaluate properly the work of a temporary agent, or where the temporary agent has not had an adequate opportunity to correct deficiencies in his or her performance, *it would be good administration to examine if "exceptional circumstances" justifying the extension of the probationary period exist. As there is no evidence in the file that the ECDC seriously examined the option of extending the complainant's probation period, the Ombudsman made a corresponding suggestion for improvement for the future. Finally, given that it is good administration to apologise for any bad practice, the Ombudsman believes that the ECDC should acknowledge its mistakes in dealing with this case and apologise to the complainant for these mistakes.*

## **The background to the complaint**

1. In October 2013, the complainant was employed as Deputy Head of Unit in the Information and Communication Technologies Unit of the European Centre for Disease Prevention and Control (ECDC) as a temporary agent for a fixed-term contract of 5 years, subject to a



probationary period of 6 months.

2. On 14 January 2014, the complainant had a Newcomers' Evaluation Dialogue with his Line Manager, the Head of the Unit, as is provided for in the ECDC procedures.
3. On 15 January 2014, the complainant e-mailed a document related to the Newcomers' Evaluation Dialogue to his Line Manager in which he expressed his appreciation for the job and referred to the difficulties he had faced when moving to Sweden.
4. By e-mail of 7 February 2014 to the complainant, the Line Manager identified the complainant's strengths [1] as well as areas for improvement [2]. The section of the Newcomers' Evaluation Dialogue entitled " *Action Plan for the improvement of performance (To be filled in by the line manager, if needed)* " was left blank.
5. On 25 February 2014, the complainant met his Line Manager in order to discuss his Probationary Period Report. In that meeting, the Line Manager informed the complainant of the decision to recommend to the Director not to confirm his contract.
6. On 26 February 2014, the Line Manager forwarded the Probationary Period Report to the complainant. The most relevant parts read as follows:  
  
*" If agreed changes in a short term perspective was put down in the Action Plan (in the Newcomer's Evaluation Dialogue); have these changes been done? If yes, describe in what way? If no, why not?*  
  
*There has been no specific action plan put down, however areas to improve were identified during the newcomer's dialogue [3] [...]."*  
  
In the part concerning the performance of tasks/key objectives, the Line Manager commented on four objectives [4] and said: *" Despite a very good start in the last quarter of 2013, including professional relationship with the jobholder, I as a line-manager have become concerned overtime by not seeing opened tasks be finalised in a timely manner. [...] Consequently a de-prioritisation of the jobholder's tasks was done, which however lead to insufficient improvement. "*  
  
The Line Manager also commented on the jobholder's *" lack of strategic view and support "* and *" a lack of independent creative solution-finding "*.
7. On 12 March 2014, the complainant rejected the Probationary Period Report.
8. By letter of 17 March 2014, the ECDC Director informed the complainant that his contract would be terminated on 31 March 2014.
9. On 2 June 2014, the complainant submitted a complaint in accordance with Article 90(2) of the Staff Regulations.



10. On 3 October 2014, the ECDC Director rejected the complainant's Article 90(2) complaint.

11. On 10 April 2015, the complainant turned to the European Ombudsman.

## The inquiry

12. On 26 May 2015, the Ombudsman opened an inquiry into the following allegation and claim:

### *Allegation:*

The ECDC failed to address the complainant's arguments when deciding not to confirm his contract at the end of the probationary period.

### *Claim:*

The ECDC should properly deal with the complainant's arguments.

In the letter opening the inquiry, the Ombudsman asked the ECDC to address the following specific issues:

(a) The complainant argued that his line manager, by ignoring the work the complainant carried out and the line manager's own systematic delays, made it impossible for him to fulfil his objectives. The decision on the complainant's Article 90(2) complaint states that the complainant received regular feedback. The ECDC was asked to provide all such examples of evidence of feedback from 1 October 2013 to 25 February 2014.

(b) The decision on the complainant's Article 90(2) complaint addressed only one of the work objectives of the complainant and did not address the complainant's arguments concerning the six remaining objectives, which, according to the complainant, were completed by him at the time the Probationary Period Report was sent to him. The Ombudsman thus asked the ECDC to address the complainant's arguments concerning the remaining 6 work objectives.

(c) Moreover, she requested the ECDC to elaborate on the apparent contradiction between the "*range of issues in relation to [the complainant's] overall performance*" that were identified in the Newcomers' Evaluation Dialogue and the absence of an Action Plan.

13. In the course of the inquiry, the Ombudsman received the reply of the ECDC on the complaint and, subsequently, the comments of the complainant thereon. The Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Allegation that the ECDC failed to address the complainant's arguments when deciding not to confirm**



## his contract at the end of the probationary period and the related claim

### Arguments presented to the Ombudsman

14. The complainant argues that the decision of the ECDC to terminate his contract was unfair. In support of this view, the complainant alleged that, in its reply in his complaint under Article 90(2) of the Staff Regulations, the ECDC failed to address his arguments that the Probationary Period Report was based on vague statements that are not supported by any evidence or facts. He added that he had produced all the work demanded of him and that, with one exception, he had received no reply or feedback from his line manager. Finally, he stated that the Newcomers' Evaluation Dialogue, which was completed only 11 working days before the Probationary Period Report, was broadly positive. What is more, there was no Action Plan to address areas in which the complainant's performance could improve.

15. As regards the evidence of feedback to the complainant, the ECDC stated in its reply that the complainant was a staff member who expected special treatment, a lot of attention and excessive guidance. It argued that the Line Manager paid special attention to his professional integration, even though one would have expected from a Deputy Head of Unit the ability to work independently and without such close supervision from the Line Manager.

16. The ECDC furthermore argued that the complainant and his Line Manager had regular interactions via regular meetings, ICT Management Team meetings, and meetings dedicated to specific topics, either bilaterally or with a group of staff and via " *short written instructions, reminders and feedback* ". The ECDC explained that feedback and instructions were mostly provided orally during meetings.

17. In his comments on the ECDC's reply, the complainant argued that the ECDC did not provide any evidence that the complainant needed " *excessive guidance* "; on the contrary, the line manager did nothing to support him. Furthermore, the complainant contested the evidence and arguments put forward by the ECDC. Moreover, he argued that the ECDC did not provide any proof of a reply from the Line Manager dealing with the substance of his deliverables or useful feedback regarding the content of his work [5] .

18. In its reply as regards the complainant's performance vis-à-vis the deliverables defined in his objectives, the ECDC argued that although the complainant mentioned six deliverables, in fact, only four [6] corresponded to defined objectives. Of those, two objectives (2 and 4) were de-prioritised because of the lack of concrete and finalised outputs at the beginning of 2014. Regarding objectives 5 and 6, the ECDC stated that these were documents produced by the complainant in previous jobs and could not be considered as objectives assigned to him.

19. Next, the ECDC argued that the complainant did not provide his deliverables in a timely manner or in a final form. With regard to objective 4, the ECDC stated that the complainant sent an e-mail with his " *first thoughts* " on this objective on 26 November 2013. The ECDC



furthermore stated that the task was deprioritised during the bilateral meeting on 21 January 2014. The ECDC noted that the complainant nevertheless sent a second draft proposal on 19 February 2014, which could not be considered as a final delivery. According to the ECDC, the complainant did not submit the final paper until 28 March 2014, without prior consultation with the relevant stakeholders.

**20.** In his observations, the complainant argued that the statement that certain of his tasks had to be de-prioritised after the complainant had failed to provide concrete output at the beginning of January 2014 was incorrect as his objectives were not defined until the Newcomers' Evaluation Dialogue report which he received on 7 February 2014.

**21.** In his detailed comments on the ECDC's arguments regarding the deliverables, the complainant argued that he did not receive any (timely) reply from his line manager in relation to the first four objectives, which blocked any possible further progress. With regard to objective 4, the complainant argued that he never received feedback on the draft outline he sent to the Line Manager in November 2013, and that he had to submit an updated version on 19 February 2014 on his own initiative. Regarding the last two objectives, the complainant acknowledged that he took action on his own initiative. In his view, there is nothing to support ECDC's view that he needed "*excessive guidance*".

**22.** As regards the alleged contradiction between, on the one hand, the "*range of issues in relation to [the complainant's] overall performance*" that were identified in the Newcomers' Evaluation Dialogue and the absence of an Action Plan, on the other hand, the ECDC argued that, among others, the complainant received feedback through the Newcomers' Evaluation Dialogue on aspects of his performance needing improvement. The ECDC noted that an Action Plan is not mandatory and principally aims to facilitate the improvement of the performance of a jobholder. It added that the complainant "*nevertheless has on numerous occasions received feedback regarding the areas of performance that required improvement*".

**23.** The complainant argued that the fact that there was no Action Plan accompanying the Newcomers' Evaluation Dialogue implied that it had not been necessary to have one.

## The Ombudsman's assessment

**24.** The Union courts have established the standard of review concerning the issue of non-establishment of a probationary official at the end of a probationary period. In this inquiry, The Ombudsman will apply the same standard of review on the issue of the correctness of the ECDC's decision to terminate the employment.

**25.** The purpose of the probationary period is to enable the administration to make an assessment of the candidates' suitability for a particular post, the manner in which he/she performs his/her duties and his/her efficiency in the service. At the end of the probationary period, the administration must be in a position to determine, without being bound by the assessments made at the time of recruitment, whether the probationary official deserves to be



established in the post to which he aspires [7] .

26. Consequently, the ECDC has a wide margin of discretion in assessing the abilities and performance of probationary staff members in accordance with the interest of the service [8] . It is therefore not for the Ombudsman to substitute her own judgement for that of the ECDC except in cases of manifest error of assessment or abuse of power [9] .

27. With regard to the issue of whether there was any manifest error of assessment, the case-law provides that it is for the staff member concerned to provide sufficient evidence to render the assessments made by the administration implausible [10] . In other words, the Ombudsman cannot accept that there was any manifest error if, despite the matters advanced by the complainant, the assessment put forward by the institution concerned **could be** true or valid.

28. It should also be noted that an Ombudsman inquiry, unlike proceedings before an EU court, provides the institution complained about with an opportunity to clarify or expand upon its views as to the staff member's performance.

29. Regarding the complainant's performance vis-à-vis the work required of him, the position of ECDC can be summarised as follows. The ECDC states that the complainant did not present the work required of him in a timely manner or finalise work. The complainant argues that it was his line manager who did not reply to him or replied very late to questions regarding the work required of him, making it impossible for him to make further progress. The Ombudsman finds that these comments of the complainant do not render implausible the position of the ECDC. She notes that the complainant was a Deputy Head of Unit, who, according to ECDC, should have had the ability to work independently and without the need for close supervision from the Line Manager. Thus, even if it were true that the Line Manager did not reply to certain emails, this would not imply that the position of ECDC was implausible.

30. The ECDC also argued in its opinion to the Ombudsman that the complainant and his Line Manager had regular interactions via regular meetings, ICT Management Team meetings, and meetings dedicated to specific topics, either bilaterally or with a group of staff and via "*short written instructions, reminders and feedback*" [11] . The ECDC explained that feedback and instructions were mostly provided orally during meetings. This explanation is not implausible.

31. The Ombudsman notes that the document resulting from the Newcomers' Evaluation Dialogue does identify weaknesses in the performance of the complainant. It stated that the complainant could contribute to strengthening the team-spirit and morale by giving **more** constructive feed-back for example. As regards the delivery of papers, it was noted that an effort could be made to deliver in a **more timely manner** , probably by being **more focused** . It added that the complainant **needed to adapt further to the management culture** . These points are all reflected in the Probationary Period Report. It is true that the Newcomers' Evaluation Dialogue make positive statements about the complainant. It refers to the complainant being loyal, good humoured, well-liked and appreciated by colleagues. However, these statements do not mean that the negative statements are not also reasonable points of



view. More importantly, they do not imply that the ECDC was not entitled, **when exercising the wide margin of discretion which the law grants it**, to give more weight to the problems it identified when it drew up the Probationary Period Report.

**32.** As regards whether an Action Plan should have been drawn up if problems were in fact identified in the Newcomers' Evaluation Dialogue, the ECDC's states that no specific Action Plan was drawn up because the areas to improve were identified during the Newcomers' Evaluation Dialogue itself. This is not convincing. It is true that the problems and areas to improve were identified in the Newcomers' Evaluation Dialogue (see paragraph 31). However, if the problems identified in the Newcomers' Evaluation Dialogue were so serious as to warrant the termination of the complainant's contract, it would have been better for the ECDC to have made very clear to the complainant, in good time, what he needed to do to improve, through a specific and clear Action Plan. The failure to do so constituted maladministration.

**33.** The Ombudsman notes that the ECDC was legally required to give the complainant a very short probation period of six months [12]. The probation report must also, by law, be drawn up one month before the end of the probation period. The combination of these legal rules implies that the complainant had very limited time, five months, to prove himself, and to correct any failures, before the probation report was drawn up. The applicable law allows, however, for a probation period to be extended in "*exceptional circumstances*". [13] While the extension of a probationary period can only occur in "*exceptional circumstances*", it would be good administration always to examine if such "*exceptional circumstances*" exist. This would certainly be the case if the public body considered that it did not have enough time to evaluate properly the work of the person concerned, or where the person has not had an adequate opportunity to correct deficiencies in his or her performance. There is no evidence in the file that the ECDC seriously examined the option of extending the complainant's probation period.

**34.** The Ombudsman accepts that the ECDC was legally entitled to terminate the complainant's employment at the end of the probationary period. However, the Ombudsman is not satisfied that the manner in which the ECDC dealt with the issue reflected good administrative practice. The Ombudsman believes that, in line with the requirements of good administration, the ECDC should be prepared to acknowledge mistakes or poor practice when they occur. Furthermore, the ECDC should be prepared to apologise to any individual who has encountered such poor practice in dealing with the ECDC. The Ombudsman believes that the ECDC should demonstrate its acceptance of this approach by agreeing to apologise to the complainant for the maladministration identified by the Ombudsman in the course of this inquiry.

## Conclusions

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

**The ECDC failed to inform the complainant in a timely manner of perceived deficiencies in his work and failed to draw up a specific and clear Action Plan to assist the**





**complainant to address these deficiencies before the probation period ended.**

**The Ombudsman believes that the ECDC should demonstrate its commitment to good administration by being willing to acknowledge mistakes when made and by being willing to apologise for them, where appropriate. The Ombudsman believes that the ECDC can demonstrate this commitment by deciding to apologise to the complainant in this case for the maladministration identified in the course of this inquiry.**

The complainant and the ECDC will be informed of this decision.

**Suggestion for improvement**

**The ECDC should always show that it has examined seriously the option of extending the probationary period of a member of staff.**

Strasbourg, 11/07/2016

Emily O'Reilly

European Ombudsman

[1] *"[The complainant] has shown great interest in the job and good will to perform; this has been noticed particularly when preparing SMT meetings or when summarising his view on ICT-Unit at his arrival.*

*Thus he has been able, by meeting colleagues, to quickly build an insight on ICT-Unit possible improvements.*

*The jobholder is quality oriented; that was notably visible when given the task to review procurement documents, defending ECDC's interest by doing so ."*

[2] *" The Unit being renewed at managerial level and still undergoing changes, [the complainant] could contribute strengthening the teamspirit and morale more, by giving more constructive feed-back for example.*

*In what regards delivery of papers, an effort could be made to deliver timely, probably by keeping more focused, despite of surrounding numerous Unit activities and changes.*

*As the Unit tends to secure a solid management line in respect to specific responsibility holders, [the complainant] might need to adapt further into this management culture. "*

[3] *Namely, contributing to the team spirit and morale; making an effort to deliver papers on time; and adapting further into the management culture.*

[4] *That is, the Centralisation Step 3, the Project management, the ICT Long term Strategy*





(LTS) and the mobile device policy review

[5] In support of his views, the complainant argued that the two meetings regarding his objectives started very late and were monologues by his Line Manager, that there was no proof that there were weekly meetings or opportunities for bilateral communication and, as regards listed meetings, that he was not even invited to many, that other meetings never took place and that his participation in some of the meetings still did not prove that he received feedback on his deliverables. The short e-mails did not contain any replies by his Line Manager on the substance of his deliverables.

[6] Namely: 1) Project governance, 2) ICT Long term Strategy, 3) Mobile Device Policy, 4) Security Governance.

[7] Judgment of the Court of Justice of 17 November 1983, *Tréfois v Court of Justice of the European Communities*, C-290/80, ECLI:EU:C:1983:334, paragraph 24 and Judgment of the Civil Service Tribunal of 13 December 2012, *BW v European Commission*, F-2/11, ECLI:EU:F:2012:194, paragraph 77.

[8] Judgment of the Civil Service Tribunal of 3 March 2009, *Patsarika v Cedefop*, F-63/07, ECLI:EU:F:2009:18, paragraph 63.

[9] As regards abuse of power, the Ombudsman found the complainant's arguments abstract and not convincing enough to meet the high threshold set by the CJEU case-law.

[10] Judgment in *BW v Commission*, cited above, ECLI:EU:F:2012:194, paragraph 80.

[11] To prove its arguments, the ECDC provided the record of one bilateral meeting containing circumstantial evidence of a previous bilateral meeting, the minutes of one ICT Unit meeting, a list of scheduled meetings in which both the complainant and his Line Manager were to participate, and a number of e-mails regarding 3 different topics.

[12] The Conditions of Employment of Other Servants (CEOS) in force at the time the complainant was recruited stated "A member of temporary staff may be required to serve a probationary period not exceeding six months". The present CEOS, which entered into force in 2014, raise that period to nine months.

[13] The CEOS state that that "a member of the temporary staff whose work has not proved adequate to justify retention in his post shall be dismissed. However, the authority (...) may, in exceptional circumstances, extend the probationary period for a maximum of six months, and possibly assign the member of the temporary staff to another department").