

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeals Nos. 485/2011 and 509/2011 (J. de la P. L. (I) and (II)
v. Governor of the Council of Europe Development Bank)**

The Administrative Tribunal, composed of:

Mr Georg RESS, Deputy Chair,
Mr Angelo CLARIZIA,
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr J. de la P. L. lodged his first appeal on 24 June 2011. This appeal was registered under No. 485/2011 on the same day.
2. The Chair acceded to the appellant's request for anonymity.
3. On 1 August 2011 the Governor submitted his observations on the appeal.
4. On 28 September 2011 the appellant lodged his second appeal, which was registered under No. 509/2011 on the same date.
5. On 28 September the appellant also submitted an application for a stay of execution of the act complained of (Article 59, paragraph 9, of the Staff Regulations).
6. The Chair dismissed this application in an order issued on 10 October 2011.

7. On 14 November the appellant filed further pleadings in Appeal No. 508/2001. The appellant's observations in reply in his first appeal were appended to this document.

8. On 12 December 2011, the Governor submitted his memorial in the second appeal proceedings. On 12 January 2012 the appellant submitted his observations in reply.

9. Having initially been scheduled for 25 January 2012, the public hearing in both appeals finally took place in the Administrative Tribunal's hearing room in Strasbourg on 20 March 2012. The appellant was represented by Maître J.-P. Cuny, and the Governor by Maître J.-M. de Forges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Appeal No. 485/2011

10. The appellant, a Spanish national, had been recruited on 1 October 2008 by the Council of Europe Development Bank (the Bank). He held a grade A2 post and had been assigned to the Directorate General for Loans, where he worked as a Country Manager.

He had been recruited to a permanent post as a permanent staff member on probation, with a three-year fixed-term contract.

11. The first appraisal report was drawn up on 10 March 2009, and the appellant signed it on 14 March 2009.

12. On 16 September 2009 the Bank proposed that the appellant represent it in Luxembourg on the team for the JESSICA (Joint European Support for Sustainable Investment in City Areas) Programme run by the European Investment Bank.

The appellant represented the Bank in this capacity from 2 November 2009 to 31 December 2010.

13. Meanwhile, on 30 October 2009, the appellant's second appraisal report was issued.

14. The appellant received his third appraisal report on 11 June 2010.

15. On 30 March 2011 the fourth and last appraisal report for the probationary period was issued. The section of the report containing the recommendation by the head of the major administrative entity, which appears only in the last appraisal report, read as follows:

"Despite manifest goodwill and the efforts expended, the weaknesses identified at the first appraisal interview are still there after 30 months, jeopardising this staff member's prospects as a

Country Manager. Consequently, I do not recommend the staff member's final appointment on a permanent contract."

16. The appellant submitted his comments within five days.

17. On 29 April 2011 the appellant submitted a complaint to the Governor. He pointed out that he had no choice but "to initiate a complaint procedure in line with the provisions of Article 59.1 of the Staff Regulations". He added that he challenged the fourth appraisal report of 31 March 2011 with respect to the form, and requested the Governor to replace it with the form for confirmed staff members, with all the implicit consequences.

18. On 16 May 2011, the Director of Human Resources informed the appellant that she would be advising the Governor to terminate his employment on 30 September 2011, the date of expiry of his three-year contract, corresponding to the probationary period.

19. On 24 May 2011 the appellant forward to the Governor his observations on the proposal from the Director of Human Resources.

20. On 27 May 2011 the Director of Human Resources, acting on the Governor's instructions, informed the appellant that his administrative complaint of 29 April 2011 had been deemed inadmissible because it did not concern an administrative act adversely affecting him.

21. On 24 June 2011 the appellant submitted the present appeal to the Tribunal.

B. Appeal No. 509/2011

22. On 16 May 2011, following the above-mentioned events, the Director of Human Resources informed the appellant of her intention to advise the Governor to terminate his employment on 30 September 2011, that is to say at the end of the probationary period. On 24 May 2011 the appellant submitted his observations.

23. On 21 June 2011 the Director of Human Resources informed the appellant that the Governor had decided to terminate his employment on 30 September 2011.

24. On 12 July 2011 the appellant submitted an administrative complaint, which the Governor dismissed on 5 August 2011.

25. On 28 September 2011, the appellant lodged the present appeal with the Tribunal.

II. THE BANK'S INTERNAL REGULATIONS

26. The Council of Europe Development Bank (the Bank) – formerly Social Development Fund and, before that, Council of Europe Resettlement Fund – was set up in 1956 under a Council of Europe Partial Agreement.

In its decisions of 29 September 1995 in Appeals Nos. 189 and 195/1994, 190, 196, 197/1994 and 201/1995, the Tribunal provided an overview of this institution and the rules governing its functioning. It is sufficient here to recall that, under the terms of Article 11 Section 1 d) of the Articles of Agreement of the Bank, the Council of Europe Staff Regulations are applicable to staff of the Bank in any matter not covered by a specific decision of the Bank's Administrative Council.

27. The matter of secondment is governed by Article 5 of Appendix II (Regulations on appointments) to the Staff Regulations. The relevant provisions are as follows:

“Article 5 – Staff movements

A. Transfers

(...)

B. Secondments

4. Any staff member confirmed in employment for an indefinite duration may be seconded to work with or without maintenance of his or her remuneration for a limited period for another international organisation, or national, local or regional administration.

5. The maximum period of secondment shall not exceed three years in the career of a staff member. This period may be extended in exceptional cases by a maximum period of three years by decision of the Secretary General. Periods of secondment shall not be taken into account within the context of Appendix VII to the Staff Regulations (Regulations on leave for personal reasons). If the staff member accepts a secondment at the request of the Secretary General, the time spent on such a secondment shall not be taken into account for the purposes of the calculation of the maximum period foreseen by this Article.

6. The Governor will establish, by a General Rule, the modalities for and conditions under which such secondments will take place, with the proviso that staff members' obligations and entitlements under the provisions of the Staff Regulations will not be diminished.

7. The Governor shall also comply with the special procedures laid down in Article 21.”

THE LAW

I. JOINDER OF APPEALS

28. Given the connection between Appeals Nos. 485/2011 and 509/2011, the Administrative Tribunal orders their joinder pursuant to Rule 14 of its Rules of Procedure.

II. SUBMISSIONS OF THE PARTIES

As to Appeal No. 485/2011, in his appeal form the appellant stated that he considered null and void the grounds on which his complaint had been dismissed and asked the

Tribunal “to replace [the appraisal form] with the form for confirmed staff members, with all the implicit consequences”.

In his observations in reply, the appellant stated that he maintained the conclusions set out in his appeal.

Lastly, the appellant requests the sum of 6 500 euros to reimburse all the costs occasioned by this appeal and also by Appeal No. 509/2011.

30. The Governor asks the Tribunal to dismiss this appeal without further consideration.

He leaves it to the Tribunal to decide the question of costs.

31. As to the second appeal (No. 509/2011), the appellant asks the Tribunal to annul the Bank’s decision to terminate his contract.

32. For his part, the Governor asks the Tribunal to dismiss the appeal without further consideration.

Here too, the Governor leaves it to the Tribunal to decide the question of costs.

A. Appeal No. 485/2011

1) The admissibility of the appeal

The Governor

33. After reiterating the Bank’s provisions on appointments (Appendix II to the Staff Regulations) and appraisal (Rule of the Governor No. 2/2008), the Governor states the need to pinpoint the purpose firstly of the administrative complaint and secondly of the appeal before the Tribunal. In his view, the purpose is clear: both are directed against the appellant’s fourth appraisal on 31 March 2011.

34. In view of the fact that under the terms of Article 59, paragraph 2, last sentence, of the Staff Regulations, “[t]he expression ‘administrative act’ shall mean any individual or general decision or measure taken by the Governor”, there is no doubt in the latter’s mind that an appraisal report cannot constitute a decision and that it does not necessarily originate from the Governor, as in the instant case.

35. The Governor adds that the report complained of ends with an opinion from the appraisers which cannot be attributed to himself because, precisely, he was its addressee. He therefore considers that the appraisal report is one part of a complex procedure which can under no circumstances be treated as equivalent to an “administrative act” within the meaning of Article 59, paragraph 2, of the Staff Regulations.

The appellant

36. In the appellant's view there can be no doubt that appraisal reports constitute administrative acts and can be the subject of an administrative complaint and a subsequent appeal. On this point he refers to the case-law of the Tribunal and other international judicial bodies.

37. The appellant therefore requests that his appeal be declared admissible.

2) The merits of the appeal

The appellant

38. The appellant states that he is requesting in his appeal to be considered as a permanent staff member. He contends that if only staff members confirmed in employment for an indefinite duration can be seconded, and given that the appellant was seconded to the JESSICA Taskforce, it can be inferred that the appellant should be considered as a staff member confirmed in employment for an indefinite duration.

39. According to the appellant, "if the fact of being a permanent staff member is a prerequisite for any secondment, the fact of considering that the staff member was necessarily to be treated as being employed on an indefinite contract constitutes an initial solution to the anomaly criticised by the appellant".

40. For the appellant, "another possible solution would be to annul the decision to terminate his probationary period on the grounds of its irregular nature, which was prejudicial to the appellant. The logical consequences of these decisions should be an extension of the probation for a period equivalent to that during which the appellant worked on the JESSICA Taskforce".

41. In connection with the other submissions, the appellant refers to his observations under Appeal No. 509/2011, notably those on the existence of a secondment situation.

The Governor

42. In reply to the appellant's complaints, the Governor highlights a number of points concerning the appellant's status within the Bank.

43. First of all, the Governor does not consider that the appellant can claim to have been transferred or promoted, further to a vacancy notice, to the JESSICA post in pursuance of Article 11, paragraph 2, of Rule No. 01/2008 establishing the procedures relating to the application of the regulations on appointments and termination of contracts. This provision concerns staff appointments to different positions and posts by transfer or promotion. The Governor is of this opinion because this provision only concerns staff members recruited to a "position", whereas the appellant had been recruited to a "post".

44. Secondly, the Governor contends that the appellant's transfer to the JESSICA team can in no way be construed as a secondment to the European Investment Bank, which is covered by Article 5 B 4 of the Regulations on appointments. While the JESSICA team is physically installed in the premises of the European Investment Bank in Luxembourg, it is not an EIB department or even team. It is a programme common to the European Commission, the European Investment Bank and the Social Development Bank geared to supporting long-term urban renovation and revitalisation projects. The appellant was at no stage a member of the staff of the European Investment Bank. Furthermore, the appraisal procedures show that the appellant remained on the staff of the Council of Europe Development Bank, and moreover, he was in Luxembourg only four days a week (the appellant spent the fifth day at the Paris headquarters).

45. Ultimately, in the Governor's view, the appellant's participation in the JESSICA team merely constituted a temporary task assigned to him with his agreement.

46. At all events, even supposing that the transfer was equivalent to a secondment, this does not mean that it has the legal effect of entitling the appellant to a permanent appointment for an indefinite duration, as the latter is governed by specific rules set out in Article 15 of Appendix II to the Staff Regulations.

47. In conclusion, the Governor asks the Tribunal to dismiss the appeal submitted by the appellant.

B. On the merits of Appeal No. 509/2011

The appellant

48. The appellant submits two main pleas in support of his appeal: irregularities in the appellant's career development within the Council of Europe Development Bank, and irregularities in the appraisal procedure.

49. In his first plea, the appellant complains that the Bank prevented him from completing his probationary period under satisfactory conditions. He considers that he was seconded to the EIB for fourteen months during his probationary period. This led to discontinuity in the work assigned to him, hampering any objective appraisal.

50. Having challenged a number of the Governor's assertions on the facts relating to his activity within JESSICA, the appellant points out that the situation in which he found himself made it difficult, or even rash, to conduct any kind of appraisal, which – especially during the probationary period – must take account of all the factors determining the appraisee's performance. The appellant infers that, where he was concerned, the Bank failed to comply with the requirements of Article 5 B, paragraph 4, of Appendix II to the Staff Regulations.

51. In his second plea, the appellant alleges irregularities in the appraisal procedure. Having examined the different reports drafted, the appellant reaches the conclusion that harsh criticism was levelled at him for his period of resumption of work at the Bank, when he had to tackle tasks which he had put aside during his time in Luxembourg. The fact is that the decision not to recommend the renewal of his contract was mainly based on that criticism. The appellant infers that he was the victim of both procedural irregularity and non-objective reports. Moreover, he contends that the adversarial principle was violated to the extent that he had not been notified of certain negative judgments made against him.

The Governor

52. In reply to the first plea above, the Governor denies that the appellant was ever seconded to the European Investment Bank. In his view, this fact is proved by a memorandum of 30 October 2009 specifying that the appellant was still a staff member of the Council of Europe Development Bank, the staff member's absence from the organisation chart of the European Investment Bank, and his working arrangements. He further submits that the tasks assigned to the appellant within JESSICA were no different from those carried out at the Bank.

53. Accordingly, this plea must be dismissed.

54. Where the second plea is concerned, the Governor considers that all the appraisal reports mentioned the same shortcomings, with the additional finding in the final report that the appellant had difficulty structuring his ideas and his texts and drafting clear, logical reports. Lastly, the Governor denies that the reports lacked objectivity. He considers that neither appraiser shows any personal animosity in the reports, but that on the contrary the latter show that the appellant was constantly supported, advised and encouraged.

55. In conclusion, the Governor submits that the appellant cannot claim that the appraisal reports were not objective.

III. THE TRIBUNAL'S ASSESSMENT

A. Appeal No. 485/2011

1. Admissibility of the appeal

56. The Tribunal considers that the decision complained of constitutes an administrative act open to challenge by means of the complaints procedure provided for in Articles 59 and 60 of the Staff Regulations. No importance can be attached to the fact that the impugned decision was not taken by the Governor himself but was prepared by other individuals for the Governor's attention. Clearly, the two staff members in question were working on the basis of responsibilities assigned to them.

57. This leads the Tribunal to conclude that the objection of inadmissibility must be dismissed.

2. The merits of the appeal

58. In order to adjudicate on this appeal, the Tribunal must first of all decide on the status held by the appellant during his time in Luxembourg working on the JESSICA team, and then ascertain whether there is any suggestion that, as he claims in his appeal, he had become a permanent staff member and therefore that the appraisal procedure should have been implemented differently.

59. In the Tribunal's view, it is clear that the appellant was not seconded to the European Investment Bank.

In the Tribunal's view, this is proved by the fact that Article 5 B, paragraph 6, of Appendix II to the Staff Regulations requires the Governor to establish a General Rule. This Rule must set out the precise conditions for effecting such secondments, with guaranteed maintenance of the staff member's rights and duties as laid down in the Staff Regulations. In the appellant's case, however, no consideration was ever given to implementing such a Rule, the existence or non-existence of which is never mentioned by the parties. Nevertheless, the absence of information on this latter point has no implications for the instant case because irregular secondment cannot *per se* enable a staff member on probation to become a permanent staff member.

Furthermore, and above all, it emerges clearly from the memoranda prepared and the procedure governing the appellant's stay in Luxembourg that the latter was still under the supervision of the Council of Europe Development Bank, despite any operational supervision by the European Investment Bank.

Consequently, it is clear that the appellant was not seconded to the EIB, but was rather sent on mission to this establishment. Accordingly, there was no irregularity in the appraisal procedure as implemented.

60. In conclusion, the appeal is ill-founded and must be dismissed.

B. Appeal No. 509/2011

61. In connection with the first plea, the Tribunal notes that sending the appellant on mission was not likely to disrupt the development of his probationary period. The appellant continued to discharge duties similar to those for which he had been recruited, and furthermore did so in liaison with his superiors. It is clear that the latter were able to appraise the appellant and, by also referring to his previous reports, to form an opinion on whether or not the appellant should be offered a permanent contract. Furthermore, since he had not been seconded, the Tribunal did not see how the probationary period could be extended by a period equivalent to that of the mission conducted within JESSICA.

62. Therefore, there was no irregularity in the appellant's career development in the Council of Europe Development Bank, under whose authority he remained for the duration of his probationary period.

63. In connection with the second plea, the Tribunal notes that since the appellant was still a staff member of his Bank acting under its authority, there was no suggestion of irregularity in connection with the appraisal procedure.

64. Where the content of the different appraisal reports is concerned, the Tribunal found no inconsistencies which might prompt doubts as to their objectivity. The Tribunal wishes to point out that if the appellant had considered that the first three appraisal reports were irregular, he should have challenged them under the complaints procedure within the corresponding time limits. Having failed to do so at the appropriate time, he could no longer file a complaint when challenging the fourth report.

65. Where this last report was concerned, it was up to the appellant to discuss and challenge, within the appraisal procedure, the items which were prejudicial to him and which had emerged from the "oral testimonies" provided by the appellant's superiors in the JESSICA team. Having failed to do so during the appraisal, he cannot challenge this now before the Tribunal without producing evidence of his work in the JESSICA team showing that the superiors in the JESSICA team had a positive assessment of his work and that the appraisal conducted by his superiors in the Council of Europe Development Bank was therefore not objective.

66. In conclusion, this second plea is also ill-founded and this appeal must also be dismissed.

For these reasons,

The Administrative Tribunal:

Orders the joinder of Appeals Nos. 485/2011 and 509/2011;

Declares Appeal No. 485/2011 ill-founded and dismisses it;

Declares Appeal No. 509/2011 ill-founded and dismisses it;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg on 16 April 2012 and delivered in writing pursuant to Article 35, paragraph 1, of the Tribunal's Rules of Procedure on 18 April 2012, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

G. RESS