Proposal of the European Ombudsman for a solution in case 559/2016/MDC on the complainant's alleged unfair dismissal from and harassment at the European Investment Bank

Solution - 30/04/2016
Case 559/2016/MDC - **Opened on** 29/04/2016 - **Decision on** 31/10/2017 - **Institution concerned** European Investment Bank (Solution achieved) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complainant, who had worked for an EU Agency, moved to Luxembourg from Germany (Cologne) with her two children in mid-August 2015 in order to take up employment with the European Investment Bank ('EIB'). She was engaged under a four year contract which was subject to a six month probationary period.

2. The complainant considers that she was the victim of psychological harassment and bullying by her direct superior and that certain comments in her report on her 'mid-term review meeting' were unfair.

3. On 15 January 2016, the complainant was informed that she had not successfully completed her probationary period and that her employment contract would come to an end on 15 February 2016 [2] . On 20 January 2016 she requested the EIB to reconsider its decision. However, the EIB confirmed its decision to terminate the complainant's contract by registered letter on 9 February 2016 and by e-mail on 10 February 2016 [3] .

4. On 16 February 2016, the EIB received a letter dated 15 February 2016, from the complainant's lawyer in which he contested the termination of the complainant's contract [4] and stated that she intended to begin the 'conciliation procedure' provided for in Article 41 of the Staff Regulations of the European Investment Bank. Article 41 provides as follows:

" *Disputes of any nature between the Bank and individual members of staff shall be brought before the Court of Justice of the European Union. Any proceedings instituted by a member of staff in respect of an action of the Bank which would adversely affect him must* **be brought within three months** .

In addition to proceedings being instituted before the Court of Justice of the European Union, an

amicable settlement shall be sought, prior to the institution of any proceedings, before the Bank's Conciliation Board in respect of disputes other than such as arise from application of the disciplinary measures provided for under Article 38.

The request for conciliation must be made within three months of the day of the occurrence of the facts or of the notification of the actions giving rise to the dispute … " (emphasis added).

5. The EIB replied on 29 February 2016. It stated, among other things, that "[a] *s regards the request to open a Conciliation Procedure ….. the Bank's Personnel lawyers explained clearly to* [the complainant] *during a meeting held on 21 January 2016, that this procedure was reserved to EIB staff members and therefore should have been requested before the end of her contract (i.e. by 15 February 2016 at the latest). On that basis, the request for a Conciliation is to be considered inadmissible.* " The EIB also stated that, in light of the complainant's personal situation (she is a single mother) and in order to avoid disrupting her children's academic year, the EIB agreed to reimburse the children's tuition fees until the end of the school year, as a goodwill gesture.

6. It is useful to cite parts of the e-mail which a member of the EIB's legal department sent to the complainant on 21 January 2016: "[a] *s per your request please find below the text of article 41 of the EIB Staff Regulations providing for the conciliation procedure by which a staff member can try to amicably settle disputes with the Bank. … I have highlighted the deadline for filing the request* [three months] *but I would like to remind you that in your case you should consider to file it before the contract formally ends.* " In that e-mail, the legal department also told the complainant that her Director was in the process of reviewing her case and that she would be informed about the final position on the outcome of her probationary period by 25 February at the latest.

7. The complainant wrote letters to the President of the EIB on 23 February 2016 and 10 March 2016 but it appears that these letters remained unanswered. In her letter of 10 March 2016, the complainant stated that she considered the EIB's assertion in its letter of 29 February 2016, that she was " *no longer allowed to initiate the article 41 procedure* ", to constitute an attempt by the EIB to " *boycott* " her. She added: " *I did not initiate this procedure before the 15th of February because I had hope to solve this in person first. I therefore herby formally open the article 41 procedure.* "

8. On 10 March 2016, the complainant's lawyer replied to the EIB's letter of 29 February 2016. He maintained the requests made previously and requested additional compensation. He stated that if the EIB did not accede to these requests, the complainant would initiate legal proceedings. The complainant lodged a complaint with the Ombudsman on 13 April 2016.

9. The EIB replied to the complainant's lawyer on 2 May 2016, a few days after the Ombudsman had informed the EIB about the opening of this inquiry. The EIB stated that the decision to terminate the complainant's contract was taken in accordance with the applicable procedure and the relevant case-law. It listed the payments she received upon the termination of her contract and added that " *in light of* [the complainant's] *difficult family circumstances and*

although her letter of appointment did not foresee the payment of a termination allowance, the Bank is prepared to pay [the complainant] *the termination allowance (equivalent to one month's salary) which is currently only paid to staff members who leave at the end of a fixed-term contract.* "

The inquiry

10. In her complaint, the complainant made a number of allegations against the EIB relating to (i) harassment and bullying, (ii) wrongful dismissal and (iii) the wrong application of and wrong information about the complaints procedure. On 29 April 2016, the Ombudsman opened an inquiry into aspect (iii) of the complaint and identified the following allegation and claim:

1) The EIB wrongly denied the complainant the benefit of the procedure under Article 41 of the Bank's Staff Regulations.

2) The EIB should open the procedure under Article 41 of the Staff Regulations.

11. On 29 April 2016, and in the context of finding a rapid solution to the complaint, the Ombudsman's Office asked the EIB to address the above allegation and claim and stated that, depending on the EIB's reply, the Ombudsman would decide whether to open an inquiry into the complainant's other allegations and claims. The Ombudsman's Office stated that " *prima facie it appears that the EIB has taken the view that Article 41 does not apply to former staff members but only to actual staff members. This seems to entail one of two consequences, either that disputes with former staff members must be solved through channels other than those foreseen in Article 41, ultimately in national courts, or that there are no fora for solving those disputes. Neither of the two consequences would appear fortunate. The first one would entail two different fora for disputes with staff members, and the second one would not seem fitting for a Union governed by the rule of law.* "

12. Regrettably, the EIB did not reply to the Ombudsman's Office until 22 September 2016. The Ombudsman's Office subsequently received the comments of the complainant in response to the EIB's reply. The Ombudsman's proposal for a solution takes into account the arguments and views put forward by the parties.

Alleged wrongful denial of the benefit of the procedure under Article 41 of the Bank's Staff Regulations and related claim

Arguments presented to the Ombudsman

13. The **complainant** argued that she received contradictory information about the Article 41 procedure. Her attempts to solve the issues raised in her correspondence with the President of the EIB and the Human Resources Manager were ignored. She was simply told that she could no longer initiate the Article 41 procedure. However, members of the Personnel Unit had told her that she could do so.

14. The **EIB** stated that it consistently interprets Article 41 of the EIB Staff Regulations " *as an*

additional internal procedure " applicable to active staff, inactive staff (staff on unpaid leave) and former staff in receipt of an EIB pension. It contended that the conciliation procedure is an " *optional procedure which provides a way to amicably challenge an internal act/decision/ failure to act.* " It is a " *resource-consuming* " procedure but the EIB considers that the persistence of a link with the staff members mentioned above " *and the perspective of its continuation make it advisable for the Bank to devote efforts in the search for an amicable settlement which could avoid litigation and preserve positive relationships with the above-mentioned categories of individuals.* " However, acting within its discretion on how it manages its resources in the best interests of the service, the EIB does not initiate the conciliation procedure when requested by former staff members who have ended their employment relationship with the EIB.

15. The EIB considered that, by so acting, it does not limit such individuals' right to a remedy, since they may still institute proceedings against the EIB before the Civil Service Tribunal. It added that " *differently from what happens under the Staff Regulations of the EU institutions, within the legal framework applicable to EIB staff, it is not mandatory to first exhaust the internal remedies, i.e. the conciliation procedure, in order to be admissible to file a court action, and this applies both to active staff and to former staff members who have not been confirmed after the probationary period.* " The latter may however, up to the date of the termination of employment with the EIB, request to have their case dealt with under the conciliation procedure. According to the EIB, submitting a request is a simple process involving a written communication to the President in which the individual identifies the challenged act/decision/failure to act or decide.

16. The EIB stated that, during a meeting with the legal department of the Personnel Unit on 21 January 2016, the complainant was provided with all the information requested about how to challenge a termination decision. She was told, among other things, that, for as long as she was a staff member (but not after the termination of her contract), she could submit a request for conciliation in accordance with Article 41 of the EIB Staff Regulations. Following the termination of her contract, she remained entitled to initiate proceedings before the Civil Service Tribunal directly (not the national courts) or to try to find an extra-judicial agreement with the EIB " *bearing in mind* " the deadline for initiating Court proceedings. This means, according to the EIB (i) that it did not take the view that Article 41 does not apply to former staff members, and (ii) that there are not two different fora for disputes with staff members, since the Civil Service Tribunal is the only judicial forum with authority to hear cases concerning former staff members.

17. The EIB stated that the complainant appeared to have wished to avail of the conciliation procedure and had asked the EIB to provide her with the text of the relevant provision of the EIB Staff Regulations. The EIB stated that, in its reply of 21 January 2016, it " *drew the complainant's attention to the fact that she had to file the case before the expiration of her contract.* "

18. The EIB contended that the complainant was aware of the fact that she had failed to submit the request for conciliation in time, since she had justified that failure by stating that she had hoped to resolve the issue in person. She was also well aware of the possibility of filing legal proceedings, in light of the information provided by the EIB. In fact, her lawyer reserved her right

to do so.

19. The EIB contended that the complainant had not exhausted all of the " *possibilities for the submission of internal administrative requests* " [5] before complaining to the Ombudsman. In effect, this was an argument that the complaint to the Ombudsman was not admissible.

20. The EIB considered that it had engaged in a constructive exchange of correspondence with the complainant and her lawyers " *with a view to giving a certain comfort to the complainant, considering her personal circumstances.* " It noted that the complainant had not replied to the EIB's letter of 2 May 2016. It reiterated the offer it had made to the complainant in that letter (the payment of one month's salary).

21. In her comments on the EIB's reply, the **complainant** pointed to the length of time it had taken the EIB to reply to the Ombudsman [6] . She considered this to amount to unprofessional behaviour and to undermine the EIB's credibility since, in its reply, it had laid emphasis on the importance of meeting deadlines.

22. With regard to the Article 41 procedure, the complainant stated that in its e-mail of 21 January 2016, the legal department " *informed* [her] *that she had three months after the 15th of February to file for the Article 41* ". During the meeting held that day, she was told that it was advisable to initiate the conciliation procedure before 15 February but that she had an additional three months to do so. Therefore the EIB's statement, that it received the letter of the complainant's lawyer of 16 February 2016 one day late, contradicted the information it had given her. Moreover, nobody had provided her with information as to how she was supposed to initiate the Article 41 procedure. According to the complainant, the EIB's statement that she was aware of the fact that she had failed to submit the application in time was untrue.

23. The complainant contended that, until 29 January 2016, she was made to believe that the EIB would reconsider its position on her dismissal, " *since the problem was not professional but relational between* [her] *and* [her] *supervisor* [7] ." Once she received confirmation that her contract would be terminated, she tried to find a solution. However, the EIB was unresponsive or replied late, making it impossible for her to meet deadlines. On 3 February 2016, access to her e-mail account was blocked without prior notice and nobody answered her phone calls. It was not until 8 February that she was able to retrieve some information. The EIB stated that it would be better to seek solutions without court involvement. However, the lack of communication from the EIB made this very difficult. Besides the attempts at communicating with the EIB mentioned in paragraphs 4, 7 and 8 above, the complainant also contacted the Personnel Section on 1 April 2016 but she never received a reply.

24. The complainant stated that the EIB's reply of 2 May 2016 to her lawyer's letter of 10 March 2016 was sent just after the Ombudsman had informed the EIB of her complaint. She added that she did not reply to the EIB because she considered that the EIB had acted unethically by sending her a letter during an ongoing Ombudsman investigation. In the same way, had she replied, this would have been unethical.

25. Finally, the complainant contested the EIB's statement that it had engaged in a constructive exchange of correspondence with her. She stated that, in her view, the EIB was unwilling to seek solutions and showed no interest in dialogue. The complainant asked the Ombudsman to investigate her other allegations and claims against the EIB also.

The Ombudsman's preliminary assessment leading to the solution proposal

26. The EIB considers that the conciliation procedure envisaged by Article 41 of its Staff Regulations applies to former staff only if they are in receipt of an EIB pension. It considers that it has discretion to interpret Article 41 in this way. The EIB also considers that former staff members who are not in receipt of an EIB pension may institute proceedings before the Civil Service Tribunal even if no conciliation procedure has been initiated.

27. It is solely the Court of Justice of the European Union ('CJEU') that is empowered to interpret EU law authoritatively. However, this does not prevent the Ombudsman from taking a position on whether an institution's interpretation of a particular provision is in line with the law and principles of good administration.

28. Article 41 makes no distinction between active and former members of staff (who are not in receipt of an EIB pension). The wording of Article 41 does not support the EIB's argument that the *right* of individuals, such as the complainant, to initiate the conciliation procedure is extinguished immediately upon the termination of the contract of employment. In fact, the wording of Article 41 appears to require the invocation of the conciliation procedure prior to the taking of court action - *"... an amicable solution* shall *be sought prior to the institution of any proceedings ..."* (emphasis added). The fact that the conciliation procedure envisaged by Article 41 is **not mandatory** for the staff member, does not alter the fact that the **right** to initiate the procedure should be given to all staff members [8] . The right should not depend, for instance, on whether the staff member initiates the procedure a few days after or a few days before the end of the staff member's employment with the EIB. Article 41 does not permit the EIB to choose which parts of it are applicable to former staff members and which parts are not.

29. By enacting Article 41 of the EIB Staff Regulations, the EIB has undertaken the obligation to try to solve disputes of any nature between it and its (current or former) members of staff amicably, through the conciliation procedure. The position which the EIB has taken in this case appears to be in breach of the *patere legem quam ipse fecisti* **[9]** principle, which requires that every authority abides by its own rules. Moreover, the principles of good administration require that internal rules be drafted in a clear manner, in order to ensure that staff members, such as the complainant, who are in weaker position than the decision-makers within an institution, may be certain of their rights. The wellbeing of staff members depends on legal certainty.

30. The EIB states that members of its legal department had informed the complainant that she could invoke the conciliation procedure only for as long as she remained a staff member. In fact, what the complainant was told by the legal department in the e-mail of 21 January 2016 was

that she " *should consider* " invoking the conciliation procedure before her contract ended; she was not told that she **had to** do so before the termination of her employment. If the legal department wished to convey the latter idea, it should have stated so unequivocally. In any event, the wording of Article 41 does not support that position.

31. It is unfair of the EIB to draw any particular inference from the fact that the complainant knew that she could file legal proceedings. Her lawyer reserved her right to go to court after the complainant had been told officially by the EIB, in its letter of 29 February 2016, that her request for conciliation was inadmissible. At that point, there were not many options left to the lawyer but to envisage court proceedings.

32. It is also unfair to insinuate that the complaint to the Ombudsman should have been considered inadmissible because the complainant had failed to request the conciliation procedure before the termination of her contract and had not provided valid reasons for her failure to do so. In effect, the EIB essentially argues that, where a staff member's contract is about to come to an end, and where in the final few days the EIB commits an act adversely affecting that staff member [10] , and where that individual is not in receipt of an EIB pension, s/he would lose his/her right to lodge a complaint with the Ombudsman if s/he does not invoke the conciliation procedure within the few remaining days. Such a tight deadline could hardly be considered fair.

33. Finally, it seems only reasonable that all staff members, including former staff members, should have equal access to the conciliation procedure. If that were not the case, staff members fortunate enough to be able to invoke the conciliation procedure before their contracts expire would be treated better than those who are unable to do so. This would result in a situation of unequal treatment within the one group of employees in relation to the same kind of grievance: some would have access to the conciliation procedure (even where their contracts had expired, because they initiated the procedure before their contract was terminated), while, at the same time, others would have no option but to start court proceedings.

34. The conciliation procedure is an essential tool which aims to solve disputes internally, without having to escalate the matter to the CJEU or the European Ombudsman. It allows both parties to openly discuss the matters at issue and to try to reach an amicable and fair settlement which is acceptable to both. In reviewing the facts of the case, including the engagement of the EIB with the Ombudsman in the course of this inquiry, it is hard to avoid the conclusion that the EIB has adopted a less than helpful approach to the complainant's situation. It is unfortunate, for example, that the EIB's response to the notification of the complaint by the Ombudsman's Office took almost five months. Given that the Ombudsman's Office had conveyed that it was seeking a rapid solution to the complaint, the delay in replying is very disappointing.

35. In light of the above, the Ombudsman makes the preliminary finding that the EIB committed maladministration in deciding to treat as inadmissible the complainant's request to invoke the conciliation procedure under Article 41 of the EIB Staff Regulations. She therefore makes a corresponding proposal for a solution below, in accordance with Article 3(5) of the Statute of the European Ombudsman.

36. In view of this proposal, the complainant's other allegations and claims will not be assessed for the moment.

The proposal for a solution

The Ombudsman proposes that the EIB (i) consider the complainant's request for conciliation under Article 41 of the EIB Staff Regulations, dated 10 March 2016, to have been admissible, and (ii) initiate the conciliation procedure without delay.

The conciliation procedure should encompass the issues of alleged unfair dismissal and alleged harassment.

The Ombudsman further proposes that, as an additional gesture of good will, the EIB should pay the complainant an additional month's salary as proposed by the EIB in its letter of 2 May 2016. This payment should be made as soon as possible and without prejudice to the eventual outcome of the conciliation procedure under Article 41 of the EIB Staff Regulations.

Emily O'Reilly

European Ombudsman

Strasbourg, 10/03/2017

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The decision was " *based on several observations through the probation period ... in particular* [the complainant's] *lack of accuracy on key administrative tasks. ... Also,* [her] *lack of accountability for* [her] *key responsibilities has resulted in tasks to be left unattended or not performed in a timely manner* ."

[3] It appears from the complainant's submissions that she became aware that the EIB intended to take this decision on 29 January 2016.

[4] The lawyer asked the EIB to inform the complainant about the precise reasons for the termination of her contract. He also requested that the EIB continue to pay the complainant's salary until 30 June 2016 and that she receive compensation for her dismissal in the form of a lump-sum payment equivalent to two and a half months' salary. Finally, he requested that the EIB maintain the complainant's rights to health insurance and her pension scheme benefits until 15 August 2016.

[5] As required by Article 2.8 of the Ombudsman Statute.

[6] The EIB reply took five months.

[7] The complainant attached to her complaint an e-mail from a member of the Staff Committee dated 20 January 2016. The latter informed her that he had spoken to the relevant Deputy Director. He stated that the latter " *was very open and constructive, and* [her] *situation is not completely blocked … The decision is not a personal decision from* [her direct superior] *but from different people. But it is the* [Deputy Director] *who decides* ."

[8] The fact that the conciliation procedure is not mandatory has been established in case-law. See, for example, the judgments of the General Court of 17 June 2003, *Seiller v EIB* , T-385/00, ECLI:EU:T:2003:169, and of 16 September 2013, *Carlo De Nicola v EIB* , T-264/11 P, *ECLI:EU:T:2013:461* .

[9] This phrase may be loosely translated as follows: 'observe the law that you yourself have laid down'.

[10] It should be borne in mind that the EIB confirmed its decision to terminate the complainant's contract by registered letter on 9 February 2016. Therefore, the three month deadline for initiating the conciliation procedure began to run from that day.