

1356/2013/AN

**FURTHER CORRESPONDENCE**

**Entrée number(s):**

E2014- 187103, 187104, 188224, 188281

**GENERAL FC** ☐

**RR REPLY** ☒

**SC REPLY** ☐

**14(3) PROPOSAL** ☐

**NOT CONFIDENTIAL** (scroll down to change)

Date of correspondence : 23/01/2014, 24/01/2014, 10/02/2014

Date registered : 23/01/2014, 24/01/2014, 10/02/2014

Date of note : 10/03/2014

Name of complainant : Ms [REDACTED]  
'represented by' (as  
relevant) :

Language : EN

**BACKGROUND** (including date of original complaint, of the EO's reply and of any further correspondence that has already been dealt with)

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The complainant is a former employee of EULEX Kosovo. In 2013, due to a restructuring of the mission, the complainant's contract was not renewed, but simply extended for the duration of her maternity leave. Together with other colleagues whose contracts were suppressed from the EULEX organisational chart, she lodged a complaint to the EO. The EO initially requested to inspect the EEAS' files related to the mission and its restructuring. During the inspection, the EEAS informed the EO that the complainants had turned to the ECJ concerning the same case. The EO thus closed the case.

In her initial complaint, the complainant also stated that during her maternity leave, the Head of EULEX Kosovo (HoM) removed her personal belongings from her office and assigned the office to someone else. She was not satisfied with this. The EO informed the complainant that there were no grounds to conduct an inquiry into this aspect, since the HoM had stated that the removal was done in the interest of the service to dispose of an office while the complainant was on maternity leave, which is lawful. In any event, the complainant's maternity leave ended on the same day as her employment contract, and therefore an inquiry would not have any meaningful purpose, as she would not need the office in any case.

**FURTHER CORRESPONDENCE** (to which the present note relates)

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The complainant challenges the following:

- (i) the EO's statement that her employment contract was not renewed. She states that in fact it was terminated.
- (ii) that the EO, who was allegedly informed of the existence of the court case in August 2013, did not close the complaint at that stage, but waited until early 2014.
- (iii) the EO's acceptance that her office was needed in the interest of the service, to the extent that, she alleges, it was assigned to someone who immediately left on leave.

(iv) the HoM's failure to apply her national law (Polish) and grant her maternity leave on that basis (much longer duration than the one provided for by the EULEX rules).

(v) the fact that the EO did not inquire into the Mission's failure to pay the necessary contribution to the Polish insurance schemes, thus preventing the complainant from receiving unemployment and pension benefits.

(vi) that the EO did not inquire into what the complainant considers to be an unlawful process leading to the termination of several contracts, including two pregnant women.

The complainant highlighted that aspects (iv) to (vi) are not subject to the ongoing judicial procedures. She asked whether there is any appeal against the EO's final decisions.

## **EXPLANATION OF PROPOSED REPLY**

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Concerning argument (i), the court application that the complainant and other colleagues in the same situation lodged with the General Court also refers to the non-renewal ("*décisions... de ne pas renouveler le contrat*"). In any event, however it is described, the end of your employment relationship with EULEX Kosovo is subject to the scrutiny of the courts of the EU in Case T-410/13. The Treaty and the European Ombudsman's Statute are clear as to my obligation not to carry out inquiries into matters that are, or have been the subject of court proceedings. Therefore, there is no possibility for the EO to inquire into this matter.

As regards (ii), the EO became aware of the existence of the parallel judicial proceedings on the occasion of the inspection carried out at the European External Action Service's premises, through the latter's representatives. This explains why she closed the complaint, and the related ones, in early 2014. Had any of the complainants informed her earlier that they had turned to the Court, she would have closed the cases immediately.

With regard to your argument (iii), in the closure letter dated 21 January 2014 the EO mentioned two reasons why she did not consider it justified to carry out inquiries into the fact that the complainant's personal belongings were removed from her office during maternity leave, and the office was assigned to another colleague. First, because this is an internal organisational matter that is for the Head of Mission to assess, provided that he does not take manifestly arbitrary decisions. It is therefore for the Head of Mission to decide whether the interest of the service is better served by keeping the former office occupied with personal belongings throughout maternity leave, or by assigning it to someone else. The fact that the colleague to whom the office was reassigned was not physically present on EULEX's premises does not change the above. Second, because in any event, the complainant's employment contract was extended only due to, and for the duration of, your maternity leave. In the current state of things, she was not expected to return to the Mission, and thus will not require an office on the premises. Therefore, even if the EO opened an inquiry into this matter, this could not lead to any useful outcome, such as having the office returned to the complainant.

As far as argument (iv) is concerned, in reply to the complainant's appeal concerning the duration of her maternity leave, the Head of Mission seems to admit that Polish law is applicable to this matter. It thus appears that the applicability of Polish law is not in dispute, but rather whether it entitles the complainant to the whole duration of maternity leave she has requested. However, the long-standing practice of the European Ombudsman as regards the interpretation and application of national law is to limit any inquiry to examining whether the Union institution, body, office or agency has provided a coherent and reasonable account of the legal basis for its actions.

Concerning argument (v), in the file there is any evidence that may support the statement that EULEX has not made the required contributions to the appropriate social security schemes. In the complainant's correspondence with the HoM she required him to confirm whether EULEX has made the necessary contributions. There is no indication in the exchange of correspondence that this has not been so. In such circumstances, the necessary prior administrative approaches do not appear to have been completed.

As regards argument (vi), the court application in case T-410/13 clearly refers to the unlawful procedure leading to the termination of the relevant employment contracts, including the violation of the principles of consultation of staff representatives, staff protection in collective dismissals, equal treatment and non-discrimination between seconded and contracted staff, as well as abuse of power in the use of successive fixed-term contracts. As regards the complainant's specific case, the court application explicitly mentions the violation of Article 8 of the European Social Charter concerning the protection of employed women in case of maternity. Therefore, the alleged breaches during the procedure which led to the complainant's non-renewal are also subject to court proceedings and, as such, excluded from my scrutiny.

In light of the above, no reasons to revise the EO decision. The complainant should be also explained that neither the Treaty nor the Ombudsman's Statute provide for an appeal mechanism. The EU courts have considered inadmissible actions seeking to annul decisions of the Ombudsman on complaints.. The complainant could, however, consider lodging an action for non-contractual liability against the Ombudsman if she considers that she has been damaged by a failure to act in accordance with the institution's legal obligations.

MHZ, 12.03.14

Finally approved, in accordance with the *Submission table*, by: JSA on 13/03/2014

## MALLEA JIMENEZ Juan Manuel

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**From:** EOdraftsSG  
**Sent:** 18 March 2014 16:58  
**To:** HIRSCH-ZIEMBINSKA Marta  
**Cc:** RICHARDSON Murielle  
**Subject:** RE: Reply to Request for review 1356-2013-AN

Dear Marta,

Yes, please do so.

Best wishes,

Ian

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**From:** HIRSCH-ZIEMBINSKA Marta  
**Sent:** 18 March 2014 10:00  
**To:** EOdraftsSG  
**Subject:** RE: Reply to Request for review 1356-2013-AN

Dear Ian,  
Thank you for your suggestions which correspond to the points made by the complainant.  
Could I please submit the RR for signature?  
Best wishes  
Marta

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**From:** EOdraftsSG  
**Sent:** 17 March 2014 18:26  
**To:** HIRSCH-ZIEMBINSKA Marta  
**Subject:** FW: Reply to Request for review 1356-2013-AN

Dear Marta,

Thank you for the drafts.

Please see my suggestions on the letter to the complainant.

Please check in particular what we say about the issue of national law. I think my revised formulation is more accurate (cf contract cases), but does it deal adequately with the complainant's point?

Best wishes,

Ian