



Decision of the European Ombudsman closing the inquiry into complaint 52/2014/EIS concerning the decision of the European Personnel Selection Office (EPSO) to have due regard to the force majeure principle in open competitions

Decision

Case 52/2014/EIS - Opened on 03/02/2014 - Recommendation on 19/03/2015 - Decision on 17/11/2016 - Institution concerned European Personnel Selection Office (No further inquiries justified) |

The complainant, who works for the Court of Justice of the European Union on a temporary contract, applied for an EPSO competition to recruit conference interpreters. The Notice of Competition stated that completed applications had to be submitted by 6 August 2013 at noon. The complainant missed the deadline. On 7 August 2013, she informed EPSO that she had been hospitalised from 5 to 6 August 2013 and therefore had not been able to complete her application on time. On 7 August 2013, she requested EPSO to extend the deadline. EPSO refused. Its main reason for refusing was, it stated, that it must treat all applicants equally.

The Ombudsman inquired into the issue and made the preliminary finding that EPSO had failed to consider whether the complainant's circumstances amounted to a situation of force majeure. She thus recommended that EPSO (i) acknowledge that there are situations where, because of force majeure, it is fair and proper that candidates should be given a new deadline; (ii) clarify the circumstances in which such a new deadline should be set; and (iii) inform candidates accordingly. EPSO initially rejected the Ombudsman's recommendations and argued that it would be difficult to draw a line between different justifications put forward by candidates and to set out how candidates would prove that force majeure had occurred. It added that allowing candidates to invoke force majeure would jeopardise both the smooth running of open competitions and the equal treatment of candidates. It also referred to statistics which, it argued, proved that dealing with all the requests for deadline extensions after the deadline has expired would be an administrative burden for EPSO.

However, following meetings between Ombudsman and EPSO staff, EPSO finally accepted the recommendations of the Ombudsman in principle. As regards the specific case of the complainant, however, the Ombudsman noted that the competition in question had ended. She also noted that the complainant had chosen not to comment on the response of EPSO to her recommendations. In view of this, the Ombudsman considered that there were no grounds for further inquiries into whether the complainant's case met the requirements of force majeure that EPSO now, in principle, agrees to apply.



The background

1. On 4 July 2013, the European Personnel Selection Office ('EPSO') published a notice of competition [1] to create a reserve list from which to recruit conference interpreters with French as their main language. The complainant wished to take part in this competition and completed the online application. The completed applications could be validated between 4 July 2013 and 6 August 2013 at noon. The complainant fell ill on 5 August. She states that she was hospitalised from **5 to 6 August 2013**, and thus failed to validate her application within the deadline.
2. On 7 August 2013, the complainant contacted EPSO, informing it that she had waited until the very last moment to complete her application. She also asked EPSO to accept her late application in view of a medical certificate which, according to the complainant, proved that she had, at the relevant time, suffered from an unforeseeable medical condition. According to the certificate dated 5 August 2013, the complainant needed two days of "*absolute rest in bed and of intensive therapy*".
3. On 8 August 2013, EPSO replied that the deadline could not be extended.
4. On 30 August 2013, the complainant made a complaint to EPSO in accordance with Article 90(2) of the Staff Regulations.
5. In January 2014 the complainant submitted a complaint to the European Ombudsman [2]. Allegation that EPSO was wrong not to admit the complainant to the competition and related claim

The Ombudsman's recommendations

6. The Ombudsman inquired into the matter and found that EPSO had failed to consider whether the complainant's circumstances amounted to a situation of *force majeure* [3]. EPSO's position was that, other than cases in which a failure to submit an application on time may be attributed to some mistake or failing **on its part**, there are **no circumstances** in which it will consider extending an application deadline or accepting a late application. In effect, EPSO does not recognise any need to have regard to the principle of *force majeure*.
7. As a result, in March 2015 the Ombudsman issued the following recommendations:
 - " 1) EPSO should acknowledge that there are cases where it is fair and proper to set a new deadline for validating applications of candidates who have failed to meet a deadline in circumstances of *force majeure*, for example because of illness or an accident.
 - 2) EPSO should clarify, in its General Rules Governing Open Competitions, the circumstances in which such a new deadline could be set.
 - 3) EPSO should inform candidates accordingly in its Guide to open competitions ."



8. On 30 June 2015, EPSO rejected the Ombudsman's recommendations. EPSO maintained its position that, in the particular case at issue, the complainant had missed a legal deadline set in the notice of competition. Further, it stated that each year there are in total about 70,000 applicants who successfully validate their EPSO applications. EPSO receives several hundred requests from candidates who do not complete their application in time. It added that about 50 per cent of applications are validated during the last 36 hours of the registration period [4] . Against this background, and in response to the Ombudsman's recommendations, EPSO stated that it is committed to adapting the General Rules Governing Open Competitions only " *in so far as to provide even more explicit information to candidates about the obligation to validate on time and urge them to complete their registration as soon as possible* ".

9. EPSO added that, even **if** it were to accept certain situations as constituting *force majeure* , it is not able to set a reasonable cut-off date for late validations, because under the principles of proportionality and non-discrimination, EPSO cannot jeopardise an entire selection procedure by allowing candidates who missed a deadline back into a competition. In this respect, it stated that allowing individuals who are incapacitated for a longer period of time back into a competition would mean that competitions, which are extremely complex logistical exercises, would not proceed on schedule. This would also risk penalising the candidates who had completed their applications on time.

10. Finally, EPSO said that it would have difficulties in assessing the different justifications of late applications around the world in a fair and consistent manner, as candidates might invoke different situations, such as hospitalisation, illness of a dependant or bereavement. This would also raise further questions about the nature and timeframe of the evidence that is necessary to consider this proven. Ultimately, EPSO felt that this would leave it exposed to even more complaints from late applicants.

Additional replies provided by EPSO following meetings between Ombudsman and EPSO staff

Meeting in January 2016

11. In January 2016, Ombudsman staff had their first meeting with EPSO to clarify EPSO's views. During the meeting, EPSO stated that candidates have an entire month to complete and validate their applications (in the present case the complainant had from 4 July until 6 August to complete and validate her application). EPSO said that it strongly and repeatedly encourages candidates to submit their applications well in advance of the deadline. It added that when problems occur, it is almost always where candidates leave the completion and submission of their applications to the very last moment. To reinforce this point, it noted that publication dates are widely communicated well in advance of the month-long period when applications can be completed and validated (thus candidates can prepare their applications well in advance of the month-long application period). Further, a candidate's EPSO account can be accessed at any time from any location where there is internet. It also noted that



since 2010 it has worked with a programme of annual cycles. Generalist competitions are therefore repeated each year. Thus, if candidates miss the opportunity to apply one year, they can apply the next.

12. EPSO then stated that a *force majeure* event needs to be examined in this legal and factual context: in accordance with the principle of the duty of care, a candidate should not wait until the last moment to validate his or her application.

13. Alongside the approximately 70,000 candidates who successfully validate EPSO applications each year, EPSO receives several hundred requests from candidates who do not complete their application in time – sometimes due to factors that were in their control, sometimes not. EPSO stated that it has always managed these requests promptly and professionally.

14. Across competitions over the years, EPSO consistently sees that approximately 50 per cent of applications are validated in the last 36 hours of the registration period.

15. If, for any reason, EPSO or its IT systems contribute to a candidate being unable to validate before the deadline, and the candidate informs EPSO in due time, EPSO either extends the deadline for all candidates or gives individual candidates extra time to validate their applications.

16. Even if one were to accept that cases of illness or accident merited an extension or the re-opening of a deadline, EPSO considered that it would be difficult to decide on a reasonable cut-off date for late validations, as potential candidates could be indisposed for significant periods of time.

17. Moreover, EPSO explained that it is also bound by the principles of proportionality and non-discrimination. It would thus be extremely difficult to strike the right balance between candidates, seeking to rely on a variety of *force majeure* situations, and the need not to jeopardise the entire selection procedure. In fact, should a candidate be incapacitated for a longer period after the validation date, the competition would not proceed on schedule, creating difficulties for an extremely complex logistical exercise. This would penalise those candidates who did validate on time and would inconvenience the institutions.

18. In addition, EPSO said that it is difficult to see how it could compare and evaluate the different justifications of late applicants in a fair and consistent manner. It posed a question as regards what constitutes a sufficient justification. For example, would the hospitalisation of the applicant, an illness of a dependant or the bereavement of a close family member constitute a justification? It also had questions concerning the documentation that needed to be provided as proof and the timeframe for submitting that documentation. EPSO considered that it would struggle to draw the line between candidates. As a result, it would receive further complaints and more cases could be brought before the Civil Service Tribunal and the Ombudsman.



Meeting in September 2016

19. The second meeting between Ombudsman and EPSO staff took place in September 2016. EPSO said that it takes the Ombudsman's findings very seriously and agrees, as a matter of principle, that a very limited number of cases may arise where candidates (or potential candidates) are prevented from meeting their obligations or taking part in a test related to a selection procedure in serious circumstances of *force majeure*. However, EPSO also emphasised the utmost importance of striking the right balance, in respect of the principles of proportionality and good administration, between protecting the interests of the candidates affected by *force majeure* on the one hand, and the interest of the service in a timely and cost-effective manner, as well as the legitimate expectations of the other candidates to be selected fairly, promptly and without undue delay, on the other hand.

20. In light of the above, EPSO said that it would assess any individual requests based on *force majeure* on a case by case basis, taking into account the circumstances of each specific case and the following factors:

- (a) whether the candidates were in fact incapacitated or otherwise unable to meet their obligations within the set deadline due to serious and unforeseeable circumstances entirely out of their control, and to which they were unable to find a solution;
- (b) whether the above circumstances persisted for a considerable period of time immediately preceding the missed deadline, and whether they persisted on the day or during the period where a specific obligation was to be fulfilled;
- (c) whether the candidates provided official proof of such circumstances (such as a medical certificate or an attestation of the competent state authorities);
- (d) whether the candidates acted diligently and without undue delay when informing EPSO about their inability to meet their obligations within the deadline; and
- (e) whether the request can be accepted without causing delay to the competition procedure and the other candidates therein.

21. EPSO said that circumstances which could, in principle, amount to *force majeure* include serious or life threatening illness or childbirth. It stated that it will not accept requests in cases where, through lack of diligence or careless behaviour, it is obvious that the candidate has contributed to his or her inability to complete the application within the set deadline. Concerning a failure to complete an application within the set deadline, EPSO also noted that candidates are given a minimum of one month to apply, and are repeatedly warned of the risks of validating their application at the end of the period, for whatever reason.

22. It noted that if the problem was one falling within EPSO's responsibility (such as a failure of its IT systems), it will, of course, continue to show flexibility, provided that a candidate informs EPSO in due time.



23. In the light of all these considerations, EPSO said that it is ready to adapt the General Rules Governing Open Competitions to reflect the policy described above.

The Ombudsman's assessment after the recommendations

24. The Ombudsman notes that the competition in question has ended and that the complainant chose not to comment on the response of EPSO to her recommendations. In view of this, the Ombudsman considers that there are no grounds for further inquiries into this specific complaint.

25. However, the Ombudsman notes that her recommendations in this case were intended to be of general application; they seek to clarify an important point of principle, namely, whether the principle of *force majeure* can apply in the context of EPSO competitions. The Ombudsman notes that the issue of *force majeure*, in the context of failure to complete an EPSO application within the specified deadline, was dealt with previously by the Ombudsman in November 2006, exactly ten years ago. In that case [5], it appears that EPSO then accepted that the principle of *force majeure* did apply to EPSO competitions but that it took the view that *force majeure* did not apply in the particular case. The then Ombudsman found that EPSO's handling of that case was neither proportionate nor fair and, accordingly, constituted maladministration.

26. EU law clearly recognises that the principle of *force majeure* applies to procedural time limits. It is also true that this principle is subject to very strict requirements, including that the person concerned demonstrates the necessary diligence and care. However, in his decision from November 2006, the then Ombudsman noted: "... the Ombudsman is not aware of any provisions which could prohibit EPSO from extending the deadline for the confirmation of the registration (of an application) if it is proved that, by reasons of *force majeure*, that deadline could not be respected. On the contrary, the Ombudsman points out, by analogy, that, according to Article 45 of the Statute of the Court of Justice (version November 2005), '*[n]o right should be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of force majeure.*'"

27. The Ombudsman is grateful that, in the course of this inquiry, EPSO changed its earlier position and has now accepted all her recommendations. Although cases of *force majeure* are rare, there are situations where it will be fair and proper to accept a late application. The Ombudsman is pleased that EPSO now accepts this point of principle.

Conclusion

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

The Ombudsman is pleased that EPSO has now accepted all her recommendations concerning the application of the principle of *force majeure* in the context of EPSO competitions.



The complainant and EPSO will be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 17/11/2016

[1] <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2013:193A:TOC>

[2] 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 recommendation available at:
<http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/59332/html.bookmark>.

[3] *Force majeure* normally refers to a situation where a serious and irresistible force or unforeseeable event beyond the control of a person makes it materially impossible to fulfil an obligation.

[4] Concerning the selection cycle for administrators in 2014, the proportion of applications initiated from scratch during the last 36 hours was equal to one third of the final number of candidates. Moreover, more than 7,000 candidates started their applications between midnight and noon on the final day of registration.

[5] Case 1085/2006/MHZ. See Decision at:
<http://www.ombudsman.europa.eu/cases/decision.faces/en/3139/html.bookmark>.