

Decision in case 559/2016/MDC on the European Investment Bank's refusal to initiate the conciliation procedure with regard to the complainant

Decision

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

The case concerned a former employee's alleged unfair dismissal from and harassment at the European Investment Bank (EIB).

The Ombudsman's inquiry focused on the issue that the EIB had allegedly wrongly denied the complainant the benefit of what is known as the 'conciliation procedure' provided for under Article 41 of the EIB's Staff Regulations (which lays down that staff members may bring proceedings before the Court of Justice of the EU when a dispute arises with the EIB and that, prior to doing so, they should seek an amicable settlement, through the conciliation procedure). The Ombudsman made the preliminary finding that, by considering that the conciliation procedure could not be applied to a former member of staff who was not in receipt of an EIB pension, the EIB had committed maladministration. The Ombudsman therefore proposed that the EIB initiate the conciliation procedure without delay, as regards both the dismissal and the harassment issues. The Bank agreed to initiate the conciliation procedure as regards the dismissal issue, and referred the complainant to another procedure concerning the issue of harassment.

The Ombudsman concluded that, following her intervention, a solution had been found. She therefore closed the case.

Background to the complaint

1. The complainant started working at the European Investment Bank ('EIB') in Luxembourg in mid-August 2015. Her four-year contract was subject to a probationary period of six months. The complainant moved to Luxembourg with her two children and enrolled them in a private school in that country.

2. During the first six months of her employment, the complainant was allegedly bullied and psychologically harassed by her direct superior. She was dissatisfied with her superior's



mid-term assessment.

3. On 15 January 2016, the complainant was informed that her probationary period was not successful and that her employment contract would come to an end on 15 February 2016.

4. In a letter to the EIB dated 15 February 2016 (received on 16 February 2016), the complainant's lawyer contested the termination of the complainant's contract and stated that the complainant intended to begin the 'conciliation procedure' provided for in Article 41 of the Staff Regulations of the EIB [1] .

5. On 29 February 2016, the EIB replied that the complainant was no longer entitled to begin the 'conciliation procedure' as this was "*reserved*" for EIB staff members. It added that she should have started the procedure before the actual termination of the contract. Since she had not done so, despite the advice to that effect given to her by the EIB's legal department, the institution considered that her request to begin the conciliation procedure was inadmissible.

6. After having sent two letters to the EIB's president on 23 February and 10 March 2016 [2] (which appear to have been ignored), the complainant lodged a complaint with the European Ombudsman on 13 April 2016. She contended that she (i) had been a victim of harassment and bullying, (ii) had been wrongfully dismissed, and (iii) had received wrong information about the complaints procedure, which had been applied incorrectly. The European Ombudsman opened an inquiry into the third aspect of the complaint . She asked the EIB to reply to the allegation that it had wrongly denied the complainant the benefit of the procedure under Article 41 of the Bank's Staff Regulations.

7. In its (initial) reply to the Ombudsman, the EIB argued that all the necessary information on how to start the procedure was given to the complainant in the course of a meeting held on 21 January 2016. Moreover, by letter dated 2 May 2016, the EIB had offered to pay the former employee one month's salary. The EIB stated that it interprets Article 41 of the EIB Staff Regulations to be applicable to active staff, inactive staff (staff on unpaid leave) and former staff in receipt of an EIB pension. However, the EIB does not initiate the conciliation procedure when so requested by former staff members who have ended their employment relationship with the EIB. The latter may request to have their case dealt with under the conciliation procedure up to the date of the termination of their employment with the EIB [3] .

Wrongful denial of the benefit of the procedure under article 41 of the Bank's Staff Regulations

The Ombudsman's proposal for a solution

8. When proposing the solution, the Ombudsman took into account the arguments and opinions put forward by the parties. Whilst noting that it is solely the Court of Justice of the European Union (CJEU) that is empowered to interpret EU law authoritatively, the Ombudsman considered the EIB's interpretation of Article 41 of its Staff Regulations to be wrong.



9. The Ombudsman noted that Article 41 makes no distinction between active and former members of staff (who are not in receipt of an EIB pension). She also considered that the wording of that article 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. The interpretation given by the EIB also appeared to breach the *patere legem quam ipse fecisti* [4] principle, which requires that every authority abides by its own rules. This was because, by enacting Article 41 of the EIB Staff Regulations, the EIB had 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.

10. The Ombudsman considered of paramount importance that the principle of **equal treatment** be respected. According to the Ombudsman, the EIB's interpretation of Article 41 effectively results in a situation where 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 (for example because the act adversely affecting them occurs a few days before their contract comes to an end). In view of her preliminary findings, the Ombudsman made the following proposal for a solution to the EIB :

“ 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. ”

11. In its reply to the Ombudsman, the EIB stated that it agreed with the Ombudsman's suggestion to initiate the Article 41 conciliation procedure as far as the issue of unfair dismissal was concerned. With regard to the harassment issue, the EIB suggested that the complainant begin a specific procedure regulated by the 'Dignity at Work' policy, since investigations of allegations concerning harassment at the EIB are governed by that policy. The EIB also agreed to pay an additional month's salary to the complainant. Moreover, it offered to reimburse the complainant for her children's tuition fees until July 2016, upon receipt of the relevant invoices. The EIB informed the complainant of the above in a separate letter.

12. The complainant was initially very pleased with the outcome of the inquiry. She expressed her deep gratitude to the Ombudsman and her staff for their work. However, she later informed the Ombudsman that she was dissatisfied with the way in which the EIB was conducting the 'Dignity at Work' procedure. She questioned, in particular, whether her case was being handled



in a confidential manner.

The Ombudsman's assessment after the proposal for a solution

13. The Ombudsman points out that this inquiry concerned the failure by the Bank to initiate the conciliation procedure. The Bank agreed to carry out that procedure in relation to the alleged unfair dismissal, and made the payments suggested by the Ombudsman to the complainant. It also offered to reimburse the complainant for her children's tuition fees. The Ombudsman welcomes the EIB's decision. Moreover, she finds reasonable the Bank's explanation that it cannot investigate the harassment issue in the context of the conciliation procedure because such matters are governed by other rules, namely by the Bank's 'Dignity at Work' policy.

14. Since the Ombudsman's inquiry focused on the conciliation procedure exclusively, the Ombudsman will not extend it, at this stage, to another procedure governed by the Bank's 'Dignity at Work' policy. Moreover, the 'Dignity at Work' procedure was initiated after the Bank replied to the Ombudsman's proposal for a solution concerning the conciliation procedure. Nevertheless, the complainant is free to submit a new complaint to the Ombudsman concerning the procedure initiated to investigate the alleged harassment should she consider that the EIB's conduct amounts to maladministration.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The Ombudsman considers that a solution has been found.

The complainant and the European Investment Bank will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 31/10/2017

[1] Article 41 of the EIB's Staff Regulations 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)."

[2] In the letter of 10 March 2016, the complainant stated, among other things, that “ *I ... hereby formally open the article 41 procedure.* ”

[3] 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 proposal for a solution, available at: <https://www.ombudsman.europa.eu/cases/solution.faces/en/85249/html.bookmark> [Link]

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