

Decisão no caso 2449/2007/VIK - Alegada falta de razões válidas para a substituição do queixoso e alegado incumprimento do seu direito a ser ouvido

Decisão

Caso 2449/2007/VIK - Aberto em 22/10/2007 - Decisão de 16/12/2009

O queixoso, um cidadão britânico, foi contratado como chefe de equipa para um trabalho de consultoria em África. O seu contrato foi realizado com uma empresa pertencente a um consórcio ("o contratante"), que foi contratado pela Comissão para realizar um estudo no país X.

Durante a primeira fase da implementação do projecto, o contratante teve de elaborar um relatório inicial. O queixoso, enquanto chefe de equipa, preparou o relatório em questão. A Comissão, no entanto, não ficou satisfeita com o seu conteúdo. Realizou uma série de comentários e solicitou ao queixoso que alterasse o relatório em conformidade. A Comissão solicitou subsequentemente ao contratante que substituísse o queixoso por outro perito. Para este efeito, enviou uma carta formal ao contratante.

Neste contexto, o queixoso alegou que a Comissão não forneceu razões válidas na carta em que pedia a sua substituição (aspecto substantivo) e que tinha violado o seu direito a ser ouvido, previsto no n.º 2 do artigo 41.º da Carta dos Direitos Fundamentais da UE e no artigo 16.º do Código Europeu de Boa Conduta Administrativa (aspecto processual). O queixoso alegou que a Comissão devia fornecer provas das alegações que fez contra si, ou retirar as alegações.

Após um inquérito exaustivo, o Provedor de Justiça chegou à conclusão de que não houve má administração no que se refere à substância, nomeadamente, a fundamentação fornecida pela Comissão. No que se refere ao processo, o Provedor de Justiça concluiu que, ao não dar ao queixoso a possibilidade de responder às críticas incluídas na sua carta de 15 de Maio de 2007 antes de solicitar ao contratante a substituição daquele, a Comissão não agiu em conformidade com o princípio da boa administração previsto no artigo 41.º da Carta dos Direitos Fundamentais da UE. Na opinião do Provedor de Justiça, tal constituiu um caso de má administração.

Por conseguinte, o Provedor encerrou o caso com uma observação crítica.



THE BACKGROUND TO THE COMPLAINT

1. The present complaint concerns, among other things, an alleged violation of Article 41(2) of the Charter of Fundamental Rights of the EU [1] and Article 16 of the European Code of Good Administrative Behaviour [2] by the Delegation of the European Commission to Country X (hereafter 'the Delegation').

2. The relevant section of Article 41 of the Charter of Fundamental Rights of the EU (hereafter 'the Charter') reads as follows:

" Right to good administration

(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

(2) This right includes:

- the right of every person to be heard before any individual measure which would affect him or her adversely is taken ...

- the obligation of the administration to give reasons for its decisions... "

3. Article 16 of the European Code of Good Administrative Behaviour (hereafter 'ECGAB') provides as follows:

" Right to be heard and to make statements

1. In cases where the rights or interests of individuals are involved, the official shall ensure that, at every stage in the decision making procedure, the rights of defence are respected.

2. Every member of the public shall have the right, in cases where a decision affecting his rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken "

4. The complainant was contracted as a team leader for consultancy work in Country X by a company belonging to a Consortium, which was led by another company ('the Consortium's leading partner'). The Consortium was awarded a contract for the implementation of a Tracer Study on Graduates of the Country X Technical Education Programme and their impact on the country's labour market, and more generally on its economic and social development. The Consortium members, which signed a contract with the Commission, are hereafter referred to as 'the Contractor'.

5. The contract between the Contractor and the Commission was governed by the General Conditions of the Framework Contract, the Global Terms of Reference of the Framework



Contract "Beneficiaries", and the Specific Terms of Reference, which specified the services to be performed by the Contractor.

6. The contract was due to start on 30 April 2007. Within seven days of commencement of the contract, the Contractor had to prepare an inception report. This report, which was prepared by the complainant, was submitted to the Delegation on 7 May 2007. The Delegation, however, was not satisfied with the report. It made a number of comments and requested the complainant to amend the report accordingly. The Delegation subsequently asked for the complainant to be replaced by another expert. This request was formally made by the Head of the Delegation in a letter to the Contractor dated 15 May 2007. In this letter, the Delegation expressed in essence its dissatisfaction with what it considered to be the poor quality of the complainant's work and his attitude. The complainant's contract was immediately terminated and he was removed from the assignment.

7. On 24 May 2007, the complainant informed the Delegation that he considered the content of the above letter to be untrue and defamatory, and asked for an opportunity to discuss it.

8. In a letter dated 31 May 2007, the Delegation replied to the complainant. It pointed out that the Commission had no contractual links with him and that any issues relating to the contract in question should, therefore, be discussed with the Contractor.

9. On 3 July 2007, the complainant submitted his first complaint to the Ombudsman (reference number 1791/2007/(BM)SAB). He alleged that the Delegation breached the above-mentioned articles of the Charter and the ECGAB. However, the documents which the complainant submitted suggest that the Delegation informed him twice of its dissatisfaction with his work. The Ombudsman, therefore, took the view that it appeared that the complainant was given an opportunity to react to the Commission's criticism. In these circumstances, the Ombudsman considered that there were insufficient grounds for an inquiry.

10. On 19 September 2007, the complainant reiterated his complaint by providing a detailed analysis of the situation and a number of new arguments in support of his case. The complainant's new letter was, therefore, registered as a new complaint (reference number 2449/2007/VIK).

THE SUBJECT-MATTER OF THE INQUIRY

11. The Ombudsman identified the following allegation and claim:

(1) The complainant alleged that the Delegation breached Article 41(2) of the Charter and Article 16 of the ECGAB by not respecting his right to be heard and by not providing adequate reasons for the statements made by the Head of the Delegation in his letter of 15 May 2007. In support of this allegation, the complainant, in essence, argued that:

(i) the Delegation took action to remove him before the deadline for the submission of the



revised report, which had to incorporate the feedback from the Delegation, had expired;

(ii) The Delegation's letter of 15 May 2007 contained allegations against him which were never previously brought to his attention and to which he was not given a chance to respond.

(2) The complainant claimed that the Delegation should provide evidence for the allegations which the Head of the Delegation made against him, or retract these allegations.

12. The complainant also claimed that the Delegation should, in accordance with Article 41(3) [3] of the Charter, provide financial compensation for the damage he suffered and for future loss of earnings. The Ombudsman found this claim to be inadmissible on the basis of Article 2(4) of his Statute, since the complainant had not made any prior administrative approaches to the Delegation in relation to his demand for compensation.

13. On 14 May 2009, the complainant renewed his claim for compensation. He submitted that he requested the Delegation to pay him compensation for his loss of earnings, accommodation allowances, and damage to his professional reputation. On 15 June 2009, the complainant submitted a copy of the response from the Delegation, in which the latter rejected the above claim for compensation. Given that the complainant had fulfilled the requirements laid down in Article 2(4) of the Statute of the European Ombudsman, the claim for compensation could have been taken up for inquiry. The Ombudsman, however, considered it appropriate to await the results of the inspection of the Commission's file before deciding whether to examine this claim. As a result of inspecting of the Commission's file concerning the allegations and claim initially put forward by the complainant, the Ombudsman considers that there is no need to investigate the claim for compensation.

14. It should finally be noted that both the Commission and the complainant indicated that a Member of the European Parliament wrote to Commissioner Ferrero-Waldner concerning the present complaint. The Commission provided a copy of its reply to the Member of Parliament. In his observations, the complainant submitted that the letter addressed to the Commissioner raised issues of a general nature, related, for example, to the legal implications of terminating a consultant's contract on the basis of unfounded allegations, and to the legal basis for requiring a consultant to sign a statement of availability and exclusivity, limiting his or her capacity to work for a competing firm. The complainant considered, however, that the Commission failed to address the issues brought to its attention. From the information provided, it is not clear whether the complainant wishes the Ombudsman to examine these issues. In any event, the complainant did not provide a copy of the relevant letter of the Member of the European Parliament to the Commission. The Ombudsman does not, therefore, have all the information necessary to enable him to decide whether he should open an inquiry regarding these issues.

THE INQUIRY

15. On 22 October 2007, the Ombudsman opened an inquiry and asked the Commission to submit an opinion. The Commission sent its opinion on 12 March 2008. The Commission's



opinion was forwarded to the complainant with an invitation to make observations, which he presented on 22 April 2008. On 2 January 2009, following a request from the Ombudsman's services, the complainant provided further documentary evidence relating to his complaint, and, on 14 May 2009, and 15 June 2009, he submitted more documentary evidence.

16. On 20 July 2009, the Ombudsman asked the Commission to allow his services to inspect the file relating to the present case. The inspection took place on 13 October 2009, at the premises of the Commission's EuropeAid Co-operation Office in Brussels. A copy of the inspection report was sent to the complainant and the Commission on 20 October 2009. On 24 October 2009, the complainant made observations on this report.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. As regards the complainant's allegation

Arguments presented to the Ombudsman

The content of the contested letter:

17. The complainant provided a copy of the Delegation's letter requesting his replacement (dated 15 May 2007). The relevant sections of this letter read as follows:

"... the Delegation has already informally communicated to [the Contractor] a series of concerns shared by the Government with regard not only to the quality of work produced by the [complainant] , but also his very beligerant [sic] attitude.

The Draft Inception Report provided by the Team Leader was unsatisfactory and failed to comply with the standard contents of an Inception Report (kindly refer to the comments provided by the Delegation by e-mail). The TORs [4] clearly required that the methodology presented in [the Contractor's] Offer be revised and resubmitted in the Inception Report but the Team Leader has completely omitted this essential aspect and rather focused on a broad and familiar analysis on the TVET [5] Sector.

The Delegation has twice provided comments to the Inception Report in order for the Team Leader to improve this Report, to which we received very defensive and ill-judged replies. The TL further attempted to create a confrontational situation between the Delegation and the Government despite their agreement on the changes to be made. The Representative of the Government reported that he spent a considerable amount of time with the TL to brief him on the assignment and help him improving the Report, but the TL still does not seem to understand or have any vision for the execution of the assignment. He is deemed just to be 'borrowing' broad ideas and concepts from the persons consulted and has failed to propose any relevant and proactive suggestion of his own regarding the methodology to undertake the study.



The Government has now expressed a strong willingness to see the Team Leader replaced, as he is failing to demonstrate the necessary skills and competencies to undertake this study. The Delegation fully concurs with the Government's view.

...

In light of the above and based on Article 17 of the General Conditions of the Framework Contract, given that the poor start has already somewhat jeopardised the successful execution of the Study to the great dissatisfaction of the Government, we kindly ask you to propose a suitable replacement matching the TORs qualification requirements and agreeable to the Delegation and the Government ... ".

The complainant's arguments

18. The complainant in essence submitted that the above letter was "*full of untruths*" and that he was not given any opportunity to react to the Commission's criticism. In this context, the complainant put forward the following arguments.

19. The complainant acknowledged that he received feedback from the Delegation's Task Manager and the Delegation's Education Adviser regarding his draft inception report. He noted that he responded to these comments and that it was agreed that he would prepare and submit a revised report incorporating the Delegation's comments. In the meantime, however, actions were taken by the Delegation to remove him from the assignment *before* the deadline for the submission of the revised report had expired. According to the complainant, the revised inception report greatly expanded on the methodological issues outlined in the initial inception report, and was the result of a number of in-depth discussions with stakeholders, the senior researcher in the consultancy, as well as of conclusions based on his own expertise and experience. Consequently, he found the Commission's decision to remove him, before even considering the revised report, to be an "*extraordinary and unacceptable act of bad faith*".

20. The complainant took the view that his reply to the comments made by the Delegation's staff was not "*defensive and ill-judged*", but "*detailed and robust*", as should be expected from a team leader.

21. Furthermore, the complainant submitted that the Delegation's letter contained a number of allegations that went beyond the points previously raised by its staff. In the complainant's view, the accusation that he was "*attempting to create a confrontational situation between the Delegation and the Government of [Country X]*" was appalling, unsubstantiated, and unfounded. Had the view that his presence was creating difficulties between the Government of Country X (the 'Government') and the Delegation been brought to his attention, he would have left the consultancy voluntarily.

22. The complainant added that, likewise, the alleged lack of understanding and vision, or the allegation that he was "*failing to demonstrate the necessary skills and competence*", had never been brought to his attention by the Government representative or anyone else. He reiterated



that he had, thus, not been given an opportunity to discuss and refute these allegations.

23. The allegation that he "*was borrowing broad ideas and concepts from the persons consulted and had failed to propose any relevant proactive suggestions of his own regarding the methodology to undertake the study*" was untrue. He did not consider himself to be the type of consultant who arrives from overseas with pre-conceived solutions, but rather one who seeks to contextualise approaches and methodologies within local circumstances, with a view to ensuring better chances for success and sustainability.

24. The complainant noted that the ostensible "*representative of the Government*" had agreed the report before it was submitted to the Delegation. He added that he spent some time discussing the report with this person, since he had been told that the latter was acting on behalf of the Government. It was not, however, a "*considerable amount of time*" because the representative accepted the initial report with the exception of one or two factual amendments.

25. The complainant also pointed out that the allegation that he had a "*belligerent attitude*" was an "*unfounded and inexcusable personal attack*" on his character. He suspected that it was the personal animosity of some of the Delegation's employees towards him which led to his dismissal.

The Commission's position

26. In its opinion, the Commission pointed out that it had no contractual relationship with the complainant, since the parties to the contract were itself and the Contractor. The Commission referred to Article 4.3 of the General Conditions, which provides that "*no sub-contract can create contractual relations between any sub-contractor and the Contracting Authority*".

27. As regards the alleged failure to inform the complainant and to respect his right to be heard, the Commission argued that Article 6.1 of the Global Terms of Reference of the Framework Contract clearly established that all communications regarding the Framework Contract were to take place between the Contractor and the Commission. More specifically, Article 6.1 stipulated that "*in the case of a Consortium, the Leading Partner is ultimately responsible for all contractual and financial aspects of the Framework Contract and the individual assignments and is the only formal contact point between the Contractor and the Contracting Authority*". The Commission, therefore, took the view that it was under no obligation whatsoever to inform the complainant directly. It was for the Contractor to give the complainant instructions in the field of project management and inform him of any relevant issue concerning the project. The Contractor, on the other hand, had been kept duly informed by the Delegation (by means of telephone conversations and e-mails) regarding the Commission's and the Government's lack of satisfaction with the complainant's work.

28. Furthermore, and contrary to what the complainant submitted, the Delegation clearly informed him on two occasions that his report was not satisfactory and invited him to contact the Delegation in case clarifications were needed. In support of this argument, the Commission provided copies of two e-mails which the Delegation sent to the complainant on 8 and 10 May



2007.

29. The Commission explained that, since the complainant had been reluctant to address the Delegation's comments, the latter did not make any further attempt to contact him, but urged the project coordinator to find a solution.

30. As regards the alleged failure to respect the deadline set for the revised report before taking action to remove the complainant, the Commission pointed out that, on 14 May 2007, the Delegation agreed with the Contractor to give the complainant two more days to produce a revised inception report. The Delegation informed the Contractor that the Government wanted the revised version by 16 May 2007, at the latest.

31. The Commission also noted that, on 15 May 2007, a Government representative called the Delegation to inform it that, in his view, after discussing the report with the complainant, the revised version of the report (which the complainant was about to present) failed to capture the essential elements of the implementation of the study, and would most certainly need to be redrafted. He expressed his concerns regarding the execution of the study as such, and informed the Delegation that he considered it appropriate to replace the complainant.

32. On the same day, namely, 15 May 2007, the Delegation's services met with the Head of the Delegation to discuss the possible options.

33. On 16 May 2007, the Delegation contacted the Contractor, informing it of the Government's feedback on the report and seeking its position. According to the Commission, the Contractor explained that the inception report, as revised by the complainant, would not be sent to the Delegation. In an e-mail which the Contractor sent the Delegation on 16 May 2007, at 6:38 pm, it asked the latter to send an official letter requesting the complainant's replacement.

34. The Commission clarified that its letter requesting the complainant's removal was dated 15 May 2007, but that it was sent only on 16 May 2007, after the deadline had expired, and no revised report had been received. The Commission provided a copy of its e-mail to the Contractor, with the letter in question enclosed. The copy of the e-mail showed that the Delegation sent it to the Contractor on 16 May 2007, at 6:39 pm, as an immediate reply to the above e-mail received from the Contractor at 6:38 PM. The Commission explained that the letter was dated 15 May 2007 because it had been prepared on that date, so that it could be ready for discussion with the Head of the Delegation. Given the short timeframe and the budget constraints for this study, the Delegation could not afford to grant the complainant any additional time. Consequently, after the new deadline had expired, the decision to request the complainant's replacement had to be taken quickly in order to secure the mission's successful outcome.

35. The Commission clarified that the Delegation was never officially provided with the revised version of the complainant's report. In accordance with Article 3.3 of the Global Terms of Reference of the Framework Contract, it was the Contractor's responsibility to ensure the quality of the reports delivered. The Commission could thus not question the Contractor's decision not



to present the revised version of the report which had been prepared by the complainant. The Commission assumed that, in the Contractor's view, the revised report did not meet the quality requirements of the Terms of Reference.

36. The request which the Delegation addressed to the Contractor to replace the complainant was based on Article 17 of the General Conditions of the Framework contract, which provides as follows:

" ... in the course of performance, and on the basis of a written and justified request, the Contracting Authority can ask for the replacement if it considers that a member of staff is inefficient or does not perform its duties under the contract ".

37. The Commission explained that the comments which the complainant considered to be defamatory were made with reference to the tone of the complainant's responses to the Delegation's previous requests to improve the report. In an e-mail sent on 14 May 2007, the Delegation informed the Contractor that the complainant's answer was not what was to be expected in this situation (*" the subsequent response to our comments is deemed to be unacceptable and clearly unconstructive "*). In the same e-mail, the Delegation also informed the Contractor that the Government had expressed concerns about the fact that the complainant's response could create a confrontational situation between the Delegation and the Government.

38. The Commission noted that it understood the complainant's disappointment that the Delegation did not draw his attention to the content of the Delegation's letter dated 15 May 2007. However, the Commission took the view that the Delegation duly and fully informed the Contractor of each element mentioned in the said letter *before* the letter was sent. The Delegation acted in compliance with Article 6.1 of the Global Terms of Reference, mentioned in point 27 above. If the Contractor had considered the arguments and the request made in the Delegation's letter to be incorrect or inappropriate, it would have been the Contractor's responsibility to inform the complainant of the Delegation's letter, to obtain his opinion, and to contest the Delegation's request and arguments. The Delegation's request to replace the complainant was, however, never challenged by the Contractor, which was aware of the justifications it contained, and agreed with it in principle.

39. The Commission further argued that there was no personal animosity on the part of the Delegation's staff, as alleged by the complainant. The Delegation's only interest was to secure a service that was acceptable to itself and the Government. This necessarily involved the scrutiny and quality control of consultancy work. At no point did its staff express any anger towards the complainant, either within or outside the Delegation. All the Delegation asked from the complainant was that he should comply with the terms of reference, which had been accepted by the Contractor, and revise the report, taking the Delegation's comments into account. The complainant was given sufficient time to act accordingly.

The complainant's observations

40. In his observations, the complainant noted that the Commission's account omitted some



events. More particularly, the complainant submitted that the Delegation's staff sent two e-mails to a Government representative concerning the complainant's comments on the feedback which the Delegation had provided with respect to the draft inception report. According to the complainant, these e-mails contained misplaced comments. He noted that the Commission did not mention or include these e-mails in its opinion. He indicated that a Government representative showed him one of the e-mails, sent on 11 May 2009.

41. The complainant referred to one of the comments made by the Delegation in relation to his report. The comment in question was worded as follows: "*I have an allergic reaction to these sorts of statements which sound like mumbo-jumbo. What does it tell us?*" The complainant submitted that the correct professional approach would have been to ask for clarifications, rather than make such comments.

42. The complainant also argued that a Government representative informed him that he and his predecessor had difficulties working with the Commission. He suggested to the complainant that, in order to avoid unnecessary difficulties with the Delegation concerning the submission of reports, the Contractor could consider submitting the complainant's reports directly to him, and he would then give a copy to the Delegation for reference.

43. The complainant further submitted that he received an e-mail from the consultancy company that had contracted him, informing him that the Delegation had refused to comment on his revised draft inception report, despite previously agreeing to do so.

44. The complainant explained that he was informed of his dismissal only on 17 May 2007. He further argued that the consultancy company that had contracted him was very happy with his revised inception report and indicated to him that the Delegation would not have accepted anything he produced.

45. He also noted that he received an e-mail from a Government representative informing him that the latter attempted to keep him in his post, but that the Delegation had been uncompromising. Given that the Delegation was a powerful donor, its position could not be ignored.

46. The complainant further commented on the Commission's statement that the Delegation's letter dated 15 May 2007 was only a draft. He submitted that the company that hired him obviously viewed the letter as a letter of dismissal and terminated his contract as of 15 May 2007. Given that the draft of 15 May 2007 was not subsequently altered in any way, this strongly suggests that the Delegation intended to remove the complainant, regardless of its agreement to wait for the revised report.

47. The complainant pointed out that he never questioned the need to make changes to the draft inception report. He stressed that he incorporated in the revised inception report all the feedback received from the Delegation, and that he submitted the revised report on time. He noted that he sent it to the Contractor on 16 May 2007, at 4.45 pm.



48. The complainant further noted that, on the one hand, the Delegation communicated directly with him regarding the draft inception report and then, on the other hand, argued that all communication had to go through the Contractor. In the complainant's view, the Delegation was thus highly selective and inconsistent in its interpretation of communication protocols. The complainant further disagreed with the Commission's argument that he was informed on two occasions that the initial report he had prepared was not satisfactory. According to the complainant, this was done only once, in the e-mail sent by the Commission on 8 May 2007.

49. The complainant noted that he continued to believe that his removal was motivated by personal animosity towards him on the part of the Delegation's staff. He surmised that the Delegation could not take action against him unless it had at least the tacit approval of some Government representatives. He suspected in this context that the Delegation's employees might have attempted to "*pressurize the representatives of a national sovereign government ... in order to secure their own agenda*".

50. The complainant remarked that no evidence whatsoever had been provided concerning the Government's alleged dissatisfaction with his work, or its alleged desire to see him removed from the assignment.

51. The complainant finally disagreed with the Commission's interpretation of Articles 41 of the Charter and Article 16 of the ECGAB, according to which it was someone else's responsibility to inform him about the allegations made in the Delegation's letter, because he, the aggrieved party, was not a party to the contract with the Contractor. In the complainant's view, by proceeding in this way, the Commission undermined the very essence of personal rights enshrined in the above articles, and thus violated the principles of good administration. In the complainant's view, the Commission simply attempted to hide from its responsibilities and avoid accountability.

The inspection of the Commission's file

52. After careful analysis of the parties' arguments and the evidence presented during the inquiry, the Ombudsman decided that an inspection of the Commission's file was necessary. The inspection was carried out by his services on 13 October 2009.

53. It emerged from the inspection that most of the documents contained in the file had already been provided to the Ombudsman by either the Commission or the complainant. However, the Commission's file also contained the following two documents, which had not previously been made available to the Ombudsman:

(i) a copy of the letter which, on 4 January 2008, the Government addressed to a law firm representing the complainant, and

(ii) a copy of a letter concerning the complainant's dismissal, which the Government sent to the Head of the Delegation on 6 December 2007.



54. After receiving a copy of the inspection report, the complainant explained that he was aware of the letter sent by the Government to his legal advisers. He did not, however, know about the letter addressed to the Head of the Commission's Delegation, sent on 6 December 2007. The complainant, therefore, asked for a copy of that letter.

55. The complainant further clarified that his legal advisers wrote to the representative of the Government, since they believed that the latter defamed him. However, no legal action has yet been taken against this person.

56. The complainant finally asked whether, during the inspection of the Commission's file, the Ombudsman's services found certain e-mails exchanged between the Delegation and the Government representative containing what he considered to be misplaced comments concerning his work (see point 40 above). He remarked that if these e-mails were not in the file, this would lend further support to his complaint.

The Ombudsman's assessment

Preliminary remark

57. In his observations on the inspection report carried out by the Ombudsman's services, the complainant asked for a copy of one of the documents mentioned in this report (see point 54 above). It should be noted that, during the inspection, the Commission pointed out that it considered this document to be confidential. The Ombudsman would like to recall in this context that, in accordance with Article 13.3 of his Implementing Provisions, complainants shall not have access to any confidential documents or confidential information obtained as a result of his inspections. The Ombudsman is, therefore, unable to disclose a copy of the said document to the complainant. The complainant is, however, free to request the Commission for access to the said document.

58. The present complaint concerns two main issues. First, the question as to whether the Commission provided adequate reasons to justify its decision to ask, in its letter dated 15 May 2007, for the replacement of the complainant (the substantive aspect). Second, the alleged violation of the complainant's right to be heard (the procedural aspect). The Ombudsman's analysis will, therefore, focus on these two aspects.

The Commission's reasoning

59. The Ombudsman notes that, in its letter dated 15 May 2007, the Delegation set out a number of considerations that led it to ask for the complainant's replacement as team leader. These considerations concerned (i) the quality of the work produced by the complainant, (ii) his behaviour, and (iii) the position of the Government of Country X.

60. As regards consideration (i), it is clear that the Delegation was not content with the first draft of the inception report. It is also clear that the complainant accepted that this draft needed to be revised and improved. However, it appears that the Contractor did not submit the complainant's



revised draft to the Delegation, thereby preventing its being assessed by the Delegation. The Ombudsman was not provided with a copy of this document. He is, therefore, unable to determine whether the quality of the complainant's work merited the Delegation's decision to ask for his replacement. In any event, the Ombudsman notes that the Delegation's justification for requesting the complainant's replacement was not based on the contents of the revised report.

61. Similar considerations apply regarding the Delegation's reliance on the complainant's behaviour. The Ombudsman notes that, in his reaction to the comments made by the Delegation on his inception report, the complainant expressed his views with some strength. This having been said, some of the Delegation's comments, and in particular, the one quoted in point 41 above, were worded in a rather marked manner.

62. In these circumstances, particular importance must be accorded to the position adopted by the Government, all the more so since tangible evidence is available in this respect. Moreover, the complainant informed the Ombudsman that he would have left his post voluntarily, if it had been brought to his attention that his presence was creating difficulties between the Government and the Delegation.

63. According to the Delegation's letter dated 15 May 2007, the Government had concerns regarding the complainant's performance and expressed a "*strong willingness*" to see him removed from his post.

64. The documents inspected by the Ombudsman's services clearly show that the Delegation's statements in the said letter corresponded to the actual position of the Government of Country X. Suffice it to say that, in the letter which the Government addressed to the law firm representing the complainant, it was noted that, although the letter dated 15 May 2007 was drafted by the Delegation, it represented the Government's view.

65. The Ombudsman is mindful of the fact that the complainant suspected the Delegation of exerting pressure on the Government, and held the view that the real reason for his dismissal was the Delegation's animosity towards him. However, none of the documents on the Commission's file inspected by the Ombudsman's services supports this theory. The complainant referred to a number of e-mails in support of his version of events. However, and despite being invited to do so, the complainant did not submit any such e-mails to the Ombudsman. The complainant pointed out that he no longer had the e-mails in question, and was thus unable to provide them.

66. The complainant further referred to correspondence between the Delegation and the Government, which he claimed was shown to him and which, in his view, constituted further evidence in support of his complaint (see point 40 above). The Ombudsman notes that the complainant did not submit copies of this correspondence and that no trace of any such correspondence was discovered in the course of the inspection. Furthermore, there was nothing to suggest that the file presented to the Ombudsman's representatives might have been incomplete.



67. The complainant drew attention to the fact that the Delegation's letter asking for his replacement was dated 15 May 2007, while it had been agreed that he had until 16 May 2007 to submit his revised inception report. The Ombudsman agrees that the date of the relevant letter, at first sight, creates the impression that the Delegation acted unfairly by deciding on its course of action, without waiting to see the revised inception report. However, the Commission explained that a Government representative contacted the Delegation 15 May 2007, and expressed the view that the forthcoming revised version of the inception report would still not provide what was expected, and that he considered it appropriate to replace the complainant. The Commission further explained that the Delegation met on 15 May 2007 to discuss the possible options and that the letter dated 15 May 2007 had been drawn up in readiness for discussions with the Head of the Delegation that same day. It stressed that the relevant letter was sent out only on 16 May 2007, after the Contractor asked for it to be sent. The Ombudsman considers these explanations to be reasonable and that they are, furthermore, confirmed by the contents of the file inspected by his services. It can, of course, not be excluded that the decision to send this letter was already taken on 15 May 2007, which would also explain why the letter carries that date. However, even if that were the case, the Ombudsman is not convinced that the Delegation acted out of animosity or unfairly, given that, by then, it had already been informed that the Government wished to see the complainant replaced.

68. In view of the evidence available to him, the Ombudsman, therefore, takes the view that the complainant did not establish his substantive allegation, namely, that the Commission failed to provide adequate reasons to justify the request, formulated in its letter dated 15 May 2007, for him to be replaced as team leader. The Ombudsman, therefore, finds no maladministration on the part of the Commission as regards this aspect of the complaint.

The alleged violation of the right to be heard

69. As regards the alleged failure to hear the complainant, the Ombudsman notes that, in accordance with Article 17 of the General Conditions, the Commission was entitled, "*on the basis of a written and justified request*", to ask the Contractor for the complainant's replacement, if it considered that the latter was "*inefficient or does not perform its duties under the contract*". The Ombudsman considers that, before making such a request, the party to which this request was to be made, namely, the Contractor, needed to be given the possibility to express its views on the reasons that led the Commission to consider taking such a step. However, the complainant does not allege that the Contractor was not heard, but that the Commission ought to have given him, that is, the complainant, the possibility to express his views before asking the Contractor to replace him. It is, therefore, the alleged failure to hear the complainant that needs to be examined here.

70. The complainant does not dispute the fact that his contract was with the company that hired him for the assignment, namely, a member of the Consortium, and that he did not have any contractual link with the Commission. The complainant was not able to identify any provision in the Commission's contract with the Contractor, or any other legally binding provision that would, at the time of the events, have obliged the Commission to hear him before making use of the



possibility foreseen in Article 17 of the General Conditions. The Treaty of Lisbon made the Charter (and thus its Article 41) legally binding (see Article 6(1) of the Treaty on the European Union) as from 1 December 2009. However, the Ombudsman considers that the relevant behaviour of the Commission needs to be assessed on the basis of the law as it stood at the time of the events at issue, namely, in May 2007.

71. The Delegation's decision to ask the Contractor to replace the complainant adversely affected the latter. Its request led to the replacement of the complainant as team leader and the termination of his contract relating to this project. It needs to be examined, therefore, whether, in the absence of a legal duty to do so, the Commission, nevertheless, ought to have heard the complainant in order to comply with principles of good administration.

72. The Commission referred to Article 6.1 of the Global Terms of Reference, according to which all communications regarding its contract with the Contractor were to take place between itself and the Contractor. It has further argued that, in the absence of any contractual relationship between itself and the complainant, it had no obligations whatsoever vis-à-vis the complainant. However, and as the Ombudsman has stressed time and again, the requirements of good administration go beyond purely legal obligations. In other words, maladministration can also occur where an administration has complied with all its legal obligations.

73. The Ombudsman has, in previous investigations, accepted arguments to the effect that, in cases such as the present one, it is sufficient for the Community institution or body concerned to hear the Contractor. This was based on the assumption that the Contractor would then hear the expert whose replacement was to be demanded, and convey to the Community institution or body concerned any observations the latter might have made.

74. Experience has shown, however, that the interests of the Contractor and the expert concerned are not necessarily identical. Contractors may be willing to accede to requests to replace experts, even though they consider that the experts complied perfectly with their duties, so as not to jeopardise their chances of winning future contracts from the same Community institution or body. In the present case, it appears that the Contractor accepted the Commission's request to replace the complainant without giving him advance notice, or the possibility to respond to the Commission's criticism.

75. In the Ombudsman's view, this situation is unfair and incompatible with the right to good administration enshrined in Article 41(1) of the Charter. The Ombudsman, therefore, considers that it would have been fair and in accordance with the principles of good administration, if the Commission had informed the complainant of its intention to request his replacement and given reasons for doing so. It appears useful in this context to point out that, as the complainant correctly observed, the Delegation addressed its comments concerning the initial version of the inception report directly to him, rather than passing through the Contractor. It would, therefore, clearly have been possible for the Delegation to inform the complainant of its criticism of him and of its intention to request his dismissal before it formulated its request on the basis of Article 17 of the General Conditions.



76. The complainant submitted that the Commission's failure to give him the possibility to comment on its intention to request the Contractor to replace him constituted an infringement of the right to be heard laid down in Article 41(2) of the Charter. The wording of Article 41 of the Charter makes it clear that the rights set out in its second paragraph form part of the general right to good administration enshrined in Article 41(1), according to which every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time. Given that the Ombudsman concludes that the Commission's approach in the present case was not in conformity with the principle of good administration, there is no need to analyse whether Article 41(2) is applicable here. For the same reasons, there is no need to decide whether Article 16 of the ECGAB applies in this case.

77. The Commission pointed out that, in addition to informing the Contractor, the Delegation twice informed the complainant of its dissatisfaction with the content of the inception report he had prepared. The Ombudsman notes, however, that at no time did the Delegation inform the complainant that it intended to have him removed from the project before it made its request to that effect to the Contractor. Nor was the complainant given advance notice of all the reasons on which this request was based.

78. The Ombudsman understands that the Delegation had to ensure that the project was completed successfully and on time, and that it could not, therefore, afford to lose time. The Ombudsman considers, however, that it would have been easy for the Delegation to hear the complainant without wasting any time. In fact, the Delegation set out its concerns on 15 May 2007, in the letter of the same date. It would, therefore, have been possible to give the complainant the possibility to express his views on these concerns already on that day. In the Ombudsman's view, it would also have made better sense to do so, rather than letting the complainant continue working on the revised version of the inception report. In fact, the revised version of the inception report appears to have reached the Contractor shortly after it asked the Delegation to submit its request for the complainant's replacement, and after the request had actually been submitted. Given that the revised version of the inception report did not play any role in these events, the complainant's work on the version of 16 May 2007, must, therefore, be considered to have been in vain.

79. In view of the above considerations, the Ombudsman considers that the Commission failed to act in accordance with the principle of good administration laid down in Article 41 of the Charter, when it failed to give the complainant the possibility to respond to the criticism it had expressed in its letter dated 15 May 2007, before, that is, asking the Contractor to replace the complainant. This is an instance of maladministration. A critical remark will be made below.

B. As regards the complainant's claims

Arguments presented to the Ombudsman

80. The complainant claimed that the Commission should provide evidence for the allegations made against him in its letter dated 15 May 2007, or retract these allegations. In the course of



the present inquiry, the complainant also renewed his claim for compensation, which was initially rejected by the Ombudsman on the basis of Article 2(4) of his Statute. The complainant claimed that the Commission should compensate him for the loss of earnings, accommodation allowances, and damage to his professional reputation.

81. The Commission argued that the complainant did not suffer any unfair action by it, since its services had acted properly and that no instance of maladministration had occurred.

The Ombudsman's assessment

82. In view of the Ombudsman's findings regarding the substance of the present complaint (set out in paragraph 68 above), the Ombudsman considers that further inquiries concerning the complainant's first claim are no longer justified.

83. As regards the claim for compensation, the Ombudsman notes that no maladministration was found regarding the Commission's decision to request the complainant's replacement. The Ombudsman found maladministration with regard only to the procedural aspect of the case, which concerned the complainant's right to be heard. The complainant did not, however, argue that his claim is based on the maladministration thus identified. In this context, it appears useful to recall that the complainant stated that he would have left the consultancy voluntarily, had it been brought to his attention that his presence was creating difficulties between the Government and the Delegation. The complainant's claim for damages does not, therefore, need to be taken up for inquiry.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

By failing to give the complainant the possibility to respond to the criticism it expressed in its letter dated 15 May 2007, before, that is, asking the Contractor to replace the complainant, the Commission failed to act in accordance with the principle of good administration laid down in Article 41 of the Charter of Fundamental Rights of the EU. This is an instance of maladministration.

The above critical remark concerns the procedural aspects of the complaint. Given that the Ombudsman found no maladministration as regards the substance of the complaint, there is no need to pursue a friendly settlement in the present case. For the same reasons, further inquiries concerning the complainant's claim are not justified.

The Ombudsman, therefore, closes the case.



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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 16 December 2009

[1] OJ 2000 C 364, p. 1.

[2] Available on the website of the European Ombudsman, <http://www.ombudsman.europa.eu> [Link]

[3] Article 41(3) of the Charter reads: "*Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States*".

[4] Specific Terms of Reference for the Tracer Study on Graduates of the country's Technical Education Programme.

[5] TVET - Technical and Vocational Education and Training.