

## Decision in case 515/2016/JAP on the European Asylum Support Office's probationary assessment of a temporary agent

Decision

**Case 515/2016/JAP - Opened on 18/05/2016 - Decision on 28/04/2017 - Institutions concerned** European Asylum Support Office ( Settled by the institution ) | European Asylum Support Office ( No further inquiries justified ) |

The case concerned the assessment of the probationary period of a temporary agent at the European Asylum Support Office ('EASO'). The complainant, who was dismissed at the end of her probationary period, argued that there were a number of procedural shortcomings in her assessment. Moreover, the EASO failed to reply to her complaints made under the EU Staff Regulations.

The Ombudsman inquired into the issue and requested the EASO to reply to the complaints. She found that the EASO had taken the necessary steps to ensure an impartial assessment of the complainant's probationary period and had respected the complainant's right to be heard before taking the final decision on her further employment. The Ombudsman thus closed the case.

### The background to the complaint

1. The complainant joined the European Asylum Support Office ('EASO') as a temporary agent in spring 2015. She then served a nine-month probationary period. The complainant was provided with the job description upon her recruitment but her detailed job objectives were agreed only later on, in the course of her probationary period. Over the duration of the probationary period, the complainant's reporting officer and administration held a number of discussions about her performance and shared their views on her work.

2. Towards the end of the probationary period, the complainant received a copy of the first draft of the Probationary Period Report ('the Report'), which recommended her dismissal before the end of the probationary period. The complainant was of the view that there were procedural irregularities and shortcomings in the assessment of her performance. She thus made two complaints about the assessment process to the EASO under Article 90(2) of the Staff Regulations [1] .



3. More than a month before the end of her probationary period, the complainant was informed of the outcome of the final report. Based on the assessment of her performance as unsatisfactory, the reporting officer recommended that the complainant's contract be terminated at the end of the probationary period.

4. In accordance with the relevant rules at the time, and in order to respect her right to be heard, the EASO offered the complainant a meeting with the Executive Director, who would be taking the final decision on her employment. However the Executive Director, whose tenure in office was coming to an end, was not able to meet the complainant prior to the end of his tenure. As a consequence, the EASO looked into the possibility of organising a meeting with a member of its Management Board. However, given the short notice, none of the members was available. Following the departure of the Executive Director, the EASO Management Board selected the Head of Administration as the acting Executive Director.

5. Subsequently, the acting Executive Director, who had previously been the complainant's reporting officer, decided not to hear the complainant himself, in order to avoid any conflict of interests. Instead, he delegated the 'powers of the Appointing Authority [2]' for the complainant's probationary period, to the EASO Head of the Centre of Training (the 'acting Appointing Authority'), then the second most senior staff member at the EASO.

6. The complainant was dissatisfied with the manner in which the reporting process was handled. She therefore made a new complaint under Article 90(2) of the Staff Regulations about the decision by the acting Executive Director to delegate his powers, while also repeating her previous concerns. She said that she had been treated unfairly and that there had been procedural shortcomings in the reporting and assessment of her probationary period. In her view, the decision of the acting Executive Director, to delegate the powers of the Appointing Authority had been "falsified". In particular, she argued that the decision document had been backdated and manipulated.

7. Following the dialogue meeting with the complainant, the acting Appointing Authority recommended her dismissal. In accordance with Article 14 of the Conditions of Employment of other servants of the European Union ('CEOS'), and four days before the end of her contract, the complainant was informed that her probationary period was unsuccessful and she received a copy of the decision terminating her employment.

8. Subsequently, the complainant made another Article 90(2) complaint concerning the dismissal decision. This complaint, along with the earlier complaints to the EASO, remained unanswered when the complainant turned to the European Ombudsman on 4 April 2016.

### **The inquiry**

9. The Ombudsman opened an inquiry into the EASO's failure to reply to the complainant's Article 90(2) complaints and also into its alleged shortcomings in dealing with her assessment.

10. In the course of the inquiry, the Ombudsman asked the complainant for additional



documents, sought some clarifications from the EASO and also inspected the EASO's file.

### **Failure to reply to the complainant's Article 90(2) complaints**

Arguments made by the complainant and the institution

**11.** The complainant provided copies of complaints made to the EASO, which had remained unanswered despite a number of reminders. In its direct contacts with the complainant, the EASO reassured her that it would reply within the statutory time limit of 4 months.

**12.** In its reply, following the opening of the Ombudsman's inquiry, the EASO noted that the Staff Regulations clearly state that a failure to reply constitutes an implicit rejection. It also explained that some of the complaints had been premature, of which it had already informed the complainant beforehand, or inadmissible. However, the EASO subsequently replied to all the grievances that the complainant had raised in her Article 90(2) complaints.

The Ombudsman's assessment

**13.** Article 90(2) of the Staff Regulations provides that the lack of reply within 4 months constitutes a tacit negative decision and allows the complainant to file an application to the General Court. However, the Ombudsman has consistently taken the view that it is good administrative practice to provide a written reply to such complaints.

**14.** The EASO provided the complainant with a detailed explanation of why it considered some of her complaints to be premature or inadmissible.

**15.** Moreover, the Ombudsman notes that the EASO has now replied to all the complainant's Article 90(2) complaints and dealt with the issues raised in them. She also welcomes the fact that the EASO replied to the complainant's last complaint within the 4-month time limit. In light of this, the Ombudsman considers that the EASO has settled this aspect of the case and that there are no reasons to pursue this aspect of the inquiry.

### **Procedural shortcomings in the reporting process**

The Ombudsman's assessment

**16.** The complainant made a number of supporting arguments, which

the EASO addressed extensively in its replies to the complainant's Article 90(2) complaints, as well as in further correspondence with the Ombudsman.

*(i) arguments that several provisions of the EASO Guide to the assessment of probationary staff ('Guide') [3] were incompatible with the CEOS and (ii) that other provisions of the EASO Guide were not followed*



**17.** The EASO said that during the period when the probationary assessment was being made there had been an inconsistency between its Guide and Article 14 of the CEOS [4] . It stated that the Guide had been updated on 30 November 2015. Moreover, the EASO argued that the provisions of the CEOS had been applied correctly in the complainant's case.

**18.** On the matter of the incompatibility of the Guide with the rules of the CEOS, the Ombudsman welcomes the fact that any discrepancies have been rectified and that the Guide now properly reflects the provisions of Articles 14 and 84 of the CEOS.

**19.** The Ombudsman notes that the complainant was given the period of time prescribed by the CEOS (8 working days) to submit her comments on the Probationary Period Report, which had been finalised more than a month before the end of her probationary period. She also availed herself of the opportunity to hold a dialogue meeting with the Appointing Authority and was notified of the decision on the termination of her contract without undue delay. In addition, she was well informed of the procedure provided for in the CEOS and agreed on the next steps with the administration.

**20.** The Ombudsman finds that the procedural steps taken in the complainant's case corresponded to those provided for in the CEOS. As regards the complainant's argument that the Guide was not followed, the inspection showed that, although not all of the rules stipulated in the Guide had been applied, the overall handling of the reporting process was satisfactory. Since the EASO followed the rules set out by the CEOS, respecting the complainant's rights, the Ombudsman does not find grounds to pursue this matter further.

*(iii) argument that the complainant's job objectives were not agreed until 2 months before the end of the probationary period*

**21.** The EASO said that the complainant had been provided with the job description immediately upon her recruitment. However, her reporting officer changed in the course of the probationary period (after one month and a half). The EASO also said that the complainant's job objectives had eventually been finalised at the beginning of the fourth month of her probationary period, after a number of discussions. Moreover, the EASO said that the reporting officer had held a number of discussions with the complainant during her probationary period. There was a regular exchange of information and feedback was given on a number of occasions.

**22.** The Ombudsman's inspection and the clarification provided by the EASO confirm that the complainant's job objectives were approved in the fourth month of her probationary period (and not, as she initially alleged, 2 months before the end). However, the agreed objectives were not signed by the complainant at that stage. In accordance with the Guide [5] , the job objectives should have been set at the beginning of the probationary period. However, the EASO has shown that it made reasonable efforts to agree with the complainant on her job objectives beforehand. It also referred to the delay caused by the change of the complainant's reporting officer.

**23.** It would have been better if the EASO had acted in accordance with the requirement of its



internal Guide and had set the job objectives at the start of the probationary period. It would also have been better if it had secured the signature of the complainant on the agreed objectives earlier. However, the objectives were linked to the job description and it appears the complainant carried out her duties on this basis. While the procedure of setting and agreeing the job objectives could have been better, the Ombudsman does not find that this amounted to maladministration in the circumstances. The Ombudsman will however make a suggestion for improvement in this regard.

*(iv) arguments that the EASO backdated the decision to delegate the powers of the Appointing Authority and that an unauthorised person terminated the complainant's contract*

**24.** The EASO did not agree with the complainant's view that the document setting out the decision to delegate the powers of the Appointing Authority had been "falsified". The complainant was informed of the delegation of powers of the Appointing Authority as regards her probationary period **the day after** it had been approved. She was also provided with a hard copy of the decision on her request.

**25.** The Ombudsman observes that, in light of the appointment of the complainant's reporting officer as the acting Executive Director, the EASO correctly avoided a potential conflict of interest. The Ombudsman agrees that this was necessary to ensure that the complainant's assessment would be impartial. The complainant has not provided any convincing arguments in support of her view that the acting Appointing Authority was not authorised to exercise his discretionary powers as regards the assessment of her performance.

**26.** The complainant has also failed to provide convincing arguments or produce evidence that the EASO "falsified" some of the documents related to her assessment process. In the Ombudsman's view, the fact that there was a delay in registering the decision about the delegation of powers does not constitute proof of malpractice. During the inspection of documents, the EASO provided a reasonable explanation for this delay, which was linked to the restructuring of the Office at the time. Moreover, the complainant was effectively notified of the decision the day after it had been taken. Immediately after, the EASO made several attempts to hold a dialogue meeting with the complainant. The purpose of the meeting and the status of the acting Appointing Authority were clearly communicated to her.

*(v) argument that the complainant's suggestion to extend the probationary period was wrongly rejected*

**27.** The EASO said that the acting Appointing Authority had exercised his discretionary powers as regards the complainant's probationary period. The acting Appointing Authority rejected the complainant's suggestion that her probationary period be extended. The acting Appointing Authority took into account the comments made in the report on her probationary period, the recommendation of her reporting officer and the complainant's comments during the dialogue meeting before taking the final decision on the termination of her employment.

**28.** The EASO also stated that the acting Executive Director had taken a decision to delegate



the powers of the Appointing Authority in the particular case of the complainant's probationary period in order to ensure an impartial appeal process and compliance with the principles of good administration. This was done to prevent any conflict of interest and to guarantee the complainant an unbiased decision-making process. Moreover, the EASO noted that the complainant had requested the acting Appointing Authority to prolong her probationary period by 6 months. By doing so, the complainant had acknowledged the right of the acting Appointing Authority to make a decision on her probationary period.

**29.** The Ombudsman finds that the EASO acted within its discretion when it did not agree to extend the complainant's probationary period. In accordance with Article 14 of the CEOS, such extensions are limited to exceptional circumstances [6] . There is no evidence in the file to establish that such circumstances existed.

*(vi) argument that the EASO incorrectly rejected the complainant's numerous requests to be given one month's notice of her dismissal decision*

**30.** The EASO said that, in accordance with Article 14(2) of the CEOS, a temporary agent on probation must be given a month's notice only if his or her employment is to be terminated **before the end** of the probationary period. Since the complainant's employment was terminated at the end of her probationary period, the EASO believed it was not obliged to give the complainant notice of the termination of her employment before **the end** of the probationary period.

**31.** The CEOS do not provide for any period of notice for temporary staff members whose employment is to be terminated **at the end** of the probationary period. However, given the importance of the matter for the staff member concerned, it would be appropriate that the staff member is informed without undue delay of the termination. The EASO's explanation in this case is in line with the applicable rules. Moreover, the Ombudsman notes that the EASO informed the complainant of the termination without undue delay.

*(vii) argument that the EASO did not provide the complainant with the original decision terminating her employment but with a copy*

**32.** The EASO stated that the complainant had received an electronic version of the decision and a hard copy was delivered to her by ordinary post on 18 January 2016, "*after a first unsuccessful attempt of delivery (...) in December 2015*".

**33.** The complainant sent an electronic copy of this decision to the Ombudsman's Office. The decision appears to be an official document, with a printed letterhead, a reference number and an electronic signature of the acting Appointing Authority . The Ombudsman points out that the complainant's argument is unclear given that the decision was prepared electronically. The EASO provided a reasonable explanation of its efforts to provide both electronic and hard copies to the complainant. The Ombudsman is thus satisfied that the EASO communicated its decision to the complainant in a satisfactory manner.



*(viii) argument that the complainant was treated unfairly*

**34.** Finally, the Ombudsman does not find anything to support the complainant's argument that she was treated unfairly by the EASO. The file material does not suggest that the complainant was subject to unfair treatment in the course of the probationary period reporting process.

**35.** In summary, the Ombudsman considers that no further inquiries by her are justified. The Ombudsman has thus decided to close the case and, in doing so, to make a suggestion to the EASO for improvement.

## **Conclusion**

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion and suggestions for improvement [7] :

**The EASO has settled the procedural aspect of the complaint (failure to reply).**

**Further inquiries into the remaining aspects of the complaint are not justified.**

## **Suggestion for improvement**

**The EASO should act in accordance with the requirement, provided for in its Guide to the assessment of probationary staff, to set the job objectives of new staff members without undue delay.**

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

Emily O'Reilly

European Ombudsman

Strasbourg, 28/04/2017

*[1] 2. Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act affecting him adversely, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. The period shall start to run:*

*— on the date of publication of the act if it is a measure of a general nature;*

*— on the date of notification of the decision to the person concerned, but in no case later than*



*the date on which the latter received such notification, if the measure affects a specified person ; if, however, an act affecting a specified person is such as to affect adversely another person, the period shall start to run in respect of that other person on the date on which he receives notification thereof but in no case later than the date of publication;*

*— on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request as provided in paragraph 1.*

*The authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 91.*

[2] Pursuant to Article 2 of the Staff Regulations, each institution determines who exercises the powers conferred by the Staff Regulations on the Appointing Authority.

[3] The EASO *Guide to the assessment of probationary staff* is an internal document, which outlines the probation procedure, the role of the assessor and the probationer.

[4] Article 14 of the Conditions of Employment of Other Servants of the European Union prescribes the conditions of the probationary period applying to temporary staff.

[5] Point A(4) of the old Guide reads as follows: “ *The assessor should meet with probationers at the start of their probation in order to explain what is expected of them, confirm their job description and set objectives* ”.

[6] In particular, when a staff member is absent for a continuous period of at least one month during their probation period, in case of sickness, maternity or accident pursuant to Article 14(1) CEOS.

[7] 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]