

## **Decision in case 1333/2015/MDC concerning the decision of the European Personnel Selection Office (EPSO) to exclude the complainant from a competition on the grounds that his diploma was not relevant**

Decision

**Case 1333/2015/MDC - Opened on 07/10/2015 - Recommendation on 17/07/2017 - Decision on 23/05/2018 - Institution concerned** European Personnel Selection Office ( Maladministration found ) |

The complainant was excluded in 2013 from a competition to recruit administrators in the field of audit run by the European Personnel Selection Office (EPSO). He was excluded on the basis that his academic qualifications were not sufficiently relevant to the post advertised. The complainant pointed out in his complaint to the European Ombudsman that several candidates who had been admitted to the same competition in 2010 had diplomas that were the same as, or less relevant than, his diploma. He argued that if the other candidates' qualifications were sufficient in 2010, then his diploma should be sufficient also in 2013.

The Ombudsman inquired into the issue and found that the 2013 competition was the same competition as that originally run in 2010 and that the same criteria regarding qualifications should apply in 2013 as in 2010. The Ombudsman found maladministration by EPSO and recommended that EPSO ask the Selection Board to revise its decision on the complainant's qualifications.

EPSO refused to accept the Ombudsman's recommendation without providing

convincing reasons for its position. The Ombudsman therefore closed the case with a finding of maladministration.

## **Background to the complaint**

1. The complainant was excluded in 2013 from a competition to recruit administrators in the field of audit run by the European Personnel Selection Office (EPSO). He was excluded on the basis that his academic qualifications were not sufficiently relevant to the posts advertised. The complainant pointed out in his complaint to the European Ombudsman that several candidates who had been admitted to the 2010 edition of the same competition [1] had diplomas that were



the same as, or less relevant than, his diploma. He argued that if the other candidates' qualifications were sufficient in 2010, then his diploma should be sufficient also in 2013 [2] .

## EPSO's handling of the Article 90(2) complaint

### The Ombudsman's recommendation

2. When addressing the recommendation to EPSO, the Ombudsman took into account the arguments and views put forward by the parties.

3. The background to the recommendation was: In the course of the Ombudsman's inquiry, the Ombudsman asked EPSO to clarify its statement (made in its comments to the Ombudsman) that, before examining the applications, the Selection Board had decided that it would accept diplomas only where the majority of the subjects studied directly concerned the audit field and the nature of the duties mentioned in the Notice. It was not clear to the Ombudsman if the Board had taken that decision prior to examining the applications of candidates who had passed the admission tests of the 2010 edition of the competition or only prior to examining the applications of candidates who participated in the 2013 edition. EPSO was therefore asked to clarify if the Selection Board, when examining the qualifications of the other admitted candidates in EPSO/AD/177/10 (that is, the 2010 edition), applied the same strict interpretation that it applied to the complainant in the 2013 edition.

4. EPSO informed the Ombudsman that the 2013 competition was a new competition and not a re-run of the 2010 competition [3] . It contended that the candidates had been informed of this.

5. However, the complainant submitted evidence to show that the 2013 competition was a re-run of the 2010 competition.

6. In her recommendation, the Ombudsman found that the 2013 edition was part of the same competition as that originally run in 2010 and that the same criteria regarding qualifications should have applied in 2013 as in 2010. The Ombudsman found maladministration by EPSO, since EPSO had failed to examine, at the relevant time, whether the Selection Board had adopted a stricter approach to its assessment of the candidates' diplomas in the 2013 edition than it had in the 2010 edition. Thus, EPSO had avoided examining whether the Selection Board had breached the principle of equal treatment. The Ombudsman recommended that EPSO “ *ask the Selection Board to revise its decision not to admit the complainant to the Assessment Centre phase of the 2013 edition of the competition in question. The Selection Board should bear in mind that the 2010 and 2013 editions of Open Competition EPSO/AD/177/10 should not be considered to be separate competitions. It should therefore interpret the eligibility conditions for the 2013 edition in the same manner as it interpreted them in the 2010 edition.* ”

7. In its opinion on the Ombudsman's recommendation, **EPSO** stated that the question whether the 2010 and 2013 procedures were the same or two separate competitions had not been



raised as such in the complainant's Article 90(2) complaint.

8. It was “ *rather surprised by the Ombudsman's conclusion that ‘ by arguing that [the 2010 and 2013 procedures] were separate competitions [...] EPSO did not carry out its administrative review (the Article 90(2) complaint) properly ’* ” [4] (and therefore committed maladministration). EPSO expressed its concern that this conclusion “ *might be based on a misunderstanding of some sorts* ”. Whilst fully recognising that the Ombudsman can raise a question of principle herself if it is relevant for her inquiry (which is why, it said, it had addressed the Ombudsman's question), EPSO stated that it had not argued, in its reply to the Article 90(2) complaint, that the 2010 and 2013 procedures were separate competitions. Therefore, EPSO saw no basis for the Ombudsman's statement and finding of maladministration. It therefore asked the Ombudsman to reconsider her finding.

9. With regard to the complainant's argument that certain candidates admitted to the Audit field of the 2010 procedure had less pertinent qualifications than the complainant, EPSO referred to well-established case law according to which, even if a misapplication of the competition notice by the selection board occurs, resulting in the undue admission of some candidates to the competition, such a circumstance may not establish a breach of the principle of equal treatment that an excluded candidate could usefully rely on to challenge the rejection of his or her own application, “ *since no person may plead in his own cause an unlawful act committed in favour of another* ”.

10. EPSO said that this is the standard approach taken in reply to complaints where an excluded candidate contests his or her non-admission by comparing his/her own qualifications to those of admitted candidates in the very same competition procedure. Thus, EPSO does not base its conclusions as to whether a Selection Board's decision not to admit a complainant was legally sound or not on a comparative analysis of the complainant's qualifications with those of admitted candidates in the same procedure. Rather, it examines whether the Board's non-admission decision appears justified in light of the specific admission criteria applied in the competition concerned.

11. EPSO also said that it was true that, when the question of equal treatment was raised in the course of the Ombudsman's inquiry, it had maintained the view that the 2010 and 2013 procedures were separate competitions. However, contrary to the statements made in the Ombudsman's recommendation, EPSO showed readiness to examine whether or not the Selection Board's interpretation of the admission criteria was different in the 2010 and 2013 procedures.

12. In the course of the Ombudsman's inquiry, it compared a sample of files from the Audit field of the 2010 and 2013 procedures, with a view to establishing whether such a comparative analysis would reveal a manifest difference in the Selection Board's approach to assessing qualifications in the two procedures. EPSO stated that “ *this comparison did not allow for the conclusion that there were any clearly identifiable systemic differences in the Board's approach in 2010 and 2013* .” It added that these issues were discussed at the meeting that took place between the Ombudsman's inquiry team and EPSO staff on 19 October 2016. EPSO provided



the Ombudsman with a copy of the sample used.

13. EPSO stated that it could not “*accept as justified the conclusion of maladministration on the basis that it willingly avoided to compare the Board's interpretation of the eligibility criteria in 2010 and 2013.*” It asked the Ombudsman to reconsider her conclusion.

14. Finally, EPSO contended that there is no evidence supporting the complainant's allegation that the Selection Board's interpretation of the assessment criteria was stricter - or indeed, any different - in 2013 than in 2010. Therefore, there is no basis to conclude that, had the complainant been assessed at the admission stage of the 2010 procedure, the Selection Board's decision with regard to his eligibility would have been any different, which, in EPSO's view, appeared to be the reason for the Ombudsman's recommendation to have his application re-assessed.

15. In his comments on EPSO's opinion, the **complainant** argued that the results of the 2013 edition of the competition were published on 10 July 2014, that is, two months after the deadline for submitting the Article 90(2) complaint. It was the analysis carried out after the publication of the reserve list of the successful candidates in the 2013 edition of the competition that proved that the selection criteria were applied differently in the 2010 and the 2013 editions. The results were clearly a “new fact”. Therefore, EPSO could not refuse to address the Ombudsman's question as to whether the two procedures were the same or two separate competitions.

16. The complainant insisted that there had been a breach of the principle of equal treatment, as some candidates who participated in the 2010 edition had a diploma that was exactly the same as his. Since the Ombudsman had clearly demonstrated that the 2013 edition was a re-run of the 2010 competition, EPSO should have checked the diplomas of the candidates who were admitted to the 2010 competition.

17. The complainant stated that he had reviewed *all* the candidates on the reserve list and had submitted “*compelling evidence that in 2010 many candidates had engineers or even medical/chemical degrees.*” For instance, one person whose name appears on the reserve list relating to the 2010 edition held a PhD in neuroscience. On the other hand, the Selection Board was stricter in 2013 and diplomas in law and economics “*were the usual diplomas*”, as shown in the sample provided by EPSO. Since less than 50 candidates had been admitted to each edition of the competition, it would have been easy to present all the applications and not just a sample. Moreover, since the complainant had highlighted several “*suspicious candidates*”, it would have been better to focus on those candidates.

## The Ombudsman's assessment after the recommendation

18. In EPSO's own words, EPSO “*examines whether the Board's non-admission decision appears justified in light of the **specific admission criteria** applied in the competition concerned*” (emphasis added). Since, in his Article 90(2) complaint, the complainant had argued that certain candidates admitted to the Audit field of the 2010 procedure had less



pertinent qualifications than his own, EPSO should not have contented itself, in its decision on the Article 90(2) complaint, with invoking case-law which lays down that a misapplication of the competition notice resulting in the undue admission of some candidates may not establish a breach of the principle of equal treatment, without investigating that allegation any deeper. In view of the particular circumstances of this case (two editions of the same competition), that allegation should have instilled some doubts in EPSO's mind as to whether the 'specific admission criteria' applied in the 2010 edition were the same as those applied in the 2013 edition. When the Ombudsman asked EPSO whether the criteria applied in the 2013 procedure were stricter than those applied in the 2010 procedure, EPSO simply replied that these were two separate competitions. It is therefore clear that, since EPSO had always considered the two procedures to be separate, it never assured itself that the 'specific admission criteria' were applied in an identical manner in the 2010 and the 2013 editions (by checking the evaluation grids used by the Selection Boards in the two editions). What the Ombudsman meant in paragraph 37 of her recommendation (i.e. the statement cited in part in paragraph 8 above and in full in footnote 4 above) was that, since EPSO considered now (and therefore, necessarily also at the time of its decision on the Article 90(2) complaint), that these were two separate competitions, it is clear that, when dealing with the Article 90(2) complaint, EPSO did not assess whether the Selection Board had breached the principle of equal treatment by applying different selection criteria to the candidates of the 2010 and 2013 procedures, because it never sought to find out whether the 'specific admission criteria' were applied differently in the two editions.

**19.** It is not enough for EPSO to argue that it carried out a comparison between a sample of files from the Audit field of the 2010 and 2013 procedures and concluded that there were no clearly identifiable systemic differences in the Board's approach in 2010 and 2013. EPSO should not have been checking for manifest differences but it should have checked whether the Board's approach was identical in the two procedures. If it wanted to prove that the Selection Board's interpretation of the admission criteria was identical in the 2010 and 2013 procedures, EPSO should have checked the evaluation grids used for the purposes of the two procedures.

**20.** Against this background, the Ombudsman confirms her finding of maladministration.

## Conclusion

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

**EPSO's refusal to ask the Selection Board to revise its decision not to admit the complainant to the Assessment Centre phase of the 2013 edition of the competition in question constitutes maladministration.**

The complainant and EPSO will be informed of this decision .

Emily O'Reilly



European Ombudsman

Strasbourg, 23/05/2018

[1] In 2010 the complainant took part in Open Competition EPSO/AD/177/10 - AUDIT - Administrators. He was excluded from the selection process on the basis of his results in the admission tests. In 2013, in view of the outcome of the *Pachtitis* case (Judgment of the Civil Service Tribunal of 15 June 2010, *Pachtitis v Commission*, F-35/08, ECLI:EU:F:2010:51), EPSO announced that it would re-run the EPSO/AD/177/10 competition. All candidates excluded from competition EPSO/AD/177/10 on the basis of their results in the admission tests were invited to sit new tests. The complainant passed the admission tests of Open Competition EPSO/AD/177/10 - AUDIT 2013 - Administrators (the '2013 edition').

[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:

<https://www.ombudsman.europa.eu/en/cases/recommendation.faces/en/81510/html.bookmark>  
[Link]

[3] If there are two different competitions, the admission criteria can be applied differently in the two competitions in question. On the contrary, if there is only one competition, split into two editions, the admission criteria must be applied in the same way in both editions.

[4] This conclusion is found in paragraph 37 of the Ombudsman's recommendation, which reads as follows: "*By arguing that these were separate competitions, EPSO avoided having to examine whether the Selection Board had adopted a stricter approach to its assessment of the candidates' diplomas in the 2013 edition than it had in the 2010 edition. Thus, EPSO avoided examining whether the Selection Board had breached the principle of equal treatment. However, as the Ombudsman does not accept that there were two separate competitions, it is her finding that EPSO did not carry out its administrative review (the Article 90(2) complaint) properly. It is the Ombudsman's finding that EPSO was wrong to have concluded that there was no evidence that the Selection Board had committed a manifest error of assessment in its evaluation of the complainant's application.*"