

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

## **TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL**

**Compensatory Decision of 6 December 2012 relating to compensation  
(Article 60, paragraph 7, of the Staff Regulations)**

**Appeal No. 521/2011 (R.V. (II) v. Governor of the Council of Europe Development Bank)**

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,  
Mr Jean WALINE, Judge,  
Mr Serkan KIZILYEL, Deputy Judge,

assisted by:

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

has delivered the following decision after due deliberation.

### **PROCEEDINGS**

1. On 3 October 2012, the Governor of the Council of Europe Development Bank requested the Administrative Tribunal to apply Article 60, paragraph 7, of the Staff Regulations in connection with the execution of the decision of 26 September 2012 in Appeal No 521/2011 – R.V. (II) v. Governor.

2. On 1 November 2012, the appellant's representative, Maître Christine Hillig-Poudevigne, filed the appellant's observations on the Governor's request. On 8 October 2012, the Tribunal held that the case was ready for decision.

### **THE REQUEST FOR APPLICATION OF ARTICLE 60, PARAGRAPH 7, OF THE STAFF REGULATIONS**

3. The origin of the Governor's request is an appeal lodged in 2011 by R.V., a permanent staff member of the Bank, who, prior to the proceedings, had held grade A6 and had been Director of General Administration.

The appeal concerned the Governor's decision to dismiss the appellant on disciplinary grounds. The latter alleged several violations.

4. In its decision of 26 September 2012, the Administrative Tribunal declared the appeal well-founded and annulled the Governor's decision to dismiss the appellant.

The relevant passages from the decision read as follows:

"71. Where the instant case is concerned, the Tribunal feels it must conduct an overall examination of the Governor's findings, rather than look separately at each fact held against the appellant in the decision to remove him from post.

72. In this connection, the Tribunal notes that the arguments put forward by the Governor are not such as to justify the severity of the measure. Of course, irrespective of whether or not the appellant's misconduct warranted disciplinary action, it involved acts intrinsically capable of disrupting the Bank's proper functioning and affecting the appellant's obligation to abide by its rules; however, these acts could not attain such a degree of seriousness as to warrant the maximum penalty.

73. As to the acts of which the Governor accuses the appellant in paragraph 9 b), c) and e) above, the Tribunal finds that they are minor offences and, in any event, not such as to justify, whether singly or in combination with other elements, a removal from post.

74. As to the appellant's allegations of psychological harassment, the Tribunal notes that the fact of alleging such harassment does not constitute a disciplinary offence even if, as emphasised by the Governor, the appellant has not provided proof of his allegations.

True, in the Council of Europe regulatory apparatus, Article 13 (Unfounded accusation) of Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe is worded as follows:

"Disciplinary proceedings, as provided for in Articles 54 to 58 of the Staff Regulations and the applicable provisions for temporary staff members, may also be initiated against a staff member or a temporary staff member who knowingly makes false allegations concerning the facts underlying a complaint of sexual or psychological harassment against another person."

However, the arguments set out by the Governor in his decision on removal from post and during the proceedings are not apt to prove that the appellant "knowingly made false allegations". Indeed, the Governor primarily held against him the fact of not having adduced conclusive evidence and thus of having made wrongful use of the procedure, which is not the same as making allegations within the meaning of the aforesaid Article 13. Furthermore, the fact that the appellant allegedly publicised his initiative does not constitute grounds for assessing the facts differently.

As regards the contention that the appellant reiterated his allegations of harassment in "several proceedings before the Administrative Tribunal or the Advisory Committee on Disputes", the Tribunal notes that under Article 14 (Lack of effective protection) of Rule No. 1292,

"Persons who complain of being victims of sexual or psychological harassment and who consider that they did not receive effective protection may lodge an administrative complaint with the Secretary General under Article 59 of the Staff Regulations."

The Tribunal fails to see how the appellant could be penalised for having invoked a right that was statutorily secured to him.

75. Concerning the complaint about breach of the provisions of the Bank's code of conduct, the Tribunal recalls that the Governor asserts, in his decision on removal from post, that he recently downgraded another staff member for comparable misconduct regarding which the Disciplinary Board was of the opinion that relegation in step should be awarded. He adds that the case of the present appellant was more serious in so far as he had heavier responsibilities in the Bank and had participated in drawing up the code of conduct.

Although it was not explicitly stated during the proceedings, it would appear that this other case prompted an appeal on which the Tribunal recently gave a decision, finding that the measure finally taken by the Governor was proportionate. However, in the instant case the Tribunal is not convinced that the additional elements invoked by the Governor for penalising the appellant are of a kind to warrant his removal from post. Indeed, these elements should be examined in the light of the minor nature of the offences in so far as the Bank clearly suffered no prejudice and finally the appellant made no gain.

76. As to the other acts of which the Governor accuses the appellant, the Tribunal finds that they are also minor offences and, in any event, not such as to warrant removal from post whether taken singly or in combination with other elements.

77. In conclusion, the acts of which the Governor accuses the appellant, whatever their reprehensible character, are not such as to warrant removal from post even having regard to the appellant's grade and duties.

78. Thus, the Tribunal comes to the conclusion that there was a manifest error of assessment and the removal from post cannot be regarded as a penalty commensurate with the facts set out by the Governor in his decision, much less with those taken into consideration by the Disciplinary Board. It follows that the removal from post is unlawful and should be annulled."

5. In his letter of 3 October 2012, the Governor expressed the view that the execution of the decision of 6 October 2000 would be likely to create "serious internal difficulties" for the Bank. He gave the following reasons (full text):

"Sir,

I have taken due note of decision no. 521/201 of 25 September 2012 in which the Administrative Tribunal of the Council of Europe annulled the disciplinary dismissal of Mr [R. V.] and I have already instructed my staff to pay as soon as possible the sum of 32 000 euros by way of costs and expenses (12 000 euros) and compensation (20 000 euros).

Since being appointed Governor and taking up my post in December 2011, I have followed this case very closely, taking into consideration not only the staff member's interests, but also those of the Bank and its operations in an extremely difficult and demanding financial environment.

I feel that the actual reinstatement of Mr [R. V.] in the senior management of the Bank is likely to create serious internal difficulties for the CEB.

It is for this reason that I am applying to the Tribunal under Article 60 § 7 of the Staff Regulations: "If the Governor considers that the execution of an annulment decision is likely to create serious internal difficulties for the Council [sic], he shall inform the Tribunal to that effect in a reasoned opinion. If the Tribunal considers the reasons given by the Governor to be valid, it shall then fix the sum to be paid to the appellant by way of compensation".

The reinstatement of Mr [R. V.] would have a major negative impact on the working atmosphere in a small institution with a staff of barely 170. On taking office I found the working atmosphere to be very poor, and this was brought out in particular by a perception survey on "Staff Commitment and Motivation" organised at the request of the Ordinary General Meeting of Staff of 11/03/2011 (see [attachment]). I cannot overlook the fact that Mr [R. V.] was for a long time in charge of Human Resources and Communication and that the major difficulties experienced by the Bank, which contributed greatly to the deterioration in the working atmosphere, lie precisely in these two areas: lack of communication, lack of transparency, lack of co-operation and lack of fairness. I personally observed, after the decision had been delivered, a growing concern among the staff which is likely to create serious internal difficulties. Furthermore, as Governor and having overall organisational responsibility at the Bank, I have to be able to count on the loyalty and cohesion of the staff as a whole, including the senior management, whose conduct must be particularly exemplary and in whom I must have full confidence. I am convinced that the reinstatement of Mr [R. V.] as a senior manager will not bring about the cohesion which is so necessary in this critical period for the Bank, which must be able

to meet new demands in a rapidly changing financial environment. In other words, the Bank's future success depends to a great extent on a close-knit and dedicated team.

Furthermore, it seems hard to imagine that it would be possible to establish a relationship of trust within the institution if Mr [R. V.] were reinstated because while they may not be of such a nature as to justify dismissal, the acts that gave rise to the annulled dismissal nevertheless constitute misconduct.

Consequently, it is inconceivable to me to reinstate Mr [R. V.] in his former post of Director of General Administration or in any other managerial or senior position corresponding to his professional qualifications and at the grade which he had reached prior to his dismissal.

In the light of all these considerations, I therefore respectfully ask the Tribunal to apply Article 60 § 7 of the Staff Regulations and, consequently, to fix the amount of the compensation to be paid to Mr [R. V.].”

The Governor makes no proposal as to the amount of the compensation.

## THE LAW

### A. The applicability of Article 60, paragraph 7, of the Staff Regulations

6. According to Article 60, paragraph 7, of the Staff Regulations in their version applicable to the Bank:

“If the Governor considers that the execution of an annulment decision is likely to create serious internal difficulties for the Bank, he shall inform the Tribunal to that effect in a reasoned opinion. If the Tribunal considers the reasons given by the Governor to be valid, it shall then fix the sum to be paid to the appellant by way of compensation”.

7. The appellant does not dispute the applicability of Article 60, paragraph 7, of the Staff Regulations in the instant case, but merely disputes the merits of the Governor's request.

8. However, the Tribunal considers it useful to reiterate its earlier case law on this matter (ATCE, Appeals Nos. 254 and 257/1999 – Léon Hornecker v. Secretary General, decision of 16 February 2001, paragraphs 12-13):

“12. The Tribunal recalls that, under Article 60, para. 6 of the Staff Regulations, decisions of the Tribunal are binding on the parties as soon as they are delivered. Decisions putting an end to an appeal are therefore final and have the force of *res judicata*. The Organisation is obliged to take all necessary measures to give full effect to the Tribunal's decision, in accordance with its terms and the reasons given. In the case of the annulment of administrative decisions, unless the Tribunal specifies otherwise, they cease to have legal existence (see ATCE, appeal no. 225/1996, Staff Committee (III) v. Secretary General, decision of 21 March 1997 previously cited, §§ 20-21).

13. Article 60, para. 7 constitutes an exception to this main rule. In serious and exceptional circumstances, that provision allows the Secretary General to ask the Tribunal to reconsider its annulment decision. If it deems the reasons given by the Secretary General in accordance with Article 60, para. 7 to be well-founded, the Tribunal may order the payment of compensation to the appellant in place of the annulment decision at issue.”

9. Article 60, paragraph 7, of the Staff Regulations therefore applies in this case.

## **B. The merits of the request**

10. In the Governor's view, the requirements of Article 60, paragraph 7, of the Staff Regulations are satisfied in the instant case. He puts forward two arguments.

First, he considers that the appellant's reinstatement would have a major negative impact on the working atmosphere in a small institution like the Bank, with a staff of barely 170.

Secondly, the Governor finds it hard to imagine that it would be possible to establish a relationship of trust with the appellant, because while they may not be of such a nature as to justify dismissal, the acts that gave rise to the annulled dismissal nevertheless constitute misconduct. He adds that, consequently, it is inconceivable to him to reinstate the appellant in his former post of Director of General Administration or in any other managerial or senior position corresponding to his professional qualifications and at the grade which he had reached prior to his dismissal.

11. The appellant opposes the Governor's request and expresses the opinion that it should be dismissed. He submits that this request a) advances grounds which are ill-founded within the meaning of Article 60, paragraph 7 of the Staff Regulations, b) constitutes a very dangerous infringement of the principle of *res judicata*, c) refers to debatable subjective elements, d) raises serious issues under the Staff Regulations, and e) is set in a very specific context.

12. The appellant therefore requests the Tribunal to dismiss the Governor's request not to execute the decision of 25 September 2012 annulling the dismissal order against him (which became effective on 1 November 2011).

He therefore asks the Tribunal to find that his reinstatement was effective as from 1 November 2011, as already notified in its decision of 25 September 2011, and that this decision has been continuously effective since the date on which it was delivered.

He adds that the execution of this decision in no way creates serious internal difficulties within the meaning of Article 60, paragraph 7, of the Staff Regulations and that the Governor's letter of 3 October 2012 does not give sufficient reasons for activating that article.

On the contrary, as the appellant further submits, the failure to apply this decision would be likely to cause serious difficulties within the Organisation in terms of administrative management of information already communicated to third parties, in terms of the defence of staff members' rights, in terms of staff confidence in the fairness of the institutional architecture and in terms of the latter's legal certainty.

Lastly, as with Article 59, paragraph 9, of the Staff Regulations, and as pointed out by the Chair of the Tribunal in several rulings given on applications made in pending proceedings for a stay of execution of a contested decision, some degree of restraint is called for in exercising the power conferred on him by this article, which must, moreover, be justified by exceptional circumstances. There is no evidence in the Governor's letter of 3 October 2012 of any serious difficulties which would justify activating an article having such major implications.

13. The Tribunal reiterates that, under Article 60, paragraph 7, of the Staff Regulations, the Governor is required to show that “the execution of the annulment decision is likely to create serious internal difficulties for the Bank”.

14. The Tribunal notes that the Governor puts forward two arguments in support of his request.

15. Regarding the first argument of a “major negative impact on the working atmosphere”, the Tribunal notes that the arguments submitted by the Governor are not of such a nature as to prove the serious internal difficulties needed to grant the application of Article 60, paragraph 7 of the Staff Regulations. Indeed, the document appended by the Governor to his request contains an analysis of the situation among the staff of the Bank, but there is no evidence that this situation is the consequence of actions by the appellant or is related to the events which gave rise to the dispute settled by the Tribunal in its decision of 25 September 2011.

16. As for the second argument, the Tribunal notes that although the Governor is not the person responsible for the dismissal decision annulled by the Tribunal, he nevertheless submits that “it seems hard to imagine that it would be possible to establish a relationship of trust within the institution if Mr [R. V.] were reinstated because while they may not be of such a nature as to justify dismissal, the acts that gave rise to the annulled dismissal nevertheless constitute misconduct.”

17. The Tribunal considers that the mere fact that disciplinary offences were committed in the course of a person’s duties does not rule out *ipso facto* the possibility of establishing a relationship of trust with that person, even if, as in the instant case, the person is a senior official who, moreover, was engaged on highly sensitive duties.

18. The Tribunal considers it useful to point out that, under Article 58 of the Staff Regulations (References in personal administrative files),

“No reference to a disciplinary measure shall remain in the personal administrative file of the staff member concerned after two years in the case of a written warning or reprimand, and after six years in the case of other measures except removal from post.”

The Disciplinary Board had suggested a reprimand. If, disregarding this suggestion, the Governor had opted for a penalty between a reprimand and removal from post (namely relegation in step or downgrading) and this decision had become final, it would only have been able to remain in the appellant’s personal file for a period of six years.

19. The Tribunal considers that, given the extraordinary nature of the remedy provided for in Article 60, paragraph 7, the management problems cited by the Governor do not attain the required degree of seriousness and, consequently, do not justify the request in this case. Besides, as pointed out in the Tribunal’s case law (paragraph 8 above), such a request may only be accepted in “serious and exceptional circumstances”, which are not present in this case. The Tribunal also considers that the appellant’s grade and the size of the Bank’s staff (only 170) are not valid reasons for altering its conclusion.

20. Accordingly, the reasons adduced by the Governor in this case are not of an exceptional nature and therefore are not sufficient, within the meaning of Article 60,

paragraph 7, of the Staff Regulations, to justify replacing the annulment decision with the payment of compensation.

For these reasons,

The Administrative Tribunal:

Declares Article 60, paragraph 7, of the Staff Regulations applicable in this case;

Declares the reasons adduced by the Governor to be unfounded;

Decides that there are no grounds for awarding compensation in place of executing the decision of 26 September 2012;

Orders that decision to be executed in full.

Done in Strasbourg on 6 December 2012, the French text of the decision being authentic.

The Registrar of the  
Administrative Tribunal

S. SANSOTTA

The Chair of the  
Administrative Tribunal

C. ROZAKIS