

Specific Instance under the OECD Guidelines for Multi-National Enterprises

Application for review of the Initial Assessment

Recommendation of the Review Committee

On 2 September 2012, an Application was made on behalf of the complainant for Review of the Initial Assessment by the UK National Contact Point on 30 August 2012, entitled 'Complaint from an individual in India against a UK registered company'.

On receipt of the Application, the Steering Board were notified, and invited to declare their availability to participate in a Review. A Review Committee was established, comprising Jeremy Carver, Patricia Feeney and Lord Jordan, three of the External members of the Steering Board. On 14 September, the UK NCP submitted its written comments on the Application, and invited the Applicant and the other party to submit any comments thereon. The Applicant commented on 18 September. The other party has not commented.

The Review Committee has duly considered the material provided, including the Initial Assessment, and, pursuant to paragraph 6.1 of the Review Procedure, has determined how the Application may best be addressed. Following initial exchanges by e-mail and telephone between members of the Committee, the Committee has agreed the following Recommendation to the Steering Board.

The Application

The applicant, a professional advocate for the complainant, seeks review of the Initial Assessment on a point which he describes as "of some general importance", namely whether the NCP in making an Initial Assessment of a complaint, ought to have taken account of 'opinions of expert bodies': specifically, in this case, a request by the European Commission to the United Kingdom government in January 2011 to put an end to discriminatory legislation allowing for differential pay of non-UK seafarers linked directly or indirectly to their nationality.

The original complaint, as we understand it, concerns the discriminatory failure of her employer to provide her with an accessible grievance procedure to raise a grievance against her former employer. Neither the Applicant nor the NCP has seen fit to provide the Committee with a copy of the complaint, which is described in the Initial Assessment.

It is clear from the Initial Assessment that the NCP decided to reject the complaint because the allegations made on behalf of the complainant had not, in the NCP's view, been supported by sufficient evidence, and were

therefore not substantiated. The Application is based on the supposition that this lack of supporting evidence should have been remedied by the NCP, of its own volition, seeking and obtaining the request by the European Commission of January 2011.

Role of the Review Committee

The review process is intended to identify procedural errors in the NCP's decision-making, and to ensure that, if identified, they are corrected to the extent possible. It is not the function of the Review Committee to examine or rule upon the substance of the NCP's decision. Thus, the Application, rightly, does not seek review of the NCP's decision that the complaint is not supported by sufficient evidence. The Application is based on the single premise that the NCP failed to take account of an authoritative statement by the European Commission. This raises two questions:

- a. Is the NCP bound to take account, without it being drawn to its attention by a party to the complaint, of information available to the UK government? This is a question of a more general character. If answered in the affirmative, a second question arises:
 - b. Is the specific information identified by the Application sufficiently relevant to the complaint so as to give rise to a procedural error in making the Initial Assessment?
- A. *Is the NCP bound to take account of information not submitted by a party, but available to the UK government?*

The UK NCP Procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises makes clear that the function of the NCP in making its Initial Assessment is to "consider the **stated grounds** of the complaint and the information **it has received** about the complaint."¹ In the complaint form made available to all complainants, it is emphasized that the complaint should contain: "detailed information on the alleged breaches of the Guidelines and provide relevant information on developments"; and "detailed evidence and information that supports the allegations. Official documents, reports, studies, articles and witness statements can be considered. The UK NCP requires enough information to substantiate what has taken place."²

¹ See §3.1 of the Procedures (28 April 2008, amended on 16 September 2009, 25 January 2011 and 19 July 2011) <http://www.bis.gov.uk/policies/business-sectors/green-economy/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/complaints-procedures> - emphasis added.

² See Q4. and Q5. of Bringing a Complaint under the OECD Guidelines for Multinational Enterprises (11 Jun 2008, updated on 14 January 2011) same web-link.

Nothing in the Procedures requires the NCP to undertake independent research in considering a complaint, although we are aware that the NCP has, and will, inform itself about the facts and circumstances raised by the complaint. Where relevant, the NCP will cite such material in its draft statements, which are in all cases made available in advance to the parties so that they can comment on them.

In its comments on the Application, the NCP has noted, correctly in our view, that it

“relies chiefly on the information submitted in the complaint and response. The NCP may consult other sources to clarify points raised by this evidence, including legal aspects, but does not usually make a more proactive search for additional information.” (§4).

The NCP gives two reasons for this: first, it “minimizes the risk that the NCP’s decision is influenced by external information that may be partial, inaccurate or irrelevant, or that cannot easily be shared with the parties”, and, secondly, “particular care” needs to be taken in the case of legal opinion or interpretation of the law so that the NCP decision does not affect parties’ legal rights and remedies.

We accept both these reservations on the use of information, particularly legal opinion, obtained by the NCP independently of the parties. It cannot be the function of the NCP to make or strengthen the case of either party to a complaint. This would be a contradiction of its essential role to seek resolution of complaints properly submitted: ideally, by mediation; but failing that, by independent review of the facts and issues submitted to it by the parties.

Accordingly, we answer the first question in the negative. We do not consider that the NCP is bound to take account of information not submitted by a party.

B. *Is the specific information identified by the Application sufficiently relevant to the Complaint?*

Even if the NCP were bound to conduct independent research, and should have turned up the request by the European Commission of January 2011, would the actual statement on which this Application is based have had a material effect on the NCP’s decision?

The NCP admits that it did not see the specific Commission request. But we read the communication provided by the Applicant as bearing on pay discrimination, not on other aspects of employment conditions. As the complainant’s complaint is over her former employer’s failure to make available a grievance procedure accessible to her, we fail to see the relevance of the 11 January 2011 statement for her complaint.

We note the comment by the NCP that, in dealing with the complaint, it had obtained information from an internet search about issues affecting non-UK seafarers and the UK Race Relations Act, including EU concerns; but: "from the details reviewed, the NCP concluded that there was no significant relevance for the assessment and did not make a record" (§7).

In this case, where the NCP has decided to undertake limited research, it is not bound to reflect that research in its formal decision where it has concluded that such information is not relevant for its decision.

Accordingly, we answer the second question also in the negative. We do not consider that the European Commission statement, had it been known to the NCP, would have had any bearing on the decision made. This is particularly the case where independent research by the NCP disclosed some of the issues raised by the Commission statement, which the NCP concluded were not relevant for the complaint.

General comment

The NCP has raised an additional point concerning this Application, with which we have some sympathy. The NCP points out that, in addressing this complaint, it allowed considerable licence to the complainant's advocate in receiving late submissions. The Initial Assessment records the occasions when submitted additional material from the advocate after the complaint was received on 16 January 2012: on 28 February, 29 May, on 7 June, on 8 June, on 5 July, and then in comment on the draft decision during August.

There are risks in granting such licence to a party. All such submissions should, strictly, be shared with the other party, who thereby has the opportunity to respond. The Steering Board has emphasized many times that the primary usefulness of the complaint procedure is that it provides parties with an independent, inexpensive and, above all, prompt means of addressing complaints falling within the Guidelines. A party who fails to make timely and complete submissions defeats the object of the procedure when, in contrast, he seeks to dribble information and evidence to the NCP in an undisciplined manner.

We incline to the view expressed by the NCP that this Application seems to be another attempt by the Applicant to submit extra information in the hope that the Initial Assessment may be overturned. This is not the function of the review process.

Recommendation

The Review Committee recommends that the Steering Board should decline the Application for a review of the Initial Assessment, and should communicate the reasons for so doing as set out above³.

Jeremy Carver

Patricia Feeney

Lord Jordan

4 October 2012

³ No objections were raised by the Steering Board to the Review Committee's recommendation and under the Review Procedures it is therefore published as the final recommendation of the Steering Board.

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