

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeals Nos. 414/2008 and 459/2009 – Renate ZIKMUND (I and II) v. Secretary General

The Administrative Tribunal, composed of:

Mr Luzius WILDHABER, Chair,
Mr Angelo CLARIZIA and
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Renate Zikmund, lodged her appeals on 26 June 2008 and 20 February 2009. They were registered the same days under numbers 414/2008 and 459/2009.
2. On 10 September 2008 and 23 March 2009 Maître Bernard Alexandre, barrister practising at the Strasbourg Bar and counsel for the appellant, submitted further pleadings in each appeal.
3. On 9 October 2008 and 23 April 2009 the Secretary General forwarded his observations on the two appeals.
4. The appellant did not reply on the first appeal but filed observations in reply on Appeal No. 459/2009 on 10 June 2009.
5. The hearing on both appeals took place in the Administrative Tribunal's hearing room in Strasbourg on 18 June 2009. Further to the Secretary General's request of 9 June 2009, the Tribunal had decided on 15 June that the hearing should be held *in camera*. The appellant was represented by Maître B. Alexandre, and the Secretary General by Ms Bridget O'Loughlin,

Deputy Head of the Legal Advice Department, assisted by Ms M. Junker-Schreckenberg from the same department.

In response to the appellant's request for investigative measures, the Tribunal ordered that a number of documents concerning proceedings before the Commission against Harassment, including the Commission report already familiar to the appellant, be laid before it. The Tribunal decided, however, that there was no need to hear the witnesses whom the appellant had wished to call.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The appellant is a permanent grade A4 member of the Council of Europe's staff and a German national. She joined the Organisation in 1999 and was working as head of division in the Directorate of Communication when the present dispute began. This dispute arose as a result of the Secretary General's decision to second the appellant to another department and the latter's complaint of psychological harassment in circumstances pre-dating that secondment.

The circumstances of the two appeals may be summarised as follows.

A. Appeal No. 414/2008

7. Further to the Secretary General's decision *ad personam* No. 4277 of 6 March 2008 the appellant was seconded to the Directorate-General of Human Rights and Legal Affairs (DG-HL), initially for the period 6 March to 30 June 2008. She was then transferred, with her consent, to a post in the Secretariat of the Congress of Local and Regional Authorities of the Council of Europe.

8. On 12 March 2008 the appellant sent a memorandum to the Director-General of Administration detailing the events following her secondment.

9. The Director-General for Administration replied to that memorandum on 14 March 2008.

10. On 2 April 2008 the appellant submitted an administrative complaint to the Secretary General concerning the aforementioned decision, in accordance with Article 59 of the Staff Regulations.

11. The Secretary General rejected her administrative complaint on 30 April 2008.

12. On 26 June 2008 the appellant lodged the present appeal.

13. In a second decision *ad personam* (No. 4465) the Secretary General extended the appellant's secondment from 1 July to 30 September 2008.

B. Appeal No. 459/2009

14. On 14 July 2006 the appellant brought a complaint (No. 02/2006) before the Commission against Harassment, in respect of conduct to which she had been subjected in the course of her duties and which, she alleged, constituted harassment.

15. The Commission delivered an opinion and recommendations on 31 July 2008.

16. The appellant had applied for unpaid leave (Appendix VII to the Staff Regulations) and was granted it from 1 January 2007 to February 2008. From information received, the Tribunal understands that the appellant was studying and working during this period.

17. On 26 August 2008 the appellant applied to the Secretary General for protection in her official capacity. This application read as follows (French original):

“Subject: Application to the Secretary General of the Council of Europe for a decision under Article 59 of the Staff Regulations

Pursuant to Article 12 of Instruction No. 44 the Secretary General was asked by the Commission against Harassment, on 31 July 2008, to take a decision further to the Committee’s recommendations in complaint 2/2006.

In accordance with Article 59 para. 1 *in fine* of the Staff Regulations, I request, in accordance with these texts, that you take a decision giving me full and satisfactory protection in my official capacity in a manner consistent both with Article 40 of the Staff Regulations and with the general principles of law applicable in such cases.”

18. As the Secretary General did not reply within the sixty-day period stipulated by the Staff Regulations, the appellant’s request was implicitly deemed to have been rejected (Article 59, paragraph 1 *in fine*, of the Staff Regulations).

19. On 21 November 2008 the appellant lodged an administrative complaint, receipt of which was acknowledged on 24 November 2008.

20. On 22 December 2008 the Secretary General declared the administrative complaint inadmissible and/or unfounded and rejected it.

21. On 20 February 2009 the appellant lodged the present appeal.

II. APPLICABLE LAW

22. Temporary secondment of a staff member to another department and the grant of unpaid leave are matters regulated by Appendix III (Regulations on the Table of Posts) and VII (Regulations on Unpaid Leave) of the Staff Regulations. Protection of staff members in their official capacity is governed by Article 40 of the Staff Regulations and the establishment of a

system of safeguards against psychological harassment is currently governed by the Secretary General's Instruction No. 44 on the protection of human dignity at the Council of Europe.

A. *Temporary secondment*

23. Appendix III, Article 3 of the Staff Regulations governs the temporary secondment of a staff member to another department. That article reads as follows:

“1. If the staff of a department needs to be temporarily increased, an official may be seconded for a specified period to a department other than that to which his or her post belongs. The Table of Posts shall remain unchanged.

2. The secondment of grade A7 or A6 officials to another department shall require the prior consent of the Committee of Ministers, which shall prescribe the duration thereof.

3. In the case of other grades, the decision shall be taken by the Secretary General.

4. A list of officials seconded to another department shall be appended to the draft budget when it is submitted; it shall specify, against the name of each official, the duration of the measure taken. If the secondment is to be continued beyond the current year, reasons shall be given.

5. At the end of the prescribed period, officials shall resume the duties attaching to their own posts.”

B. *Unpaid leave*

24. Appendix VII to the Staff Regulations sets out the Regulations on unpaid leave. Article 8 deals with staff returning after their period of leave and reads as follows:

“When staff members assigned to posts (Appendix III to the Staff Regulations) take unpaid leave, they are entitled to be reinstated in their post on their return. This entitlement shall continue until such time as the authorisation is granted for an absence totalling fifteen months. Once the absence has been authorised for a period of more than fifteen months, the post will be deemed vacant.

The staff member whose post or position has been re-assigned shall on his or her return be redeployed to another post or position of the same grade as the one occupied before the departure on leave and requiring similar qualifications.”

C. *Protection of staff members in their official capacity*

25. Article 40 of the Staff Regulations deals with the question of protection for staff members in their official capacity. It reads as follows:

Article 40 - Protection of staff members in their official capacity

“1. Staff members may seek the assistance of the Secretary General to protect their material or non-material interests and those of their family where these interests have been harmed without fault or negligence on their part by actions directed against them by reason of their being a staff member of the Council.

2. Where the Secretary General deems that the conditions set forth in the above paragraph are met, he or she shall decide what form such assistance may take and the amount up to which the Council shall pay the costs incurred in the defence of the interests referred to in paragraph 1, including the costs of any legal action taken. If the Secretary General considers that legal action may harm the interests of the Council, he or she may ask the persons concerned not to take such action; in such cases, if they do not take legal action, the Council shall make good the material damage suffered by the persons concerned, provided that they assign their rights to the Council.”

D. Psychological harassment

26. On 7 March 2002, the Secretary General adopted Instruction No. 44 on the protection of human dignity at the Council of Europe.

In his “Policy statement” introducing the Instruction, the Secretary General says that

“In the event of any instances of sexual or psychological harassment which may nevertheless occur, immediate intervention as provided for under this strategy is designed to put an end to the harassment in question through mediation. As a last resort, the strategy provides for a formal complaint procedure which can result, where the alleged perpetrator of the sexual or psychological harassment has the status of staff member, in disciplinary proceedings initiated by the Secretary General under Article 54 of the Staff Regulations and in the imposition of disciplinary measures.”

The preamble to the Instruction refers to Article 40 of the Staff Regulations (protection of staff members in their official capacity).

Article 3 defines psychological harassment as follows:

“Psychological harassment is any sustained, repetitive and/or systematic abusive conduct in the workplace or in connection with work in the form of behaviour, actions, gestures, spoken or written words, threats or working organisation methods which, intentionally or otherwise, is prejudicial to a person’s personality, dignity or physical or psychological integrity ; which causes a deterioration in the working environment or endangers that person’s employment or creates a hostile, intimidating, degrading, humiliating or offensive environment.”

27. Under Article 7, any staff member who believes himself or herself to be a victim of psychological harassment may submit a written complaint which is forwarded to the Commission responsible for dealing with complaints.

Articles 11 and 12 deal with the procedure followed by the Commission. Regarding the action to be taken by the Commission, Article 12 reads as follows:

“ (...)

At the end of the procedure, the Commission shall express its opinion on the facts behind the complaint of sexual or psychological harassment and shall make a recommendation to the Secretary General on the measures to be taken.

Depending on the seriousness of the case, the Commission may also recommend that disciplinary proceedings be initiated against the party at fault in accordance with Articles 54 to 58 of the Staff Regulations.

For the purposes of assessing the seriousness of the case, the fact that the victim is a subordinate of the party at fault shall be regarded as an aggravating circumstance.

The Secretary General shall take a decision further to the recommendation of the Commission.

The measures that may be ordered by the Secretary General after completion of any disciplinary proceedings are those provided for in Article 54.2 of the Staff Regulations.

The Directorate of Human Resources shall be responsible for implementing the decisions taken by the Secretary General. It shall report to the Commission accordingly.”

28. Under Article 13:

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

Under Article 16:

“All persons involved in a complaint of sexual or psychological harassment, including the parties themselves, shall be required to respect the strictest confidentiality during both the informal and formal stages of the proceedings, including after the resolution of the problem or the closing of the case.”

THE LAW

I. JOINDER OF THE APPEALS

29. As the two appeals are closely interconnected, the Administrative Tribunal orders their joinder under Rule 14 of its Rules of Procedure.

II. SUBMISSIONS OF THE PARTIES

30. In her first appeal the appellant challenges the decision to second her temporarily to a department other than the one to which she was originally assigned. In her second appeal she challenges the Secretary General's implicit decision to reject her application for protection in her official capacity. The appellant claims that these two matters are undeniably linked since they both arise from a single event, namely the harassment to which she was subjected.

A. *Appeal No. 414/2008*

31. The appellant asks that decision *ad personam* No. 4277 of 6 March 2008 be annulled. She adduces three grounds in support of this request: abuse of power, breach of Appendix VII, Article 8 of the Staff Regulations and the lack of any need for secondment to the Directorate-General of Human Rights and Legal Affairs. The appellant also asks the Tribunal to order the Secretary General to pay her the sum of one euro in damages plus 3 000 euros in costs.

32. The Secretary General, for his part, asks the Tribunal to declare the appeal ill-founded and to dismiss it.

33. The appellant's arguments may be summarised as follows.

Concerning the first ground, the appellant points out that she was the victim of psychological harassment on the part of her hierarchical superior. There was, furthermore, no reason not to allow her to resume her duties in the Directorate of Communication when her unpaid leave ended, since she had not at all asked to be moved and her post had not been reassigned to someone else. The appellant adds that she was in any case entitled to be reinstated in her old job.

In the appellant's view, the only possible explanation for her secondment was therefore the complaint she had been compelled to lodge, which "made it 'expedient' for the Directorate of Communication to get rid of her."

The appellant concludes that her secondment was based on an abuse of power, which justifies its annulment.

34. Concerning the second ground, the appellant states that under Appendix VII, Article 8 of the Staff Regulations staff members taking unpaid leave are entitled to reinstatement in their post if they have not been away for more than fifteen months, as was her own case. The appellant thus argues that her appointment to the DG-HL, on her return from unpaid leave, is a direct breach of

that article. She adds that if the Secretary General's power of appointment could be exercised at his discretion when a person returned from unpaid leave, this would deprive the provisions of Appendix VII, Article 8 of all effect.

35. Concerning the third ground, the appellant states that the Secretary General, in rejecting her administrative complaint, referred to Article 3 of the Regulations on the Table of Posts which says that a staff member may be seconded for a specified period to a department other than that to which his or her post belongs, "if the staff of a department needs to be temporarily increased".

But according to the appellant, the Secretary General in no way substantiated this need to increase the staff of the DG-HL, a directorate-general which had no special requirements. Neither did he offer any specific and objective explanation of why the staff of this directorate needed to be increased. Moreover, given the number of tasks entrusted to the appellant, it appears hard to justify her secondment in terms of a supposed priority need of the DG-HL for additional staff. On this latter point, the appellant refers to the Tribunal's case-law under which the Secretary General has a general obligation to avoid situations where a staff member is assigned to a department without precise duties being assigned to him/her (ATCE, Appeal No. 285/2001, *Parienti v. Secretary General*, decision of 16 May 2003).

36. The Secretary General's arguments may be summarised as follows.

The Secretary General emphasises, firstly, that the Staff Regulations do not entitle staff members to occupy a specific post, because it is the Secretary General who has the power to assign staff members, in the interests of the service, to various posts commensurate with their grade. In his view it is clear that he acted perfectly lawfully, because in this case the DG-HL needed additional staff and he used his discretionary power to assign the appellant to that directorate-general.

After referring to international case-law on matters of staff management, the Secretary General denies that the appellant was not given "adequate reasons". He argues that a reading of the memorandum which the Director-General of Administration and Logistics sent the appellant on 14 March 2008 shows that the Secretary General took his decision taking into account the priority he gives to the optimal functioning of the DG-HL following the reorganisation of the directorates. He believed that the appellant's assignment to that directorate would help achieve this optimal functioning and that her qualifications and skills in publication and communication strategies were excellently suited to the DG-HL's needs in those areas.

37. The Secretary General emphatically denies the first allegation of an abuse of power. Allegations of that nature must, he says, be properly substantiated. But the appellant offers no precise and verifiable fact in support of her arguments, not even a hint of any. The Secretary General adds that his decision was consistent with the rules of the Council of Europe and with case-law. He is the one best placed to evaluate the needs of the Council of Europe and in this case his judgment was that the appellant's experience and qualifications would be valuable additions to the DG-HL. His decision was clearly explained to the appellant and proper reasons were given. He concludes that there is nothing to suggest that he exceeded his discretionary power in reaching that decision or that it was in any way incorrect.

38. Concerning the alleged breach of Article 8 of the Regulations on Unpaid Leave, the Secretary General holds that the purpose of this provision is to ensure that staff members taking less than fifteen months' unpaid leave can be reinstated at the end of that leave. In the event, the appellant did resume the post she held and it was as the incumbent of that post that she was seconded to the DG-HL, temporarily and for the reasons already explained. Furthermore, the appellant has suffered no prejudice by the fact of being seconded to the DG-HL: her post is of the same grade as the one she held when she began her leave and it requires similar qualifications. It should also be noted that the appellant has not challenged the second decision *ad personam* No. 4465 (extending her secondment from 1 July to 30 September 2008).

39. Regarding the alleged lack of any need to second the appellant to the DG-HL, the Secretary General denies that there was no special need in the DG-HL which justified adding the appellant to the staff of that directorate. A study had been commissioned from the directorate, and it produced a report on this in July 2008. To the Secretary General that is proof, if proof were needed, that there was indeed a special need warranting an increase in staff for that directorate.

40. The Secretary General concludes that the appeal is ill-founded.

B. Appeal No. 459/2009

41. The appellant asks the Tribunal to annul the Secretary General's decision of 22 December 2008 rejecting her administrative complaint. She is also asking for 130 000 euros in compensation plus 3 000 euros in costs.

42. The Secretary General, for his part, asks the Tribunal to declare the appeal inadmissible and/or ill-founded and to dismiss it.

1. Admissibility of the appeals

43. The Secretary General argues that the spirit of Article 40 of the Staff Regulations is that the appellant should have sought the Secretary General's assistance at the time her interests were harmed and not at the end of the proceedings which she brought for harassment. Since the appellant did not do that, the Secretary General concludes that she is now time-barred from doing so. Consequently, her administrative complaint is inadmissible and so is her appeal.

44. The appellant contends that it cannot be claimed that she should have invoked Article 40 of the Staff Regulations once she became aware of the circumstances prejudicial to her, because the Staff Regulations do not stipulate any time limit for action here. Her first concern had been to establish harassment, and since it was established that her interests had been harmed, she then had every reason to ask for protection in her official capacity.

2. Merits of the appeals

45. The appellant states that the harassment she suffered due to the actions of her hierarchical superior affected her in her capacity as a staff member of the Council. The terms of Article 40 of the Staff Regulations thus apply.

46. The appellant states that under Article 40 of the Staff Regulations, staff members may seek protection in their official capacity where they are harmed by acts “directed against them by reason of their being a staff member of the Council”. She claims that the harassment she suffered due to the actions of her hierarchical superior affected her in her capacity as a staff member of the Council and that the terms of Article 40 of the Staff Regulations thus apply.

She argues that the measures taken, and particularly after her unpaid leave, to assign her to a post outside the Directorate of Communication in no way equate to protection in her official capacity. She adds that, at this stage, protection in her official capacity should have been aimed specifically at obtaining reparation of the prejudice she had suffered. In her view, on the level of principles, the obligation to provide reparation arises from the wrong and damaging harassment to which she was subjected.

The appellant adds that the Council of Europe, as an employer, has a “duty of care” towards its staff and must prevent all acts of harassment within the Organisation.

The appellant concludes that Organisation owes her compensation and the decision rejecting her request for protection in her official capacity must thus be annulled under Article 40 of the Staff Regulations.

47. The Secretary General argues that it is clear from international administrative case-law that acts which threaten international civil servants and justify action on the part of the institutions employing them must come from third parties and must be committed by reason of duties performed in the service of the Organisation (case T-67/99, Court of First Instance of the European Communities, judgment of 27 June 2000).

He states that the appellant can in no way claim to be in that situation, because there is no link between the harassment she may have suffered and her status as a Council of Europe staff member. Neither is this a situation in which the Organisation would have to act in place of the staff member in order to safeguard its own interests against a third party. In this case the Council of Europe has in no way been “attacked”, and there is no requirement here for it to safeguard its interests, which are not under threat, by providing protection in her official capacity to a staff member who is in dispute with another staff member.

The Secretary General also points out that there are specific texts covering situations of difficulties between members of the Organisation’s staff and, given these texts, the appellant has no reason to think that protection in her official capacity as defined in Article 40 of the Staff Regulations might be applicable to her situation.

Lastly, even assuming the appellant had requested protection in her official capacity at the right time and that the circumstances had warranted it, it is hard to see what other protective measures could have been taken in the appellant's case by the Secretary General who, after all, removed her from the source of the alleged harassment. At present she can no longer claim to be suffering harassment and the Secretary General is no longer in a position to give her protection in her official capacity.

III. THE TRIBUNAL'S ASSESSMENT

A. Appeal No. 414/2008

48. In the Tribunal's view, the appellant's secondment and the need – real or alleged – to increase the staff of the DG-HL are two aspects of one and the same issue, so the appellant's first and third grounds must be considered together.

The Tribunal agrees with the Secretary General that it is up to the appellant to prove her allegations. But she has given the Tribunal a coherent set of evidence from which the Tribunal concludes that the reason the appellant was given – namely the need to increase the staff of the DG-HL – was not necessarily the true reason for her secondment. Faced with this set of evidence, it was thus incumbent on the Secretary General to give the appellant an adequate explanation of his decision and to provide convincing evidence to refute her allegations. Article 3 of Appendix III to the Staff Regulations does not itself say (paragraph 23 above) that the Secretary General's discretionary power here is absolute. In failing to justify his assertion that the DG-HL needed more staff in a manner which would have enabled the appellant's allegations to be refuted, the Secretary General thus exceeded his discretionary power. Consequently, the Tribunal must conclude that there was an abuse of power and must annul the Secretary General's decision *ad personam* No. 4277 of 6 March 2008.

49. Concerning the second ground, the Tribunal notes that on her return from unpaid leave the appellant was taken back into her original directorate, in the same post, and it was only later that she was seconded to another department. It is of course possible that the Organisation was thinking about seconding the appellant well before she returned to work, but when she did resume work she came back to her previous post as stipulated in Article 8. Moreover, the appellant's post had not been reassigned to another staff member and she continued to hold it until she was transferred to the Secretariat of the Council of Europe's Congress of Local and Regional Authorities (paragraph 7 above).

50. Thus there was no breach of Appendix VII, Article 8 of the Staff Regulations even though the Tribunal has already found that the appellant's secondment was unlawful.

B) Appeal No. 459/2009

51. The Tribunal must first rule on the Secretary General's plea of inadmissibility.

52. The Tribunal notes that the appellant lodged her appeal – and previously her administrative complaint – against the Secretary General's implicit rejection of her request made

on 26 August 2008 (paragraph 17 above). In that request the appellant asked the Secretary General for protection in her official capacity and referred to the opinion which the Commission against Harassment had just delivered on 31 July 2008. From this it is clear, even if we accept the Secretary General's argument that the appellant should have referred the matter to him earlier, that in view of the outcome of the procedure before the Commission against Harassment, the appellant was nevertheless entitled to ask the Secretary General to take action in August 2008.

Consequently the Secretary General's plea is without merit and must be dismissed.

53. Regarding the merits of the appeal, the Tribunal does not deem it necessary to refer here to the substance of the procedure before the Commission against Harassment. Nevertheless, it cannot help but point out that this procedure took just over two years. And it is inconceivable that the procedure before the Commission against Harassment could have been delayed by the conduct of the person accused. The policy statement which precedes Instruction No. 44 says that

“In the event of any instances of sexual or psychological harassment which may nevertheless occur, immediate intervention as provided for under this strategy is designed to put an end to the harassment in question through mediation. As a last resort, the strategy provides for a formal complaint procedure which can result, where the alleged perpetrator of the sexual or psychological harassment has the status of staff member, in disciplinary proceedings initiated by the Secretary General under Article 54 of the Staff Regulations and in the imposition of disciplinary measures.”

54. So measures should have been taken to avoid delays. It is not for the Tribunal to say what those measures should have been or whether the current rules allow them to be taken. But if they cannot be taken, the Organisation should consider the desirability of improving the rules on this point.

55. The Tribunal notes the Commission against Harassment's finding that the appellant was the victim of psychological harassment and that the only question laid before the Tribunal was what should be done as a result of that decision. The appellant says she is entitled to compensation and that this was the sole purpose of her request for protection in her official capacity. The Secretary General, however, argues that the appellant was not entitled to ask for protection in her official capacity.

The Tribunal accepts that protection in one's official capacity, as understood in the system of international organisations (and borne out by international case-law), is both a form of assistance to staff members and a guarantee of the Organisation's interests against acts by third parties outside the Organisation. The Tribunal accepts this definition of protection even though Article 40 of the Staff Regulations does not expressly mention third parties, because the wording of Article 40's two paragraphs leaves no room for any other interpretation.

56. However, the Tribunal necessarily notes that the Secretary General's Instruction No. 44 refers, in its preamble, to Article 40 of the Staff Regulations (paragraph 26 above). And the appellant, in her request of 26 August 2008 to the Secretary General for protection, also referred to the “the general principles of law applicable in such cases” (paragraph 17 above). It is clear

that the policy for implementing protection for staff of the Council of Europe required the Organisation to react quickly and take decisions about the protection to be given to the appellant. In the event, the measures taken by the Organisation failed to ensure that such protection was quickly provided and the appellant must be awarded the compensation she is claiming.

IV CLAIM FOR DAMAGES AND COSTS

57. In her first appeal, the appellant asks the Tribunal to order the Secretary General to pay her the sum of one euro in damages plus 3 000 euros in costs.

In her second appeal she asks for 130 000 euros in compensation. This breaks down as follows: a little over 85 000 euros in respect of the earnings differential between what the appellant would have earned if she had not taken unpaid leave and what she actually earned during her unpaid leave, because she worked in a job paying significantly less than her Council post; 40 000 euros for psychological harm and distress, and 5 000 euros to meet the costs of consulting a lawyer to handle her harassment case. Lastly, the appellant asks for 3 000 euros to cover the costs of the present proceedings.

58. The Secretary General argues that the appellant's request for damages in her first appeal should be rejected. The award of such a sum would only be justified if there had been fault, prejudice and a direct causal link between the two. This is not the case here, since no fault can be demonstrated and the appellant has not suffered prejudice. The Secretary General considers that her claim for costs should be treated in the same way. The Secretary General thus asks the Tribunal to declare the request for costs ill-founded.

Regarding the second appeal and the appellant's request for non-pecuniary and pecuniary compensation, the Secretary General points out that the Commission against Harassment made no recommendation to that effect and that neither Instruction No. 44 nor any of the Council's rules provide for the possibility of such compensation. As for the loss of earnings between 1 January 2007 and 17 February 2008, for which she is seeking compensation, it should be pointed out that it was the appellant's own decision to take unpaid leave. She cannot claim to have been "obliged to ask for unpaid leave, to get her away from the Council of Europe and give her time to regain her health", because if she had so requested at that point, other solutions could have been considered, such as temporary transfer, or secondment to a post commensurate with her grade in another administrative unit. This is in fact what happened when she returned at the end of her unpaid leave.

The Secretary General further points out that the appellant did not leave the Council of Europe to "regain her health". The reason she gave in her application for personal leave was that she wished to pursue "studies or research work of value for the staff member's training and/or the Council" at a university institute in Berlin and to work at the same time in a German advertising agency. This proves that the appellant's health was not impaired.

The Secretary General considers that the appellant's application for costs should be rejected.

59. Firstly the Tribunal notes that under Article 60, paragraph 2, third sentence of the Staff Regulations, it “may also order the Council to pay to the appellant compensation for damage resulting from the act complained of.” Consequently the Tribunal does not need to consider the Secretary General’s plea that the Commission against Harassment did not say that the appellant was entitled to compensation.

In the view of the Tribunal the claim for damages in the first appeal must be considered at the same time as the claim for psychological harm and distress in the second appeal, since the two are connected.

Concerning the pecuniary damage mentioned in the second appeal, the Tribunal notes at the outset that the appellant stated she had been obliged to apply for unpaid leave due to the “serious impairment” of her health. The Tribunal thinks, however, that this part of her claim should be looked at when it considers her claim for non-pecuniary damage. Concerning financial damage, the Tribunal notes that it was the appellant’s own decision to ask for unpaid leave and that during the period in question she underwent training potentially of value to her. So the earnings differential which the appellant is seeking to recover can in no event be deemed prejudice which the Council of Europe should make good. The Tribunal must, however, accede to the appellant’s request for reimbursement of her costs in consulting a lawyer over the harassment case. For this she should be awarded the sum of 4 000 euros.

Concerning the matter of non-pecuniary damage, after acquainting itself with all the facts of the case and in view of its seriousness, the Tribunal rules that the Secretary General shall pay the appellant the sum of one euro for non-pecuniary damage, the sum claimed by the appellant in the first appeal, plus 30 000 euros for the second appeal.

60. The appellant, who retained the services of legal counsel, asked for 6 000 euros to cover the costs of proceedings in the two appeals. The Tribunal considers it reasonable for the Secretary General to pay her the sum requested (Article 11, paragraph 2 of the Statute of the Administrative Tribunal).

V. CONCLUSION

61. The Tribunal concludes that the two appeals are well founded and that the Secretary General must pay the sums of 4 000 euros in damages and 30 001 euros for non-pecuniary damage, plus costs in the sum of 6 000 euros.

For these reasons, the Administrative Tribunal:

Orders the joinder of the two appeals;

Dismisses the Secretary General’s plea of inadmissibility in Appeal No. 459/2009;

Declares Appeal No. 459/2009 admissible;

Declares the appeals well founded;

Orders the Secretary General to pay the appellant the sums of 4 000 euros in damages and 30 001 euros for non-pecuniary damage;

Orders the Secretary General to refund costs in the sum of 6 000 euros.

Delivered by the Tribunal in Strasbourg on 30 October 2009, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

L. WILDHABER