

CONSEIL DE L'EUROPE—— ——COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 178/1994 (FENDER (I) v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Kåre HAUGE,
Mr Alan H. GREY, judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Mrs Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant lodged his appeal on 9 May 1994 and it was registered the same day under file No. 178/1994. He filed a supplementary memorial on 29 June 1994.
2. The Secretary General submitted his observations on 27 July 1994.
3. The appellant's reply was dated 22 September 1994.
4. The public hearing took place in Strasbourg, in one of the courtrooms of the European Commission of Human Rights on 23 January 1995. The appellant, Mr F. FENDER, was assisted by Professor J. WALINE; the Secretary General was represented by Mr G. BUQUICCHIO, Head of the Legal Advice Division, Directorate of Legal Affairs, who was assisted by Mr R. LAMPONI, Principal Administrative Officer in the Directorate of Legal Affairs.

THE FACTS

5. The appellant, a permanent staff member on grade C4, entered the Council of Europe's employment on 9 April 1985. He was assigned to the Publishing and Documentation Service, where latterly his duties consisted in machine maintenance.

6. From 18 September 1989 to 30 June 1990 he was on leave for personal reasons, taking a university degree in computer technology and mathematics.

Prior to that, on 26 May 1989, his superior had sent him a memorandum commenting adversely on his performance.

On his return to work he was assigned to the Computer Division from 1 July to 30 October 1990.

7. In a memorandum dated 21 September 1990 to the Head of Personnel, the Head of Computer Division said that the appellant lacked the basic skills for a particular type of work, that he had not fitted into the team despite performing his work satisfactorily, and that in two cases work had been interrupted as a result of the appellant's making unrectifiable technical errors and causing problems.

He concluded by stating that he saw no possibility of a place for him in Computer Division.

In a memorandum dated 10 October 1990 Mr Fender answered these observations one by one.

8. Meanwhile, on 3 October 1990, the Head of Publishing and Documentation had sent to the Head of Personnel Division a report referring to difficult relations between the appellant and his colleagues. He stated that Mr Fender's technical qualifications were not at issue but that his attitude and approach to his work were those of a technologist and inappropriate to his duties as a technician.

His conclusion was that, for personality reasons, Mr Fender was incapable of performing his duties in the workshop or fitting into the team.

In a memorandum dated 10 October 1990 Mr Fender replied to this report. He informed the Head of Personnel Division that there were two reasons for his difficult relations with his colleagues: firstly he had reported to his supervisors that his colleagues were careless in cleaning the machines which he was responsible for repairing and secondly he did not do any printing work - despite having been assigned to a post which involved printing work - because he was responsible for machine maintenance.

9. In a memorandum dated 24 October 1990 the Head of Personnel Division informed Mr Fender that, after studying the reports from the Head of Publishing and Documentation and the Head of Computer Division and Mr Fender's observations in reply, the Secretary General had decided to require him to serve six months' probation under Article 23 para. 3 (b) (iii) of the Staff Regulations, which reads:

“3. A contract for either a fixed or an indefinite period may be terminated at the end of a calendar month by:

(...)

b. the Secretary General, on one of the following grounds:

iii. manifest unsuitability or unsatisfactory work on the part of the staff member;

termination for either of these reasons may not occur unless the staff member has been formally asked to remedy his shortcomings during a 6-month probationary period and the probationary period has not had any positive results;

the decision concerning termination may be taken only after examination of the case by an *ad hoc* group comprising the Chairman of the Disciplinary Board and two staff members chosen by the procedure laid down for the Disciplinary Board; the staff member shall be given a hearing and may be assisted by a person of his choice; the *ad hoc* group shall formulate a reasoned opinion for the Secretary General;

the decision to terminate the contract shall carry prior notice of at least three months;”

In his memorandum the Head of Personnel Division formally requested that during the six-month probationary period the appellant remedy the shortcomings recorded in the aforementioned reports. He further informed him that the Secretary General had decided to assign him, with effect from 1 November 1990, to the Technical Resources Unit in the Directorate of Information and told him what his main duties would be.

The Head of Personnel Division concluded by stating that the Director of Information would write an assessment report on his aptitude for and performance of the work assigned to him.

10. On 30 May 1991 the Director of Information sent to the Head of Personnel a report stating that Mr Fender’s work could be regarded as generally satisfactory although his immediate superiors had noted some shortcomings, more particularly in his attitude.

The Director ended his report with a recommendation that the appellant be transferred to his Directorate in the interests of the service and to reinforce the unit.

11. On 1 June 1991 the Director of Information sent to the Head of Personnel the explanations the latter had requested concerning apparent contradictions between his report dated 30 May 1991 and a previous report dated 6 December 1990.

12. In an undated memorandum the Head of Personnel Division informed Mr Fender that, as the probationary period had not been without positive effect, the Secretary General had decided to discontinue the procedure set in motion under Article 23 para. 3 of the Staff

Regulations. The memorandum confirmed that with effect from 1 August 1991 Mr Fender was transferred to the Technical Resources Unit.

13. On 1 July 1992 the Head of Personnel sent to Mr Fender, for comment, two memoranda received from the Head of the Unit and dated 6 March and 24 June 1992 respectively. On 10 July Mr Fender submitted his comments, which dealt with the procedure followed and the content of the memoranda.

14. On 26 August 1992 the Head of Personnel informed Mr Fender that the Secretary General had decided, under Article 23 para. 3 (b) (iii) of the Staff Regulations, to have him serve a probationary period starting on 1 September 1992.

15. On 8 September 1992, under Article 59 of the Staff Regulations, Mr Fender submitted an administrative complaint to the Secretary General challenging the decision to have him serve a probationary period.

16. On 14 December 1992 the Head of Personnel informed the appellant that, in the light of the opinion which the Advisory Committee on Disputes had delivered under Article 59 of the Staff Regulations, the Secretary General had decided to withdraw the decision to have him serve a probationary period.

17. On 8 March 1993 Mr Fender lodged a further administrative complaint concerning a memorandum dated 4 March 1993 from the Director of Administration in which the Administration replied to his memorandum dated 17 February 1993. In this memorandum the appellant had requested that the monthly reports on him in connection with the second probationary period be removed from his file. A memorandum dated 8 March from the Administration to Mr Fender enclosed a copy of the assessment report for November 1992, written by the Head of the Technical Resources Unit on 2 February 1993.

In his complaint Mr Fender asked that the complaint be referred to the Advisory Committee on Disputes under Article 59 para. 4 of the Staff Regulations.

18. On 30 March 1993 the Head of Personnel informed Mr Fender that the Secretary General had decided, under Article 23 para. 3 (b) (iii) of the Staff Regulations, to place him on probation with effect from 1 April 1993. The memorandum, which had the same wording as the previous two memoranda on the same subject, further stated that the head of service would write progress reports at the end of each month in addition to the final assessment report.

19. On 26 April 1993 the Advisory Committee on Disputes delivered its opinion. It expressed the view that the monthly reports written before the withdrawal of the decision to put the appellant on probation should remain in his personal file. With regard to the report written on 2 February it held that "once the decision to place Mr Fender on probation had been withdrawn by the Secretary General the preparation of a report as part of the probationary procedure could have no legal basis.

If, therefore, the report [of the head of the Unit] had been prepared after the decision to discontinue probation, it should be withdrawn from Mr Fender's personal file. It ought not

to have been drawn up for the purposes of a procedure which was no longer in force and required to be distinguished from the other documents which, in the Committee's view, are rightly in Mr Fender's file as a matter of record."

20. On 22 October 1993 the head of the unit sent the Head of Personnel the overall report. On 29 October 1993 the appellant submitted his comments.

21. On 20 December 1993 the *ad hoc* Group provided for in Article 23 para. 3 (b) (iii) delivered its opinion.

22. In a decision dated 25 January 1994 the Secretary General terminated Mr Fender's contract with effect from 1 May 1994.

23. On 15 February 1994 the appellant submitted an administrative complaint. This contended that the decision to terminate his contract contravened the Staff Regulations and general principles of international civil service law and requested that the case be reconsidered and the termination stayed. The complaint was dismissed on 28 February 1994.

THE LAW

24. The appeal challenges the Secretary General's decision of 25 January 1994 terminating the appellant's contract under Article 23 para. 3 (b) (iii) of the Staff Regulations.

25. The appellant firstly alleges that the decision of 28 February 1994 dismissing the administrative complaint of 15 February 1994 was flawed in that it consisted in a mere memorandum signed by a person who was not competent to take such a decision. In addition the memorandum did not even state that authority had been delegated to its signatory. The appellant maintains that this in itself renders the decision of 25 January 1994 invalid in that it results from a serious procedural irregularity.

26. On the merits the appellant submits five grounds of appeal.

Firstly, he maintains that the decision of 30 March 1993 to have him serve a period of probation is null and void, being tainted by a serious procedural defect in that the Secretary General based her decision on a document - the report by the Head of the Technical Resources Unit dated 2 February 1993 - which the Advisory Committee on Disputes has expressly held to lack any legal basis.

He also alleges an illegality in that the decision to have him serve a further probationary period was taken on 30 March 1993 - that is, without waiting for the Advisory Committee on Disputes, to which the matter was referred on 8 March 1993, to deliver its opinion.

In addition he maintains that the decision terminating his employment was flawed by a clear misassessment of the case, as attested by the huge disproportion between the penalty, of virtually unprecedented harshness, and the alleged offences.

He also submits that the decision complained of constituted a misuse of procedure in that it was a disciplinary measure in disguise.

Lastly it is contended that the decision was illegal in that the opinion of the *ad hoc* Group was not communicated to Mr Fender, contrary to the principle of adversariality and in contravention of defence rights.

27. The Secretary General maintains that the appeal is unfounded.

With regard to the objection that the decision was not taken by a competent person, he argues that the Director of Administration was undoubtedly competent to deal with the administrative complaint even though, formally, it was addressed to the Secretary General. He adds that the Director of Administration acted with the then Secretary General's consent. Pointing out that the Administrative Tribunal has never raised any problem of competence in this connection, he submits that in any case the question is of no great practical relevance since if the memorandum were to be declared null the situation would be comparable to a tacit rejection, which would have the same effects.

28. On the merits the Secretary General submits that the decision complained of was unobjectionable from the formal standpoint and that the procedure was correctly adhered to. He further argues that if the Administrative Tribunal were to find that the reference in the memorandum of 30 March 1993 to the report of 2 February constituted a procedural irregularity, the irregularity would be a very minor one and would not vitiate the procedure as a whole since the Secretary General's decision was based on other evidence - namely the reports of 2 March and 24 June 1992 and the file as a whole.

He further submits that there was no manifest misassessment of the case and that the Secretary General drew the necessary conclusions from the evidence in the file.

Further, there was no misuse of power and there is nothing to support the assertion that the termination of the contract was a disguised disciplinary measure.

Lastly he maintains that defence rights were scrupulously observed.

29. The Administrative Tribunal must therefore consider firstly the appellant's contention that the decision dated 28 February 1994 to dismiss his administrative complaint was not taken by a person competent to deal with the matter.

The Tribunal notes that the Director of Administration's memorandum setting out the dismissal decision started with the following words: "With reference to your administrative complaint of 15 February 1994, I am instructed by the Secretary General to reply as follows". Further, in his memorial of 27 July 1994 to the Administrative Tribunal, the Secretary General stated that the Director of Administration had acted with his consent.

Be that as it may, in the Tribunal's view Article 59 of the Staff Regulations cannot be interpreted in such a way as to infer from it, as the appellant does, that there was an irregularity which vitiated the whole procedure, including the previous part of it with which

the administrative complaint was concerned, even though it is desirable that a decision on an administrative complaint be taken and signed by the Secretary General.

In addition, the Tribunal agrees with the Secretary General that if the memorandum were to be declared null, the resultant situation would be comparable to a tacit rejection, which would have the same effects.

This ground of appeal must therefore be dismissed.

30. On the merits the appellant argues firstly that the decision of 30 March 1993 to have him serve a probationary period was null in that it was based on a document - the report of 2 February 1993 by the Head of the Technical Resources Unit - that in the opinion of the Advisory Committee on Disputes no longer had any legal basis.

31. The Secretary General maintains that the appellant was time-barred from challenging the decision of 30 March 1993 since he failed to do so within the prescribed 60-day period.

The appellant for his part maintains that this is undoubtedly to misunderstand the intention of his appeal. He says that he has never, as such, requested the annulment of the decision of 30 March, though he is convinced that if he saw fit he would be entitled to do so since that decision was a preliminary decision whose legality may be contested in any challenge to the final decision. He states, however, that he does not seek to contest its legality. He observes that, on the Administration's own admission, the report of 2 February 1993 was one of the grounds for the decision of 30 March. The latter decision, he contends, was illegal because it rested on a ground from which no basis for it could legally be derived and because that ground was a decisive one and in no way supererogatory.

In view of this clarification from the appellant the Tribunal does not consider it necessary to rule on the Secretary General's objection.

32. The Tribunal notes that in the decision of 30 March the Secretary General referred not only to this report but also to those dated 6 March and 24 June 1992 which resulted in the second decision to have the appellant serve probation. The Secretary General states that the report of 2 February merely confirmed the inadequacies which had already been put on record.

The Tribunal observes that the parties have presented submissions as to the nature of this document: in the appellant's view it is relevant only to the second probation decision whereas in the Secretary General's view it belongs in the personal file on Mr Fender which is provided for in Article 46 para. 2 of the Staff Regulations.

The Tribunal lastly notes that the Advisory Committee on Disputes - whose opinions are not binding on the Secretary General - held as follows: "The Committee is of the opinion that once the decision to put Mr Fender on probation had been withdrawn by the Secretary General the preparation of a report as part of the probationary procedure could have no legal basis. Accordingly, if [the Head of the Unit's] report was prepared after the decision to discontinue probation, it should be withdrawn from Mr Fender's personal file: it ought not to have been drawn up for the purposes of a procedure which was no longer in force and it

required to be distinguished from the other documents which, in the Committee's view, are rightly in Mr Fender's file as a matter of record".

33. The Tribunal for its part notes that in his report dated 2 February the Head of the Technical Resources Unit, as well as referring to a memorandum that one of his colleagues sent him on 8 December 1992, states that he has "had to hold back the report until Mr Fender's return to work on 27 January 1993" (Mr Fender having taken annual leave just before Christmas and having then been on sick leave since the beginning of January).

The Tribunal accepts that there is legitimate room for doubt as to whether the report was actually written before or after the Secretary General's decision to discontinue probation and therefore as to whether it was appropriate to add it to Mr Fender's personal file.

It observes, however, that the memorandum of 30 March 1993 requiring Mr Fender to serve a further probationary period also refers to two previous reports dated 6 March and 24 June 1992. It was these which gave rise to the second imposition of probation, the one which was withdrawn - on account of a procedural irregularity - when the Advisory Committee on Disputes delivered its opinion (the committee expressed the view that before being required to serve a period of probation Mr Fender should have been given a reasonable opportunity to improve his performance).

34. Even assuming the report of 2 February was not a valid basis for imposing a further probationary period, the other two reports were. It must also be pointed out that there had likewise been monthly reports - written before the Secretary General's decision to rescind the second imposition of probation - which formed part of the appellant's personal file.

In this ground of appeal the appellant seeks a finding that the third imposition of probation was null and void, but on the basis of the foregoing the Tribunal cannot so find.

35. In his second ground of appeal the appellant argues that the third probation procedure was illegal in that the decision to impose probation was taken before the Advisory Committee on Disputes had delivered its opinion on the administrative complaint of 8 March 1993.

36. As will be remembered, the issue in that administrative complaint was whether it was permissible for documents produced in connection with the second probationary period, especially the report of 2 February 1993, to be included in Mr Fender's personal administrative file. In the Tribunal's view the Secretary General was not legally bound to defer deciding whether to have Mr Fender serve a third probationary period until the Advisory Committee on Disputes had delivered its opinion. It was for the Secretary General to decide whether it was better not to impose the further probationary period until the Advisory Committee on Disputes had delivered its opinion and she (the then Secretary General) had replied to the administrative complaint. Clearly, however, if at this or a later stage any finding of irregularity were delivered, there would have been an obligation on the Secretary General to draw the appropriate conclusions with regard to imposing the third probationary period and allowing it to proceed further.

37. Under the first ground of appeal the Tribunal has already expressed its views on the

status of the various documents referred to in the decision of 30 March.

Having concluded that the reports of 2 March and 24 June 1992 and the monthly reports which were subsequently written - and which were in the personal file - were a sufficient basis for imposing the third probationary period, the Tribunal likewise dismisses the second ground of appeal.

38. In his third ground of appeal the appellant alleges manifest error on account of the disproportion between the harshness of the measure imposed and the charges against him. In addition he maintains that the decision complained of rested on factual inaccuracies.

39. The Tribunal firstly points out that in disputes it cannot substitute its own judgement for that of the Administration. It must, however, satisfy itself that the decision complained of was taken in accordance with the regulations and with the general principles of law which must prevail in the legal systems of international organisations (ABCE n° 165/1990, Vangeenberghe v. Secretary General, decision of 26 June 1992, paragraph 36).

40. In this connection the Tribunal notes that there had been numerous adverse reports on the appellant since May 1989, in three different departments.

Certainly, during the third probationary period, there had been a favourable assessment from a department for which Mr Fender had done good work. The Tribunal further notes that, on the whole, Mr Fender's technical skills were not disputed and that the criticisms were of his personality and inability to fit into a team.

41. However, in deciding to have him serve a third probationary period and in deciding to terminate the contract, the Secretary General did not take account solely of the appellant's conduct immediately before and during the probationary period.

42. Again, international tribunals have held that there is legal error where a disciplinary measure against a staff member appears to be out of all proportion to the objective and subjective circumstances in which the offence was committed (see ILOAT, Judgments No. 203 of 14 May 1973 and No. 349 of 8 May 1978).

43. In the Tribunal's view that necessarily also applies to the special procedure provided for in Article 23 of the Staff Regulations. In the present case, however, there is no reason to conclude that the termination of the contract was out of all proportion to the charges.

44. As to the fourth ground of appeal, the Tribunal notes that the appellant has not supplied any evidence that the termination was a disciplinary measure in disguise. Nor has he even shown why the Secretary General should wish or be obliged to use a disciplinary measure in disguise. The appellant has not indicated why the Secretary General wanted or was obliged to use a disciplinary measure in disguise rather than institute proper disciplinary proceedings. The Tribunal cannot accept the sweeping assertion that there was a desire to get rid of Mr Fender on account of his endeavours to improve his qualifications. It points out that it is for the appellant to provide compelling evidence that the administrative decision complained of was prompted by bias (see ABCE, decision of 26 June 1992, Beygo v. Secretary General, paragraph 44).

45. The appellant lastly complains that the *ad hoc* Group's opinion was not communicated to him, contrary to the principle of adversariality and in contravention of defence rights.

The Tribunal points out that Article 23 para. 3 (b) (iii) provides: "the *ad hoc* group shall formulate a reasoned opinion for the Secretary General" (see paragraph 9 above). The *ad hoc* Group completes its remit when it adopts its opinion and it is for the Secretary General to take his decision. The Tribunal accordingly cannot see in what respect there was any breach of defence rights. As soon as the Secretary General took his decision the appellant had the opportunity to present his defence grounds.

It is certainly desirable that the opinion be notified immediately to the staff member concerned and it is no less desirable that, as in disciplinary proceedings, the Secretary General give the staff member a hearing before taking his decision. However, failure to meet these desiderata cannot be regarded as contravening the legal principles which must govern a procedure of this kind or, more particularly, an infringement of defence rights. In the matter of defence rights, Mr Fender was given a hearing by the *ad hoc* Group and had the opportunity to defend himself properly at that stage in the proceedings. In addition he subsequently had the opportunity to put his case to the Tribunal and have it rule on the lawfulness of the procedure.

46. In conclusion the Tribunal cannot find any illegality.

For these reasons the Administrative Tribunal:

Declares the appeal unfounded;

Dismisses it; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 24 February 1995, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. RUSSO

Appendix

CHAIRMAN'S ORDER OF 2 MARCH 1994

in the case FENDER v. Secretary General

THE FACTS

1. The complainant, who entered the Council of Europe service in 1985, is a permanent official in the Directorate of Information, Audio-visual Resources Unit.
2. On 30 March 1993 the Secretary General, acting in accordance with Article 23 para. 3 (b) (iii) of the Staff Regulations, decided to put the complainant on probation for a period of six months as from 1 April 1993, during which he was formally asked to remedy the shortcomings which his immediate superiors had found in his work.
3. On 17 January 1994 the Secretary General, having taken note of the report on the complainant's work at the conclusion of the probationary period, and of the opinion of the *ad hoc* group provided for in Article 23 para. 3 (b) (iii) of the Staff Regulations, decided to terminate the complainant's contract with effect from 1 May 1994. The Secretary General held that the complainant had not remedied the shortcomings found.
4. On 15 February 1994 the complainant lodged a complaint with the Secretary General, under Article 59 para. 1 of the Staff Regulations, against the above decision. He alleged that the decision was contrary not only to the provisions of the Staff Regulations, in particular those of Article 23 para. 3 (b)(iii), but also to general international civil service principles. He complained of procedural defects and incorrect assessment of his efficiency in performing his duties.
5. On 17 February 1994 the complainant applied to the Chairman of the Appeals Board for a stay of execution of the decision to terminate his contract.
6. On 18 February 1994 the Chairman of the Appeals Board invited the Secretary General to submit any comments on the application for a stay of execution.
7. The Secretary General submitted her observations by letter of 23 February 1994. These were disclosed to the complainant the same day. No reply has been received.

THE LAW

8. Under Article 59 para. 7 of the Staff Regulations, a complainant may apply for a stay of execution of an act of the Administration if its execution is likely to cause "grave prejudice difficult to redress".
9. The complainant submits in support of his application that the execution of the

contested act would cause him grave prejudice difficult to redress, in consequence of the present labour market situation.

10. The Secretary General maintains that in the event of the contested act being confirmed and, after appeal proceedings, set aside by the Appeals Board, the outcome would be the reconstruction of the complainant's career and the payment of salary arrears. In addition, the Appeals Board might order redress of any other damage arising from the contested act.

11. The Chairman of the Appeals Board considers that in itself, and in the absence of specific circumstances, the termination of the complainant's contract which occurred following the application of the procedure prescribed by Article 23 para. 3 (b)(iii) of the Staff Regulations does not constitute an eventuality which would cause the complainant "grave prejudice difficult to redress" within the meaning of Article 59 para. 7 of the Staff Regulations.

12. The Chairman finds that the complainant's supporting argument does not suffice to establish that the execution of the act in question would cause him "grave prejudice difficult to redress". It should be noted in particular that, as the Secretary General specified in her observations, in the event of the contested act being set aside following an appeal procedure before the Appeals Board, the complainant's career would be reconstructed and salary arrears would be paid.

13. The Chairman points out that it is his duty to show restraint in the exercise of the exceptional power conferred on him by Article 59 para. 7 of the Staff Regulations (cf. Chairman's Order of 31 July 1990, paragraph 12, in the case of Zaegel v. Secretary General). Furthermore, the Chairman of the Board is not, at this stage, in a position to examine the submissions made by the complainant in the context of his complaint.

14. It follows from the foregoing considerations that the application for a stay of execution is unfounded.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59 para. 7 of the Staff Regulations, Article 8 of the Statute of the Appeals Board and Article 21 of the Rules of Procedure of the Appeals Board,

Having regard to the urgency of the matter,

I, CHAIRMAN OF THE APPEALS BOARD,

Decide

- to reject the application for a stay of execution submitted by Mr Fender.

Done and ordered in Savona, 2 March 1994.

The Deputy Secretary of the
Appeals Board

C. WESTERDIEK

The Chairman of the
Appeals Board

C. RUSSO