

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 28 June 2013

In Appeal No. 538/2013 (Dorota LELONEK v. the Governor)

I, Chair of the Administrative Tribunal,

Having regard to Appeal No. 538/2013 lodged by Ms Dorota Lelonek on 22 February 2013;

Having regard to the Governor's observations of 25 March 2013;

Having regard to the applicant's observations in reply of 22 April 2013;

Having regard to Article 60, paragraphs 1 and 3, of the Staff Regulations applicable to the Bank;

Having regard to Article 5, paragraph 2, of the Statute of the Tribunal applicable to the Bank;

Having regard to Rule 19 of the Rules of Procedure of the Tribunal;

Considering it appropriate to apply the procedure provided for in Rule 20 and Article 5, paragraph 2;

Having submitted a reasoned report to the judges of the Tribunal on 19 June 2013;

Noting that they raised no objection but assented to this order;

DECLARE

- Appeal No. 538/2013 inadmissible on the grounds set out in the report appended hereto.

Done and decided at Strasbourg on 28 June 2013, the present order being notified to the parties to the case.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS

REPORT DRAWN UP FOR THE PURPOSES OF THE PROCEDURE PROVIDED FOR IN ARTICLE 5, PARAGRAPH 2, OF THE STATUTE OF THE TRIBUNAL AND RULE 19, PARAGRAPH 2 OF THE RULES OF PROCEDURE OF THE TRIBUNAL

Appeal No. 538/2013

Dorota LELONEK v. the Governor

This report concerns Appeal No. 538/2013 lodged by Mrs Dorota Lelonek. It has been drawn up for the purposes of the procedure provided for in Article 5, paragraph 2, of the Statute of the Tribunal and Rule 19, paragraph 2 of the Rules of Procedure of the Tribunal.

THE PROCEEDINGS

1. Mrs Dorota Lelonek posted her appeal on 22 February 2013. The Tribunal Registry received it on 26 February 2013 and on 27 February 2013 it was registered under No. 538/2013.
2. On 25 March 2013 the Governor submitted his observations.
3. On 22 April 2013 the applicant submitted her observations in reply.
4. On 19 June 2013, the Chair of the Tribunal, having taken note of the arguments put forward by the parties during the written procedure (Rule 19, paragraph 2, of the Rules of Procedure of the Tribunal), submitted this report to the Tribunal.

THE FACTS

5. The facts of the case which are relevant to this decision can be summarised as follows:
6. For fourteen years the applicant was the common law wife of a permanent member of staff working at the Council of Europe Development Bank. The latter passed away on 3 June 2010.
7. On 17 September 2012, the applicant applied to the Governor of the Bank for a survivor's pension (Article 18 of Appendix V (Pension Scheme rules1) to the Staff Regulations).
8. On 24 October 2012, the Director of Human Resources informed the applicant that the Governor could not accede to her request for a survivor's pension.
9. On 23 November 2012, the applicant lodged an administrative complaint pursuant to Article 59, paragraph 2, of the Staff Regulations. She asked that the decision of 24 October 2012 be set aside and that she be granted a survivor's pension retrospectively. She asked the Governor to refer her complaint to the Advisory Committee on Disputes so that it could give its opinion on the administrative complaint before he ruled on the complaint (paragraph 5 of the aforementioned Article 59).

10. On 22 January 2013, the applicant received a communication from one of the co-secretaries of the above-mentioned Committee informing her that the Governor had been invited to submit his observations by 22 February 2013

11. The applicant lodged the present appeal on 22 February 2013.

12. At that date, the Advisory Committee on Disputes had not yet issued its opinion (aforementioned Article 59, paragraph 5) and, consequently, the Governor had not yet ruled on the administrative complaint. During the written procedure, the Tribunal has not been informed that the Advisory Committee on Disputes has issued its opinion.

APPLICABLE LAW

13. The following articles of the Staff Regulations and of the Statute of the Tribunal applicable to the Bank and of the Bank's Rules of Procedure are relevant to the instant case:

14. Article 59 of the Staff Regulations governing administrative complaints is worded as follows:

1. Staff members may submit to the Governor a request inviting him to take a decision or measure which he is required to take relating to them. If the Governor has not replied within sixty days to the staff member's request, such silence shall be deemed an implicit decision rejecting the request. The request must be made in writing and lodged via the Director of Human Resources. The sixty-day period shall run from the date of receipt of the request by the Bank, which shall acknowledge receipt thereof.

2. Staff members who have a direct and existing interest in so doing may submit to the Governor 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 Governor.

3. The complaint must be made in writing and lodged via the Head of 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 Governor may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.

4. The Governor 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 Governor fails to reply to the complainant within that period, he shall be deemed to have given an implicit decision rejecting the complaint.

5. Either on the initiative of the Governor or if the staff member so requests in his complaint, the complaint shall be referred to the Advisory Committee on Disputes. The Advisory Committee on Disputes shall formulate its opinion within one year of the date of such referral. In that event, the Governor shall have thirty days from the date of receipt of the opinion of the Advisory Committee on Disputes to give a decision on the complaint.

6. The Advisory Committee on Disputes shall comprise four staff members, two of whom shall be appointed by the Secretary General and two elected by the staff under the same conditions as those for the election of the Staff Committee. The committee shall be completely independent in the discharge of its duties. It shall formulate an opinion based on considerations of law and any other relevant matters after consulting the persons concerned where necessary. The Secretary General shall, by means of a rule, lay down the rules of procedure of the committee.

7. When dealing with cases concerning a staff member of the Council of Europe Development Bank, the Advisory Committee on Disputes shall include two members of the Bank's staff, one of whom shall be appointed by the Governor and the other elected by the Bank's staff under the same conditions as apply for the election of the Bank Staff Committee. These two members shall respectively take the place of the second member appointed by the Secretary General and the second member elected by the Council staff.

8. The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*:

a. ();

b. to persons claiming through staff members or former staff members, within two years from the date of the act complained of; in the event of individual notification, the normal time-limit of thirty days shall apply

(...).

9. (...) ».

15. Article 60 of the Staff Regulations governs the introduction of appeals. The paragraphs that are relevant in the instance case read as follows :

“1. In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers.

(...)

3. An appeal shall be lodged in writing within sixty days from the date of notification of the Governor's decision on the complaint or from the expiry of the time-limit referred to in Article 59, paragraph 3. Nevertheless, in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods.

(...).”

16. Article 5 of the Statute of the Tribunal concerning the admissibility of appeals, stipulates that:

“1. An appeal shall not be admissible unless it complies with the conditions laid down in Article 60, paragraphs 1 and 3, of the Staff Regulations.

2. If the Chair states, in a reasoned report to the judges of the Tribunal, that he or she considers the appeal to be manifestly inadmissible, and if the judges raise no objections within two months, the appellant shall be informed without delay that his or her appeal has been declared inadmissible for the reasons stated in the report, a copy of which shall be communicated to him or her.”

17. Rule 19 of Rules of Procedure of the Administrative Tribunal concerns the conditions under which an appeal is considered admissible and reads as follows:

“1. The appellant must substantiate the grounds of admissibility of his appeal, as mentioned in Article 60, paragraphs 1 and 3 of the Staff Regulations.

2. If, during the written procedure, the Chairman considers the appeal to be manifestly inadmissible, Article 5, paragraph 2 of the Statute shall apply. Any decision of rejection is given by on Order of the Chairman”

THE LAW

18. In the appeal the applicant asked the Tribunal to establish the unlawfulness of the decision of 24 October 2012, to have the decision set aside and to order the Governor to pay her a survivor’s pension with retroactive effect.

19. The Governor claims that the appeal is inadmissible on two counts. Firstly, he claims it is inadmissible *ratione personae* because the applicant’s case is not provided for in sub-paragraph b) of paragraph 8 of Article 59 of the Staff Regulations (see paragraph 14 above). Secondly, he claims that the appeal is premature in that he had not yet taken a decision on the administrative complaint, which was still pending before the Advisory Committee on Disputes. With regard to the merits of the appeal, the Governor believes that it is ill-founded

20. In her observations in reply, the applicant reasserts that her appeal is admissible and founded.

21. With regard to the second objection of inadmissibility raised by the Governor, she acknowledges that she did not wait until the “period of one year granted to the Advisory Committee on Disputes” had expired; nevertheless, she claims that there are “no provisions in the statutes (...) nor any text of any type stipulating that an appeal is inadmissible if it is lodged, on a precautionary basis, before the time-limit, in the instant case of one year, has expired”.

22. She then adds that the administrative complaint had been implicitly dismissed thirty days after it had been lodged.

23. Finally, the applicant claims that “in the event that it is considered that the fact of bringing the appeal before the Advisory Committee on Disputes suspends the time-limit given to Governor to rule on the administrative complaint, it would be appropriate not to reconsider the application as

premature but, on the contrary, to stay the proceedings pending the opinion of the Advisory Committee and the subsequent decision of the Governor”.

24. The Chair would point out that the Staff Regulations fix the conditions under which an appeal to the Tribunal is admissible. Article 5 of the Statute of the Tribunal also stipulates that an appeal shall not be admissible unless it complies with the conditions laid down in Article 60, paragraphs 1 and 3, of the Staff Regulations, while Rule 19 of the Rules of Procedure of the Tribunal stipulates that the appellant must substantiate the grounds of admissibility of his or her appeal.

25. In the instant case, it appears that the applicant lodged her application without waiting until the Governor had ruled on her administrative complaint. Consequently, when she lodged her appeal she had not received an “explicit rejection, in whole or part, or implicit rejection” of her complaint, given that it was still pending before the Advisory Committee on Disputes.

26. As a result, one of the conditions for lodging the application had not been met and the application must therefore be declared inadmissible.

27. The Chair notes that, according to the second sentence of paragraph 3 of Article 60 of the Staff Regulations (paragraph 15 above), “in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these [two] periods”, which are indicated in the first sentence of the same paragraph, i.e. “sixty days from the date of notification of the Governor’s decision on the complaint or from the expiry of the time-limit referred to in Article 59 paragraph 3 du Staff Regulations”.

28. The Tribunal could therefore consider the preliminary question of whether this possibility applies only to a belated appeal or whether it could also apply to a premature appeal. However, the Chair considers that, in the instant case, this question must be answered in the negative because, in the present case, the issue is not only one of time but also of the exhaustion of remedies: not only had the Governor not yet ruled on the administrative complaint but the thirty-day period had not even commenced as the Advisory Committee had not yet issued its opinion.

29. Moreover, even if the second sentence of paragraph 3 could be applied, the fact remains that there is no “exceptional circumstance” that could justify a declaration of admissibility. The applicant – who has twice stated that she lodged the application “on a precautionary basis” – is also aware that on the day when the Governor rules on her complaint (or when the thirty-day period for ruling on the complaint had expired without a ruling by the Governor), she will have the possibility to lodge a new appeal if she has been unsuccessful and wishes to challenge the Governor’s decision before the Tribunal.

30. In view of this situation, it is clear that, contrary to the applicant’s claim, a declaration of inadmissibility is the only decision that can be taken; it is impossible to take a decision to stay the proceedings before the Tribunal until the end of the proceedings concerning the administrative complaint insofar as, according to the statutory texts, the proceedings concerning the administrative complaint cannot overlap with the proceedings before the Tribunal, but, in keeping with the principle of the exhaustion of internal remedies, must necessarily precede it.

31. In conclusion, the Chair considers that the appeal must be declared inadmissible and that the corresponding special procedure should be applied.

CONCLUSIONS

32. This report is submitted to the judges of the Tribunal so that they may exercise the supervision provided for in Article 5, paragraph 2, of the Statute of the Tribunal.

The Chair
Christos ROZAKIS