

Decision in case 318/2016/ZA on the failure by the Executive Agency for Small and Medium Enterprise to reply to a request for review in a recruitment procedure

Decision

Case 318/2016/ZA - Opened on 16/03/2016 - Decision on 22/12/2016 - Institution concerned European Innovation Council and SMEs Executive Agency |

The case concerned the failure by the Executive Agency for Small and Medium Enterprises (EASME) to reply to the complainant's request for review following a recruitment procedure for a contract agent.

The Ombudsman inquired into the issue and asked EASME to reply to the complainant and address her concerns about her exclusion from the 'reserve list' of successful candidates. In its reply, EASME apologised for what it described as "an unfortunate event", which should not have happened, and explained why the complainant had not been included in the reserve list.

The Ombudsman found EASME's explanations about the complainant's exclusion convincing. However, she regretted the fact that it had taken EASME one year to reply to the complainant's request for review, and that it had done so only after the Ombudsman's intervention. The Ombudsman encouraged EASME to take steps to ensure that similar incidents do not occur in the future.

The background to the complaint

1. The complainant applied to the Executive Agency for Small and Medium Enterprises (EASME) for a position as a contract agent [1] . Following an eligibility check [2] and the assessment of the applications [3] , the complainant was invited for an interview on 19 March 2015.
2. When the complainant was informed that she had not been included in the reserve list of the successful candidates, she submitted a request for review (on 24 April 2015). EASME confirmed receipt of the complainant's request but it subsequently failed to reply to her. In February 2016, the complainant contacted the Ombudsman.

The inquiry



3. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claims:

EASME failed to reply to the complainant's request for review.

EASME should reply to the complainant and address the complainant's concerns as regards her exclusion from the reserve list.

4. The Ombudsman contacted EASME on 16 March 2016. Given the delay, the Ombudsman asked EASME to deal with the complaint as a matter of priority. On 11 April 2016, EASME forwarded to the Ombudsman its reply to the complainant's request for review. On 25 April 2016, the Ombudsman invited the complainant to submit her observations, which she did on 24 May 2016. In the course of the inquiry, the Ombudsman duly considered the information provided in the complaint.

Allegation that EASME failed to reply to the complainant's request for review and related claim

Arguments made by the complainant and the institution

5. The complainant's main allegation and claim against EASME concerned the agency's failure to reply to her request for review within the time limit of 45 days, which was set out in the 'call for expression of interest' (hereafter 'the Call').

6. In its reply, EASME apologised for the considerable delay, noting that this " *was an unintended and unfortunate event that should have not happened*".

7. In her observations the complainant claimed that EASME's failure to reply could have been a means of intentionally preventing her from launching administrative or judicial proceedings against the decision not to include her in the reserve list.

The Ombudsman's assessment

8. The Ombudsman regrets that it took EASME one year to reply to the complainant's request for review, and that it did so only after the Ombudsman's intervention. This is at odds with the provisions of the EU's Code of Good Administrative Behaviour [4] . She strongly encourages EASME to take the necessary steps to ensure that similar incidents do not occur in the future.

9. Concerning the complainant's claim that EASME's delay might have been intentional, in order to prevent her from launching administrative or judicial proceedings, the Ombudsman notes that there is no evidence to support this. Furthermore, in EPSO competitions and in Commission's internal site (myintracomm) it is clear that the decision following a request for review is considered as the act adversely affecting a candidate and, therefore, the complainant, who works for the EU, could still have made use of the administrative and judicial appeal possibilities foreseen by the EU 'Staff Regulations.



10. In the light of the foregoing analysis, there is no need for further investigation following the Ombudsman's intervention.

Claim that EASME should address the complainant's concerns about her exclusion from the reserve list

Arguments made by the complainant and the institution

11. In her request for review the complainant maintained that she fulfilled all the eligibility and 'essential selection' criteria set out in the Call. She noted that she also fulfilled the 'advantageous selection criteria' [5], making reference to her professional experience, her knowledge of the agency and the EU institutions in general, her knowledge of languages, and her personal talents and capacities. She also stated that she considered her performance in the interview to have been "outstanding".

12. In its reply, EASME explained the stages of the selection procedure and informed the complainant of her performance in each of them. It stated that following the careful examination of the applications according to the eligibility criteria (Section 4.A of the Call) and, subsequently, the essential and advantageous criteria (Section 4.B of the Call), the complainant was shortlisted and invited for interview. The complainant had been awarded 12 points, while the threshold for being invited for an interview was 10.5 points.

13. EASME explained that, during the interview, the complainant was asked to present her CV and to answer to seven questions: one about her knowledge of EASME and its relation to the European Commission; three technical questions on her knowledge and skills relevant to the duties described in the job description; and three questions on her generic competences. The complainant's knowledge of English, her motivation and overall suitability for the post were also assessed. The 'selection committee' awarded 22 points to the complainant for her performance during the interview. As the threshold for inclusion on the 'reserve list' of successful candidates was 27 points, the complainant was not included on the list. EASME included a detailed evaluation grid in its reply.

14. Concerning the review of the decision by the selection committee, EASME stated that, following the re-examination of the complainant's evaluation, the committee confirmed the scores it had initially awarded to the complainant.

15. The complainant found the agency's reply unsatisfactory. She pointed out that: (i) the reply did not state the three 'generic skill questions' and the three 'technical questions' that she was asked during the interview; (ii) the reply did not refer to her answers; (iii) the reply did not refer to the specific criteria used for assessing her answers; and (iv) she was not provided with a qualitative assessment of her answers apart from the scores she had attained. Moreover, the complainant pointed out that, as the interviews are not recorded, it is hard for the interviewees to substantively challenge or check the validity of the selection committee's decision.



The Ombudsman's assessment

16. EASME informed the complainant of her overall evaluation in the interview (22 points), the cut-off score for a candidate to be included in the reserve list (27 points) and the maximum possible score (44 points). It also informed the complainant how her performance was evaluated in each of the questions asked/topics discussed during the interview [6] .

17. The Ombudsman notes that the assessment criteria used in the interview corresponded to the description set out in the Call [7] . On that matter, established case law accepts that, notwithstanding its wide powers of appreciation, the selection board is bound by the wording of the 'notice of competition' as published [8] , as the term of the notice constitute both the legal framework of the board's proceedings and the assessment framework for its evaluation of the candidates [9] . The applicable case law also makes clear that selection committees enjoy broad discretionary powers to define the criteria for assessing the qualifications related to diplomas and work experience on the basis of the importance of these qualifications in relation to the requirements of the post to be filled, provided they stay within the limits set by the notice [10] .

18. Concerning the complainant's observation that the agency's reply did not refer to her answers nor did it contain a qualitative assessment of them, the relevant case law stipulates that the principle of secrecy that governs the selection procedures of EU institutions, bodies and agencies preclude both disclosure of the opinions of individual members of the committees and disclosure of any factor relating to the individual or comparative assessment of applicants [11] . Furthermore, case law makes clear that, under these circumstances, the communication of the marks the candidate obtained in each of the assessed criteria constitutes an adequate statement of the reasons on which the decision of the selection committee were based [12] . Finally, it should be pointed out that the agency, in its reply, specified the nature of the questions the complainant was asked during the interview.

19 . In the light of the foregoing analysis, the agency's reply appears to be correct and therefore no further investigation is justified.

Conclusion

On the basis of the inquiry into this complaint, the case is closed with the following conclusion [13] :

There are no reasons to justify further investigation.

The complainant and the Executive Agency for Small and Medium Enterprises will be informed of this decision.

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Unit 1- Inquiries and ICT



Strasbourg, 22/12/2016

[1] Call for expression of interest for administrative officer, FGIII - Reference number [EASME/III/2014/077 \[Link\]](http://ec.europa.eu/easme/en/system/files/vacancies/VN%20_EASME_III_2014_0077%20%282%29.pdf) (hereafter 'the Call').

http://ec.europa.eu/easme/en/system/files/vacancies/VN%20_EASME_III_2014_0077%20%282%29.pdf

[2] Section 4.A of the Call listed the formal criteria the candidates should fulfil by the deadline for applications.

[3] Section 4.B of the Call identified the selection criteria which were divided in two categories: (i) essential and (ii) advantageous.

[4] Article 17.1 of the Code of Good Administrative Behaviour stipulates that " *The official shall ensure that a decision on every request or complaint to the institution is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt* ". Furthermore, Article 17.2 requires that " *if a request or a complaint cannot, because of the complexity of the matters which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author as soon as possible. In such a case, a definitive decision should be communicated to the author in the shortest possible time* ".

[5] According to the Call, the selection criteria comprised two essential criteria and eight 'advantageous' criteria. The latter were: "university studies in a field related to the profile of the post; relevant additional certification, studies and/or training; good knowledge of the organisation, structure, working procedures and policies of Commission services/Agencies and/or other EU institutions; good oral or written command of French or German; ability to work independently, as well as in a team; flexibility and ability to work under pressure and manage his/her responsibilities within tight deadlines; good analytical, problem solving & learning and development skills; and, a good knowledge of the European Union policies and/or programmes relevant to the post."

[6] The complainant got: 3 out of 4 points for the presentation of her CV; 2.5 out of 4 points for the presentation of her motivation; 2.5 out of 4 points as regards her knowledge of EASME and its relation to the European Commission; 4 out of 12 points for her responses to three technical questions on her knowledge and skills relevant to the duties described in the job description; 5.5 out of 12 points for her responses to the three questions on her generic competences; 3 out of 4 points for her knowledge of English; and 1.5 point as regards her overall suitability for the post.

[7] The Call described the skills and competences to be tested during the interview as follows: *knowledge and skills relevant to the duties described in the job description, knowledge of the organisation, structure, working procedures and policies of Commission services/Agencies and/or other EU institutions; high motivation, strong aptitude for team work and the capacity to work autonomously ; and, finally , ability to work under pressure and manage his / her*



responsibilities within tight deadlines .

[8] Judgement of the Court of First Instance of 13 March 2002, *Bal v Commission* , T-139/00, ECLI:EU:T:2002:65, paragraph 35; Judgment of the Civil Service Tribunal of 11 July 2006, *Tas v Commission* , F- 12/05, ECLI:EU:F:2006:68, paragraph 43.

[9] Judgment of the Court of First Instance of 16 April 1997, *Fernandes Leite Mateus v Council* , T-80/96, ECLI:EU:T:1997:57, paragraph 27; Judgment of the Court of First Instance of 5 March 2003, *Staelen v Parliament* , T-24/01, ECLI:EU:T:2003:52, paragraph 47.

[10] Judgment of the Court of 6 February 1986, *Vlachou v Court of Auditors* , C-143/84, ECLI:EU:C:1986:55, paragraph 16; Judgment of the Court of First Instance of 28 November 2002, *Pujals Gomis v Commission* , T-332/01, paragraphs 39-41; Judgment of the Court of First Instance of 11 February 1999, *Mertens v Commission* , T-244/97, ECLI:EU:T:1999:27, paragraph 44; Judgment of the Court of First Instance of 11 May 2005, *de Stefano v Commission* , T-25/03, ECLI:EU:T:2005:168, paragraph 34.

[11] Judgement of the General Court of 12 May 2010, *Commission v Meierhofer*, T-560/08 P, ECLI:EU:T:2010:192, paragraph 16.

[12] Judgment of the Court of First Instance of 5 April 2005, *Christensen v Commission* , T-336/02, ECLI:EU:T:2005:115, paragraph 89; Judgment of the Court of 28 February 2008, *Neirinck v Commission* , C-17/07 P, ECLI:EU:C:2008:134, paragraph 52.

[13] Information on the review procedure can be found on the Ombudsman's [website \[Link\]](http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/70669/html.bookmark): <http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/70669/html.bookmark> [Link]