

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

Appeal No. 565/2015 (Maria-Lucia ORISTANIO (II) v. Governor of the Council of Europe Development Bank)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Ms Mireille HEERS, Judge,
Ms Lenia SAMUEL, Deputy Judge,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Maria-Lucia Oristanio, lodged her appeal on 19 June 2015. The appeal was registered on 26 June 2015 under No. 565/2015.
2. On 28 July 2015, the Governor submitted his observations on the appeal.
3. On 26 August 2015, the appellant submitted observations in reply.
4. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 23 October 2015. The appellant was represented by Me Olivier d'Antin, a lawyer practising in Paris. The Governor was represented by Me David Jonin, a lawyer practising in Paris.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

5. The appellant is a permanent staff member of the Council of Europe Development Bank (“the CEB”).

6. On 19 July 2010, the appellant was appointed director of human resources. Under the system in operation at the CEB, this was an A6/A7 post.

7. Following a decision taken by the Governor on 25 January 2013, this post was downgraded from A6/A7 to A5/A6. The appellant retained her job title but was placed under the authority of another director, who held the grade A6.

8. On 12 September 2014, the appellant’s lawyers lodged an initial administrative complaint with the Governor on behalf of their client, under Article 59 of the Staff Regulations.

9. The dispute gave rise to an appeal (No. 559/2014) which the Tribunal settled in a decision delivered on the same day as this one.

10. On 19 March 2015, the Governor undertook an internal reorganisation of the Bank’s departments, with effect from 30 March 2015. It was this reorganisation that gave rise to the present dispute.

11. Prior to that, on 9 March 2015, the Governor had sent the appellant the following note:

“The purpose of this note is to inform you, after having discussed it extensively with the Vice-Governors who concur, about my intention to proceed with a reorganization of certain of the Banks services and to ask your views on the envisaged reorganization with respect to your new function as “Senior Advisor to the Director of Human Resources and International HR-Co-operation (see hereafter).”

Context

In order to optimize the functioning of the Bank I intend to:

- 1) Create a new Directorate responsible for Information Technology and Procurement (both internal procurement and project-related procurement). This new Directorate will be headed by [...]. He will report to the Governor.
- 2) Appoint Mr [...] as head of a Directorate that would comprise the responsibilities of the former entities Cabinet and the Department for General Facilities & Security. He will report to the Governor.
- 3) Appoint Mr [R. V.] as Director of the Directorate of Human Resources and International HR-Co-operation. He will report to the Governor.
- 4) Appoint you as “Senior Advisor to the Director of Human Resources and International HR- Co-operation”

DIRECTORATE OF HUMAN RESOURCES AND INTERNATIONAL HR-CO-OPERATION

The Directorate of Human Development will comprise the following entities:

- HR-Projects & Liaison with other IFIs and Council of Europe on HR-Issues
- Compensation & Benefits
- Recruitment
- Pension Scheme & HR-Analytics Missions

In your new function within this new Directorate, as Senior Advisor, you will report to Mr [R.V.].

The main motivation of the proposed changes to the organization of HR is reinforce the policy making capacity at Human Resources at the highest level. Being relieved from day to day management responsibilities, you will be able to use your expertise and long practical experience in advising the Director of Human Resources and International HR-Co-operation on fundamental HR issues such as the need to follow up/benchmark and update HR Policies.

It was also taken into account the fact that you expressed in the past the wish to have a different role in the Bank and your request for early departure as per letter of 4 December 2014 which will follow the procedure as provided for under the Resolution.

Timing

I would be grateful if you could provide me before 18/3 with any comments you may have in respect with your new function. Vice-Governor [D.] is at your disposal for any questions you might have. »

12. On 16 March 2015, the appellant's lawyer sent the Governor the following letter:

"[The appellant] has forwarded to me the letter which you sent her on 9 March 2015.

She is unable, on account of her state of health, to reply to you herself.

As she sees it, this letter, whose contents upset her greatly, is part of the continuing harassment that she has been complaining about.

[The appellant] firmly intends to oppose what she sees as a further downgrading of her responsibilities, implemented to her detriment on the spurious grounds of the requirements of a reorganisation whose immediate effect is the loss of her title of Director of Human Resources.

She has urged us to let you know that she is against the move and she naturally reserves the right to challenge any decision that erodes her working conditions and undermines her job.

I enclose herewith for information a copy of the letter that we are sending to the Administrative Tribunal of the Council of Europe [in connection with her appeal No. 559/2014.]."

13. On 19-20 March 2015, there was a meeting of the CEB's Administrative Council, during which the Governor made a statement about the reorganisation and at the end of which the Administrative Council approved the new organisational chart and took note of the information provided.

14. Insofar as the reorganisation in question is of relevance to the present appeal, it should be noted that the Governor did away with the "Directorate for Human Development & Internal Services", which involved moving certain departments to other directorates and renaming the former "Directorate for Human Resources" the "Directorate for Human Resources & International HR Co-operation".

15. The guidance provided with regard to human resources was as follows:

"Regarding Human Resources, its cross-cutting role in the institution and the important ongoing and future HR-related projects more than justify to reinforce Human Resources. Renaming this Directorate "Human Resources & International HR Co-operation" underlines the necessity to also reinforce our close co-operation with other IFIs and in particular the Council of Europe on HR matters in order to stay up-to-date and competitive. Furthermore, the administration of pension-related matters of staff - active or retired - will also be entirely managed by this Directorate.

[R. V.], currently on secondment to the European Investment Bank (EIB), will return to the CEB and take over this new Directorate, bearing in mind the experience he has gained in this field at the CEB

and further expanded during his secondment. He will take up his duties on 31st March 2015. [The applicant], who is being relieved from her day-to-day management responsibilities, is asked to support him as Senior Advisor to the Director for Human Resources & International HR Co-operation. She will put all her expertise and long practical experience to the service of the Bank so that the CEB can progress on fundamental HR issues such as HR policies and regulations."

16. On 30 March 2015, the appellant's lawyer, acting on behalf of his client, submitted to the Governor an "administrative complaint under Article 59, paragraph 1, of the Staff Regulations". He asked the Governor to reverse his decision of 19 March 2015 to reorganise the Bank, insofar as it would adversely affect the appellant.

17. On 8 April 2015, Mr R.V., in his capacity as Director of Human Resources, wrote to the appellant, asking her to specify whether she was making a request within the meaning of paragraph 1 of Article 59, mentioned above, or whether she was filing an administrative complaint under paragraph 2 of the same article.

18. In his letter, Mr R.V. stated the following:

"If your complaint is based on the former (Article 59-1 of the Regulations), I would be grateful if you could also specify the kind of decision which, in your view, ought to be taken in relation to yourself. If you wish, I would be happy to discuss the matter with you, under whatever arrangement you consider most appropriate. I think, for example, that some adjustment to your new duties and/or title might be possible, one that would be acceptable to you while still adhering to the general organisational framework, as approved by the Administrative Council.

19. On 16 April 2015, the appellant's lawyer stated that the administrative complaint submitted on 30 March 2015 was based on paragraph 2 of Article 59 of the Staff Regulations.

20. On 29 April 2015, one of the Vice-Governors informed the appellant that her administrative complaint had been dismissed.

21. On 19 June 2015, the appellant lodged the present appeal.

RELEVANT LAW

Staff Regulations of the Council of Europe Development Bank

22. Article 59 of the Staff Regulations deals with administrative complaints and paragraphs 1 to 3 read 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 Director responsible for 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 responsible for 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.”

THE LAW

23. In the form that must be completed in order to lodge an appeal, the appellant states that the administrative act against which she is appealing is the decision taken by the Governor on 19 March 2015 to reorganise the Bank. As to the object of the appeal, the appellant states that the decision in question represents “a further erosion of [her] working conditions, and a continuation of the downgrading / harassment / disguised disciplinary action already brought to the Tribunal’s attention in Appeal No. 559/2014.”

In the grounds for the appeal, the appellant asks the Tribunal to:

- a) find that the decision to assign her to the post of “*Senior adviser to the Director for Human Resources & International HR Co-operation*” was not intended to fill a vacancy appearing in the Table of Posts of the budgetary organisation chart and as such is against the rules;
- b) find that such decision also amounts to a disguised disciplinary measure and is, as such, unlawful;
- c) accordingly, set aside the Governor’s decision of 19 March 2015 insofar as its effect is to downgrade Ms Oristanio’s professional standing and the decision of 29 April 2015 to reject her administrative complaint of 30 March 2015;
- d) order the Bank to pay her the sum of 5 000 euros to cover the costs which she incurred in respect of the present appeal.

24. The Governor for his part asks the Tribunal:

- a) Firstly, to declare the appeal partially inadmissible in that it does not meet the requirements of Article 59 of the Staff Regulations;
- b) Secondly, if the Tribunal considers that the appeal is admissible, to reject the appeal since the reorganisation decision is compatible with the interests of the service, the Regulations on the Table of Posts and the appellant’s grade and cannot be deemed to constitute a disguised disciplinary measure.

The Bank leaves the matter of costs and expenses to the Tribunal's discretion.

I. THE PARTIES' SUBMISSIONS

A. On the partial inadmissibility of the appeal

25. The Governor submits that the object of the appeal against the decision of 19 March 2015 is essentially to describe facts that have no proven connection with the impugned decision and are identical to those alleged in the appellant's first appeal (No. 559/2014). In the context of that appeal, the Bank believes it showed that the allegations of "harassment" were inadmissible, not least because firstly they were not mentioned in the administrative complaint which gave rise to this initial appeal, and secondly because they had not been the subject of separate proceedings, as required under the Bank's Compliance Policy.

26. The Governor submits that the appellant's initial appeal against the reorganisation which took place in 2013 is manifestly time-barred as it was not lodged in keeping with the requirements of Article 59 of the CEB Staff Regulations.

27. It is accordingly contended that the appellant's appeal against the decision of 19 March 2015 is inadmissible insofar as it seeks to cure the alleged non-compliance with the provisions of the aforementioned Article 59 in connection with an earlier appeal No. 559/2014 that is manifestly time-barred.

28. The Governor adds that, in any event, the Tribunal is bound to find that the appellant's intention is to use the decision of 19 March 2015 as a pretext for raising arguments that were not presented within the time-limit and/or in accordance with the relevant rules and procedures of the Bank. These arguments are therefore inadmissible.

29. In her observations in reply, the appellant states that it is difficult to see what makes her appeal partially inadmissible. She points out that the Governor does not deny that she is challenging the decision of 19 March 2015 which adversely affected her within the meaning of Article 59, paragraph 2, of the Staff Regulations. Nor does he deny that this decision had a purpose and content distinct from those of the decision of 12 September 2014 challenged in her first appeal.

30. The appellant therefore asks that the plea of inadmissibility be dismissed.

B. On the merits of the appeal

31. The appellant points out that she does not dispute the Governor's authority to reorganise departments in response to the Bank's changing needs or his authority to appoint and assign staff members, in the interests of the service, to the most appropriate posts and positions.

32. She states that her appeal is directed against the decision which concerns her only insofar as it adversely affects her professional standing.

33. The appellant argues that the decision in question was not intended to fill a vacant post listed in the Table of Posts of the budgetary organisation chart; it appears to be an attempt to formalise the situation that resulted from the progressive downgrading referred to in her first appeal, the explanation for which is, in her view, both strange and conflicting. The decision amounted to a sidelining and as such is unlawful.

34. She further submits that the decision is unlawful because it is a covert way of punishing her for opposing proposed decisions which were manifestly against the rules.

35. The appellant therefore requests that the impugned decision be set aside.

36. The Governor for his part argues that the decision in question was taken in the interests of the Bank. It is, he maintains, compatible with the Table of Posts and the appellant's grade and cannot be deemed to constitute a disguised disciplinary measure.

37. With regard to the question as to whether the reorganisation was in the Bank's interest, the Governor refers to the statements he made to the Bank's Administrative Council and to the memorandum sent to Bank staff on 19 March.

38. The Governor later makes the point that the appellant's new post is in fact mentioned in the Table of Posts approved by the Administrative Council on 19 March 2015.

39. The Governor further maintains that the contested measure is in keeping with Article 11 of the Staff Regulations, as the appellant was assigned to duties in her category corresponding to her grade. Staff members' job titles and duties, moreover, are not immutable over time and what is important, in the Governor's view, is that the new duties should be compatible with the person's grade. The appellant, therefore, was not downgraded. Quite the reverse in fact.

Lastly, the Governor denies that the appellant has been the subject of a disguised disciplinary measure. He points out that the reorganisation was a general measure that had a number of consequences. The appellant, furthermore, was not to be Mr R.V.'s subordinate but rather his special adviser. On this point, the Governor notes that the appellant was given "a role that focused on the development of human resources policies in the light of the practice of other relevant international organisations, which would necessarily complement the competences of the Director of Human Resources and International HR-Co-operation".

40. In the alternative, the Governor denies that there was any bullying.

41. In conclusion, the Governor asks that the appeal be dismissed.

II. THE TRIBUNAL'S ASSESSMENT

A. On the partial inadmissibility of the appeal

42. The Tribunal notes that, as the appellant observes, the present appeal concerns only the decision of 19 March 2015. As she correctly points out, moreover, she is entitled to submit whatever arguments she wishes in support of her appeal, the onus being on the

Tribunal to sift through them and reject any that might be unrelated to the object of the appeal.

43. The Governor's argument that the appeal is partially inadmissible must be rejected, therefore.

B. On the merits of the appeal

44. The Tribunal notes firstly that it is for the head of the Organisation to decide whether there is a need to reorganise the departments and, if so, to proceed in accordance with the Organisation's internal rules.

45. At the same time, however, a staff member who is affected by any such reorganisation has the right to expect it to be implemented without he or she being effectively downgraded by reason of the new tasks which he or she is required to perform.

46. In the opinion of Tribunal, that is precisely what happened in this instance.

47. While it is true that the appellant kept her grade, the fact remains that, quite apart from the redeployment and the creation of a new hierarchical relationship, there has been an "assignment" of tasks which amounts to a downgrade in relation to the tasks which the appellant performed prior to the reorganisation in question.

48. The Tribunal has reached this conclusion both because of the change in the appellant's job title and because of the content of the new tasks assigned to her and which appear to the Tribunal to be significantly diminished in relation to her previous role and responsibilities.

49. Not only has the appellant been relieved of the operational tasks (the day-to-day management referred to in the memo dated 9 March 2015, paragraph 11 above) which made up her core activity in the field of human resources, but these tasks have also been replaced by advisory duties whose content and, notwithstanding the defendant's assertions, importance – despite the title of "*Senior Adviser to the Director of Human Resources*" – and equivalence to the appellant's previous role and responsibilities have not been demonstrated to the Tribunal.

50. At the time when the reorganisation took effect, moreover, the new tasks were not clearly identified, it having merely been stated in general terms that the appellant would advise the Director of Human Resources on "*fundamental [Human Resources] such as the need to follow up/benchmark and update [Human Resources] Policies*"; given the particular circumstances surrounding this case, however, such guidance was too vague. Nor was it based, as far as the Tribunal is aware, on any preparatory studies/documents that would have provided some indication of the importance of the advisory duties assigned to the appellant and the actual level of responsibility involved.

51. Nor were these duties identified later on, during the proceedings initiated by the appellant. Admittedly, during this final stage, the Bank did provide more information and tried to emphasise the importance of the tasks which the appellant would be called upon to perform but there is nothing in these new submissions that would allow the Tribunal to

conclude that these tasks did not involve a reduction in the level of responsibility previously enjoyed by the appellant.

52. The fact that the appellant was not in post is no excuse for the vague nature of the responsibilities that were to be assigned to her, as these should have been clearly identified before she was placed in the new post. The Tribunal notes in particular that in the instant case, she has been relieved of her responsibilities as a Director and, as a result, is no longer attending the same meetings as before, without equivalent compensation, is no longer in charge of staff in the same department and is confined to the role of acting as adviser to the Director of Human Resources.

53. The fact that the appellant has kept her grade is no reason either why the Bank should be exempt from all criticism.

54. Granted, it has been established that, despite what the Governor says, her role was subsequently cut back insofar as, after the appellant's Directorate was reorganised in 2013, she was affected by the changes introduced. The Tribunal found in the first appeal, however, that there had been no breach of the appellant's acquired rights.

55. In this instance, however, the Tribunal is compelled to note that this second dispute between the parties differs from the first in that this reorganisation had a greater effect on the appellant's statutory rights, significantly reducing the scope of her tasks and the level of her responsibilities, and for that reason the Tribunal arrived at different conclusions in the two appeals.

56. The Organisation having failed to assign the appellant tasks of a level comparable to those which she performed before the reorganisation, it must be concluded that the appellant's complaint is well-founded and the impugned decision must be set aside.

57. Having arrived at this conclusion, the Tribunal does not need to examine the appellant's arguments concerning the irregular nature of the procedure and her allegation that it was essentially a "disguised disciplinary measure". Nor does the Tribunal need to consider the secondary complaint to the effect that the appellant was bullied.

58. The appellant, who had recourse to a lawyer's services, has claimed 5 000 euros by way of costs and expenses. The Tribunal considers it reasonable that the Governor should reimburse the requested sum (Article 11, paragraph 2, of the Statute of the Tribunal - Appendix XI to the Staff Regulations).

III. CONCLUSION

59. The appeal is founded and the impugned decision must be set aside. The appellant is entitled to reimbursement of the sum claimed in costs and expenses.

For these reasons, the Administrative Tribunal:

Dismisses the Governor's plea that the complaint is partially inadmissible;

Declares the appeal well-founded and annuls the contested decision;

Orders the Governor to pay the appellant the sum of 5 000 euros by way of costs and expenses.

Adopted by the Tribunal in Strasbourg on 28 January 2016 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 29 January 2016, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS