

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 514/2011 (Roza MUSTAFAYEVA v. Secretary General)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Mr Jean WALINE,
Mr Rocco Antonio CANGELOSI, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEDURE

1. Ms Roza Mustafayeva lodged her appeal on 21 November 2011. It was registered the same day under number 514/2011.
2. On 22 December 2011, the Secretary General submitted his observations on the appeal.
3. The appellant filed a memorial in reply on 5 March 2012. During the written procedure, the appellant, on several occasions, lodged documents which were forwarded to the Secretary General.
4. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 24 September 2012. The appellant defended her own interests, and the Secretary General was represented by Ms Bridget O'Loughlin, assisted

by Ms Maija Junker-Schreckenberg and Ms Sania Ivedi, all from the Legal Advice Department in the Directorate of Legal Advice.

5. At the end of the hearing, the appellant handed a document directly to the Administration; that afternoon, she lodged at the registry a document which she said was a copy of her administrative complaint.

THE FACTS

I. BACKGROUND

6. The appellant is a former temporary staff member of the Council of Europe. She is a national of Azerbaijan.

7. According to the information supplied to the Tribunal, the relevant facts may be summarised as follows.

8. The appellant worked for the Organisation, holding grade B1, from 24 July 2002 to 30 June 2003 as an assistant assigned to the Registry of the European Court of Human Rights.

9. Following a request, dated 8 December 2009, for a certificate of service with an appraisal of the work done, the appellant learned that an appraisal report had been drawn up for her period of work in 2003.

10. The appraisal report had been written on 1 August 2003, i.e. after the appellant had left the Organisation. In contravention of the regulations, that report had not been signed by the appellant.

11. Following several exchanges between the appellant and the Directorate of Human Resources, the appraisal report was finally posted to the appellant on 5 February 2010, and a copy was placed at her disposal at the Organisation's headquarters.

12. The appellant asserts that she did not receive this correspondence. For his part, the Secretary General has not proved that the appellant did actually receive it.

13. The appellant states that she lodged an administrative complaint, in accordance with Article 59, paragraph 2, of the Staff Regulations, on 22 August 2011. However, she did not supply documents (acknowledgement of receipt, receipt or other document) to prove that she did lodge such a complaint on the stated date.

14. On 1 September 2011, the appellant handed some documents to the Private Office of the Secretary General. The acknowledgement of receipt states that these were the 2003 appraisal form, the Azeri version of the European Convention on Human Rights, an "exam letter" and a letter from the appellant.

15. No decision on the administrative complaint was taken by the Secretary General.
16. On 21 November 2011, the appellant lodged the present appeal.

II. RELEVANT LAW

17. The text governing the appraisal procedure at the time was Rule No. 1084 of 12 December 2001. Article 7 thereof was worded as follows:

“Use of appraisal reports

1. Appraisal reports shall be confidential documents at every stage of the appraisal procedure.
 2. Appraisal reports shall be part of staff members’ administrative files.
 3. Appraisal reports shall be consulted whenever a decision is to be taken about a staff member’s career, vocational training or personal development. They shall also be considered when contracts are renewed or terminated, as well as in the context of disciplinary proceedings.”
18. On the subject of the lodging of administrative complaints, the relevant paragraphs of the Staff Regulations read as follows:

“2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression ‘administrative act’ shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.

3. The complaint must be made in writing and lodged via the Director of Human Resources:
 - a. within thirty days from the date of publication of the act concerned, in the case of a general measure; or
 - b. within thirty days of the date of notification of the act to the person concerned, in the case of an individual measure; or
 - c. if the act has been neither published nor notified, within thirty days from the date on which the complainant learned thereof; or
 - d. within thirty days from the date of the implicit decision rejecting the request referred to in paragraph 1.

The Director of Human Resources shall acknowledge receipt of the complaint.

In exceptional cases and for duly justified reasons, the Secretary General may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.

4. The Secretary General shall give a reasoned decision on the complaint as soon as possible and not later than thirty days from the date of its receipt and shall notify it to the complainant. If, despite this obligation, the Secretary General fails to reply to the complainant within that period, he or she shall be deemed to have given an implicit decision rejecting the complaint.”

THE LAW

19. The appellant lodged this appeal in order to complain about her appraisal report drawn up for 2003. She also complains about the Azeri version of the European Convention on Human Rights.

20. The Secretary General requests the Tribunal to declare the appeal “inadmissible and/or unfounded and to dismiss it”.

I. SUBMISSIONS OF THE PARTIES

A. The admissibility of the appeal

21. According to the Secretary General, the appeal is inadmissible for the following reasons.

22. In respect of the first ground relating to the appraisal report for the year 2003, the Secretary General points out that the appellant – who did not produce supporting documents, and the probative nature of whose document handed over on the afternoon of the hearing was dubious (paragraph 5 above) – did not lodge an administrative complaint. Furthermore, all the time limits for complaining about any damage that she might have suffered had expired.

23. The Secretary General adds that the appellant’s appraisal report was not an “administrative act adversely affecting” her, since she had left the service of the Organisation on 1 July 2003, following non-renewal of her temporary employment contract. He adds that appraisal reports are of importance only for serving staff, particularly when they apply for promotion. Furthermore, the appellant’s conclusions in her appeal are insufficiently precise to enable the Tribunal to take a decision which would have application.

24. As a result of all these facts, the appellant had not exhausted internal remedies and was manifestly out of time to complain now about this appraisal report.

25. As to the second ground relating to the poor quality of the language in the Azeri version of the European Convention on Human Rights, the Secretary General argues that this part of the appeal is quite clearly inadmissible. In any case, this question was not within the jurisdiction of the Tribunal.

26. For her part, the appellant states that she sent an administrative complaint on 20 August 2011 and received confirmation that the Organisation had received it on 22 August 2011. She adds that she did not receive a reply. Furthermore, she had handed in a copy on the occasion of a visit to the Organisation’s headquarters, and a receipt had been handed to her. She reaffirms that she received a copy of the appraisal form on 19 July 2011.

B. The merits of the appeal

27. Where the first ground is concerned, the appellant submits that she was unaware of her appraisal report when it was written, and she also challenges its substance.

28. Where the second ground is concerned, relating to the Azeri translation of the European Convention on Human Rights, the appellant submits that some errors had been added after she had left the Organisation.

29. The Secretary General submits that the appeal is manifestly unfounded.

30. In his view, the appraisal report was written on the basis of a serious and sufficiently reasoned assessment. The appraisal conducted by the appellant's appraiser was based on a comprehensive analysis of the appellant's work and performance during the reference period, and the criticisms expressed in the report were justified in the light of her record of service. There was reason to consider that the appellant's appraiser, who exercised the broad discretion available to her in this respect, reached, in full knowledge of the facts, the conclusion that the appellant had not satisfied the basic requirements of her post. In this context, the comments made by the appellant's two superiors were unanimous and unequivocal.

31. The Secretary General acknowledges that the appellant was not given a hearing at an appraisal interview, but, as stated in the report, this was solely because the appellant, who had three times been invited to an interview with her appraiser, had never presented herself as invited. Furthermore, the appraiser also states, in her comments, that the appellant could not be contacted, since neither her address nor her telephone number were known to the Administration. The report was written in accordance with the relevant applicable rules. It was failure by the appellant firstly to attend the interviews to which she was invited by her appraiser, and secondly to communicate her personal details so that she could be contacted, that prevented the appraisal interview from taking place and explained why she had been unable to be involved in the writing of this report or to have knowledge of it at the time of the facts. And, according to the Secretary General, one is not entitled to base a claim on one's own wrongdoing (*nemo auditur propriam turpitudinem allegans*). The grounds on which the appellant relies being attributable to her, she has no foundation for complaining, today, that this appraisal report was written in an irregular manner, since she made her own participation in the writing of this report impossible.

32. The report is objective, and the appellant offers no evidence in support of any accusations of prejudice.

33. In conclusion, the report writing procedure was not flawed.

34. In the Secretary General's view, it follows from all the above that he has not violated any regulations or any rules of legal practice or general principles of law.

Neither have there been any errors in assessing evidence, faulty conclusions or misuse of authority.

35. In the light of the foregoing, the Secretary General asks the Tribunal to declare the appeal inadmissible and/or unfounded and to dismiss it.

II. THE TRIBUNAL'S ASSESSMENT

36. The appellant's first ground of complaint relates to her appraisal procedure. The Tribunal must first consider the objection to admissibility raised by the Secretary General.

37. In his first objection, the Secretary General argues that the appeal is inadmissible because no administrative complaint had been made.

38. The Tribunal notes that it is for the appellant to supply information capable of proving that she complied with the conditions of admissibility for her appeal, among which is the obligation to lodge an administrative complaint before lodging an appeal. In pursuance of Article 59, paragraph 3, of the Staff Regulations, "The complaint must be made in writing and lodged via the Director of Human Resources" within 30 days, on a basis calculated differently in different cases.

39. However the appellant supplied information that was not very clear and was such as not to facilitate the task of verifying compliance with this condition. Nevertheless, with her observations in reply, she submitted a copy of an acknowledgement of receipt dated 1 September 2011 for documents deposited at the Private Office of the Secretary General, among which is her appraisal form for 2003. Certainly, a complaint has to be lodged via the Director of Human Resources, and in order to avoid misunderstandings, must be so worded as to make it clear that it is an administrative complaint. For its part, the Tribunal has already pointed to the need to comply with these rules and to the advisability of presenting documents which are immediately recognised as administrative complaints.

40. The Tribunal also notes that the question may be raised of whether, in application of Article 59, paragraph 3.c, of the Staff Regulations (paragraph 18 above), the appellant should not have submitted an administrative complaint to the Secretary General as soon as she learned, in December 2009 (paragraph 9 above), that an appraisal report had been written without her being consulted, and whether she should have done so without waiting for a copy of it.

41. However, in this instance, the Tribunal, because of the circumstances of the case, considers that it does not need to deal rigorously with all these questions, for the ground of complaint is in any case unfounded.

42. It is true that the appellant did not sign the appraisal report and that she was therefore unable to submit her observations on her superior's comments. However,

without it being necessary to establish whether this omission was a failure by the appellant or a shortcoming of the Organisation, in view of the fact that this was the final report because the appellant was leaving the Organisation, in the present case this departure from the procedure could not justify invalidation of the report, insofar as no use could be made of that report which would be likely to be prejudicial to the appellant. Indeed, Article 7 of Rule 1084 precisely states those cases in which the appraisal report may be used (paragraph 17 above), which relate to the staff member's future within the Organisation; it is clear, however, that this document loses its usefulness if the appraisee has left the Organisation. It remains the case nevertheless that it is appropriate for such a report to be deposited anyway, since the said rule does not provide that the final appraisal report should not be written. Furthermore, the Tribunal cannot a priori rule out the possibility that a failure to comply with this provision may be found in a given case.

43. Certainly, the Organisation wished to use this report to provide an appraisal of the appellant's work; however, it did not ultimately do so. Thus no damage occurred which could enable the conclusion to be drawn that the failure to comply with the rules was not only formal – albeit at a level which does not justify penalisation in this case – but also substantive. However, given that the Directorate of Human Resources wished to use this document as a basis for writing the certificate of service with an appraisal of the work done that the appellant had requested from it, the Tribunal could not conclude that the appeal was inadmissible because the appraisal report did not constitute an “administrative act adversely affecting” her.

44. In short, the appellant's ground of complaint, on the assumption that it is admissible, must be dismissed because it is unfounded.

45. Where the second ground of complaint is concerned, the Tribunal points out that, in pursuance of Article 59, paragraph 3, of the Staff Regulations, an appellant can complain only about administrative acts adversely affecting them. On the assumption that the said translation did constitute such an act, the fact nevertheless remains that the appellant did not even indicate why the said translation was prejudicial to her; the mere fact that she might have worked on this translation as a secretarial assistant could not constitute a fact proving – or even giving reason to suppose – that she would suffer damage of some kind from the alleged translation errors, which, moreover, she does not indicate, and which could have been made after her departure from the Organisation.

46. Consequently, this ground of complaint is inadmissible because the appellant cannot claim to be a victim.

47. In conclusion, the appellant's first ground of complaint is to be dismissed, and the second is to be declared inadmissible.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible in respect of the ground of complaint relating to the appellant's appraisal;

Declares the appeal otherwise inadmissible;

Declares the appeal unfounded and dismisses it;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg on 8 November 2012, and delivered in writing on 9 November 2012 pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS