

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

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No 192/1994 (FENDER (II) v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Kåre HAUGE,
Mr Alan GREY, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr FENDER lodged his appeal on 10 October 1994. The same day it was registered under file No 192/1994.
2. His representative, Mr C. GAILLOT, lodged a supplementary memorial on 8 October 1994 and another on 9 December 1994.
3. On 2 February 1995 the Secretary General submitted his observations on the appeal. The appellant filed observations in reply on 20 March 1995. The Secretary General filed observations in reply to these on 12 April 1995.
4. The public hearing took place in Strasbourg, in the courtroom of the European Court of Human Rights, on 23 May 1995. The appellant, Mr F. FENDER, was represented by Mr GAILLOT, of the Luxembourg Bar ; the Secretary General 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. In a decision dated 25 January 1994 the Secretary General terminated his contract with effect from 1 May 1994 under Article 23 para. 3 (b) (iii) of the Staff Regulations, whereunder a contract for either a fixed or an indefinite period may be terminated at the end of a calendar month by the Secretary General on the ground of "manifest unsuitability or unsatisfactory work on the part of the staff member".

6. On 15 February 1994 the appellant lodged a complaint seeking to have the decision set aside. The complaint was dismissed on 28 February 1994. On 9 May 1994 he lodged an appeal (No. 178/1994) against the decision of 25 January 1994 to terminate his contract. The Administrative Tribunal declared the appeal unfounded on 24 February 1995.

7. The appellant also claimed payment of the severance grant provided for in Article 11 of the Pension Scheme Rules. In a letter dated 20 June 1994 the Deputy Director of Administration informed him that it had been decided to defer payment of the severance grant because he had appealed against the decision to terminate his contract on 30 April 1994 and the grant would not be payable if the appeal were successful and the decision annulled.

8. On 22 July 1994 the appellant lodged a complaint against this decision. In particular he argued that the appeal did not have suspensive effect and that the dismissal decision must accordingly be given full effect, which included paying the severance grant. The complaint was dismissed in a letter dated 12 August 1994 and signed by the Director of Administration.

9. On 1 September 1994 the Council of Europe paid Mr Fender an initial advance (amounting to less than 15% of the severance grant) on any sums due to him.

10. On 17 and 21 January 1995 it paid further advances on the severance grant (each amounting to slightly over 15% of the severance grant) and then paid him the balance of the grant (slightly over 50% of the total sum) on 9 March 1995. The interest due was paid to him on 12 April 1995. A disagreement having arisen between the parties as to the amount of interest payable, he received the balance on the day of the Tribunal hearing.

THE LAW

11. On 10 October 1994 the appellant lodged his appeal against the Secretary General's decision dated 12 August 1994 withholding the severance grant. He asked the Tribunal to order that the Council of Europe pay him the severance grant, interest on it, a lump sum of 50,000 French francs and a sum to cover his legal costs.

12. He points out that under Article 11 of Appendix V to the Staff Regulations a staff member, on leaving, is entitled to payment of the severance grant and that under Article 60 para. 4 of the Staff Regulations an appeal to the Administrative Tribunal does not have suspensive effect. He argues that the dismissal decision accordingly had full legal effect, consisting in termination of his employment and loss of salary but also in payment of the severance grant, and observes that the Secretary General has not replied to this ground of

appeal. He says that the refusal to pay the grant was discriminatory and caused him severe financial difficulty “no doubt intended to deter him from lodging his first appeal”. He adds that the Council of Europe Financial Rules are general in scope and do not override a special provision such as Article 60 of the Staff Regulations.

13. Having been paid the balance of the grant and the interest (see paragraph 10 above) he is now claiming only payment of 50,000 French francs in damages with interest in respect of late payment of the grant.

14. The Secretary General’s position is that if, in Appeal No 178/1994, the Tribunal had set aside the decision terminating the appellant’s contract, the appellant would have been reinstated in his duties with retroactive effect from 1 May 1994 and the severance grant would not have been payable and that the decision to defer payment of the grant pending determination of Appeal No 178/1994 was therefore justified. In addition the Secretary General contends that the decision to defer payment was dictated by “the principles of economy and sound financial management” by which he is bound under Article 2 of the Council of Europe Financial Regulations and was not prompted by bias against the appellant, of which the appellant, he says, has not presented any evidence.

15. He further submits that the grant is not automatically payable compensation and that its purpose is not to ensure income after loss of employment but to enable the staff member to make retroactive pension contributions to another scheme. Thus, he maintains, the appellant is not entitled to claim damages with interest. He further states that, in a spirit of equity, the Council of Europe paid an advance on any sums due to the appellant and that the appeal has now been rendered redundant, therefore inadmissible, by payment of the grant and the interest on it.

16. On the Secretary General’s objection that the appeal is inadmissible, the Tribunal holds that the subject of Mr Fender’s second appeal is different from that of his first and that the Tribunal’s dismissal of the first appeal does not affect the relevance of the appellant’s claim, which relates to the time taken to pay the severance grant and not to the payment itself. The appellant could of course have raised this issue in the first appeal but it was entirely up to him to decide what course of action to take. In addition, and above all, the Tribunal notes that when, on 23 February 1994, the appellant lodged the complaint in which his first appeal originated (see paragraph 23 of the Tribunal’s decision of 24 February 1995), he did not know that there was going to be a problem over payment of his severance grant.

The Secretary General’s objection must therefore be dismissed.

17. At the hearing on 23 May 1995 the appellant stated that, as a result of the Secretary General’s making the final payment that same day, his claim had been met in so far as payment of the severance grant was concerned and that there remained only the issue of payment of damages with interest, under which head he claims the sum of 50,000 French francs.

The Tribunal therefore requires to determine this claim.

18. The appellant bases it on grave prejudice allegedly suffered as a result of being paid the grant not at the end of his contract but a year later. He states that this injury must not be

confused with the injury caused by monetary depreciation, which, as in the present case, is remedied by payment of interest for delay.

In this connection he observes that Council of Europe staff are not entitled to unemployment benefit. He points out, too, that a former staff member is free to use the severance grant as he sees fit: even though, as stated by the Secretary General, the purpose of the severance grant is to return pension contributions deducted from salary to the staff member so as to enable him to buy pension entitlement with other pension schemes, he is free to do with the money as he wishes. The appellant points out that he personally found himself in very straitened circumstances.

19. The Secretary General maintains that any order that he pay damages would have to be made under Article 60 para. 2 of the Staff Regulations but that the requirements for applying that provision are not met in the present case.

Firstly, he says, his decision to defer payment of the severance grant until the Tribunal had determined Mr Fender's first appeal was lawful in that the Secretary General is required to conduct the financial administration of the Organisation "in accordance with the principles of economy and sound financial management" (Article 2 of the Financial Regulations).

Secondly, there has to be a causal link between the challenged decision and the alleged injury: the injury which the appellant alleges consists in having been deprived of income for a time whereas the purpose of the severance grant is not to provide a staff member who leaves the Organisation with income but to enable him to buy pension entitlement retroactively. He argues that it remains entirely possible for the appellant to do so and that the reason for his finding himself without income was not that he had not received the grant but that he had lost his employment.

20. The Tribunal would make the initial point that the present case solely concerns payment of the severance grant where there is a dispute in which the staff member's dismissal is being challenged.

21. Secondly it would point out that an award of compensation to the appellant does not require annulment of the decision challenged: injury such as is alleged in the present claim is possible even though the Tribunal has already found that the Secretary General's decision to terminate Mr Fender's contract was not illegal.

22. The Tribunal accepts the appellant's contention that he is entitled to use the severance grant as he sees fit without being under any obligation to purchase pension entitlement.

23. Lastly it notes that the appellant bases his claim on pecuniary damage other than the delay - remedied by payment of interest - in paying him the severance grant. He does not claim compensation for non-pecuniary damage.

24. However, he has not established that he has suffered the alleged damage -though he refers, for instance, to having had to give up his accommodation and move in with his mother and to having had to sell his motor car - and in particular he has not established any causal link between the alleged damage and the Secretary General's decision to await the Tribunal's

decision in the first appeal. In addition he does not itemise his claim but requests a lump sum (see paragraph 11 above).

Further, there is no provision which specifies how soon the Secretary General must pay the severance grant, regardless of the reason for the staff member's leaving the Council of Europe. The provisions on which the appellant relies do not make any stipulation in the matter.

There is therefore no illegality to be found.

25. The appellant likewise contends that delaying payment of the grant amounts to trying to deter staff from lodging appeals for fear of not being paid the grant and finding themselves in financial hardship. In addition he alleges outright bias against him.

26. The Tribunal notes that he has not desisted from exercising his rights, though his counsel stated at the hearing that he had several times told him he intended doing so.

It does not underestimate the force of the appellant's argument. It would point out, however, that in both the first and second appeals, although the stay-of-execution procedure is available only in cases where execution of the challenged decision is liable to cause grave prejudice difficult to redress, the appellant, if faced with financial hardship, could have applied to the Tribunal for an order on the matter under Rule 42 of its Rules of Procedure. In the event he applied only to the Secretary General, stating that he was prepared to offer a guarantee that, if necessary, the grant would be repaid.

27. The Tribunal would nonetheless draw the Secretary General's attention to the problems which delayed payment of the severance grant might cause. A staff member's circumstances might change in the time that elapsed between his leaving the Council and payment of the grant: at worst he might become incapacitated or even die before acquiring new pension entitlement through some other scheme. To allow the possibility of such occurrences runs counter to the principles governing the Council of Europe's own provident scheme.

28. On the charge of bias the Tribunal points out that it is for an appellant to present compelling evidence that the decision against him was actuated by bias (see ABCE, decision of 26 June 1992, *Beygo v. Secretary General*, paragraph 44). In the present case the Tribunal notes that the appellant's allegations are not supported by any evidence.

29. To sum up, no illegality is to be found.

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 29 September 1995, the French text being authentic.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. RUSSO