

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

**Appeal No. 559/2014 (Maria-Lucia ORISTANIO (I)
v. Governor of the Council of Europe Development Bank)**

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Ms Mireille HEERS,
Mr Ömer Faruk ATEŞ, Judges,

assisted by:

M. 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 12 December 2014. The appeal was registered on 19 December 2014 under No. 559/2014.
2. On 29 January 2015, the Governor submitted his observations on the appeal.
3. On 5 March 2015, the appellant submitted a memorial in reply.
4. The public hearing for this appeal was held on 26 June 2015 in the Administrative Tribunal's hearing room in Strasbourg. The appellant was represented by Mr Olivier d'Antin, lawyer at the Paris bar. The Governor was represented by Mr David Jonin, lawyer at the Paris bar.
5. During the proceedings, Ms Lenia Samuel, deputy judge, replaced Mr Ömer Faruk Ateş, who was unable to be present (Article 2 of the Statute of the Administrative Tribunal – Appendix XI to the Staff Regulations).

6. The Tribunal considered that it was unnecessary to recommence the part of the proceedings preceding this replacement (Rule 33 of the Tribunal's Rules of Procedure).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The appellant is a permanent staff member of the Council of Europe Development Bank ("the CEB") with a contract of unlimited duration.

8. On 19 July 2010, the appellant was appointed Director of Human Resources. In accordance with the system in force at the CEB, her post was grade A6/A7.

9. Following a decision by the Governor of 25 January 2013, this post was downgraded from A6/A7 to A5/A6. The appellant kept her title but was placed under the authority of another director whose grade was A6.

10. On 12 September 2014, the appellant's lawyers lodged with the Governor on their client's behalf "an administrative complaint on the basis of Article 59 of the Staff Regulations". They requested:

"pursuant to Article 59-1 of the Staff Regulations, [that he] reinstate [the appellant] in her previous situation prior to 25 January 2013, as regards both her position in the job classification and the reality of her duties as 'Director of Human Resources'."

Owing to the particular circumstances of this complaint given the applicant's official title of 'Director of Human Resources', this complaint is being lodged with you both directly and via the Director of Human Resources, in accordance with Article 59-2 of the Staff Regulations".

11. On 30 September 2014 the appellant sent the Governor a letter.

12. On 15 October 2014, one of the Vice-Governors replied as follows (original language English):

"The Governor has delegated the handling of this matter to me. Consequently, I hereby acknowledge receipt of your registered letter, dated 30 September 2014 and received on 2 October 2014 ("letter"), concerning the basis for your complaint dated 12 September 2014 ("complaint").

I take note of the statement in your letter that your complaint should not be understood as an administrative complaint under Article 59 (2), but as a request under Article 59 (1).

Nevertheless, I must draw your attention to the fact that Article 59 (1) refers to requests from staff members to the Governor "...inviting him to take a decision or measure which he is required to take relating to them...", while Article 59 (2) refers to complaints "...against an administrative act adversely affecting..." a staff member.

Your letter refers explicitly to a decision of the Governor, dated 25 January 2013, regarding a reorganisation of the Bank; a reorganisation that you state had an adverse effect on you and concerning which you request to have the decision reversed.

Neither your complaint, nor your letter, introduces any new factual elements with respect to the Governor's decision of 25 January 2013. Consequently, in line with above, there is no ground to invoke Article 59 (1), but rather Article 59 (2).

As I am confident that you appreciate, the periods to launch complaints (in this case thirty days), as laid down in the Staff Regulations, cannot be circumvented by disguising an administrative complaint, relating to a decision from January 2013, as an invitation to take a decision.

The fact that you have waited more than one and a half years to contest the decision to reorganise the Bank, means that the complaint is time barred as per Article 59 (3) and as such not receivable.

On a secondary basis, and although I have already explained that your complaint is not receivable, I would like to take the opportunity to address some of the statements made in your complaint in order to clarify the situation:

- Reorganisation: As you know, since you have been, as Director of Human Resources, personally involved in the process of the reorganisation of 2013, it concerned several services of the Bank and was by no means limited to the area of Human Resources, but rather the overall structures of the Bank.
- “Downgraded”: You have not been downgraded, but have kept your grade of A6 with the same salary and have remained Director of Human Resources with the same responsibilities, even though the reporting line was modified as of 1st February 2013.

It should, furthermore, be noted that the Governor granted you three additional steps from A6, step 3 to A6, step 6 in July 2013 and one additional step from A6/6 to A6/7 in July 2014.

- Committees and other representation: As a general remark, it should be noted that internal committees are not statutory. It is the Governor, by virtue of Article XI of the Articles of Agreement, who organises the operational services of the Bank and decides on participants in committees that he has set up for the functioning of the Bank. There are no posts that per se guarantee a staff member, in his/her official capacity as a holder of a certain post, to be a member in committees, such as the General Management Committee (GMC).

Furthermore, with respect to the GMC, it has always been the Director of the Directorate in charge of Human Resources who participates in the GMC, as opposed to the Director of Human Resources; noting that Human Resources formed its own Directorate during the period between the two reorganisations of 2010 and 2013. Nevertheless, as you know, the Governor or yourself (on matters pertaining to Human Resources) may request, that there should be ad hoc participants, such as yourself, depending on the agenda of the GMC. It is noted that you have been participating in the GMC on several occasions since the reorganisation of 2013. You have also been fully informed of the agenda of each GMC and received a copy of the minutes.

I would take the opportunity to clarify that the “Director in charge of Human Resources” should not be confused with the “Director of Human Resources”. As was the case before the reorganisation of 2010, the Director in charge of Human Resources refers to the head of the Directorate to which the Director of Human Resources reports. In the past this was Mr. [...]. As of 25 January 2013, the holder of the post is Mr. [...].

- “Lost the possibility to be promoted to the grade of A7”: Your post is part of Group 1 (A5 - A7) and, as for all staff members, you can move within the rank group in which you are assigned or you can participate in the internal or external competitions in which all staff members can participate.
- “Job classification”: you refer to the job classification exercise which Human Resources has been in charge of: “...l'emploi occupé par Mme Oristanio a été déclassé de A6/A7 en

A5/A6..." [*The post occupied by Ms Oristanio was downgraded from A6/A7 to A5/A6*] As you know this exercise is still not completed (e.g. a rule needs to be in place determining the way that this HR tool is used). Irrespective of the uncompleted nature of the exercise, a HR tool cannot be considered as conferring "acquired rights" to staff members with respect to future promotions on the post they occupy...."

13. On 27 October 2014, the appellant wrote the following letter to the Governor:

Subject: Dispute: My request under Article 59.1 (letters of 15 and 30 September 2014)
Your reply of 15 October under Article 59.2

Dear Sir,

I received your letter dated 15 October 2014 on 16 October 2014.

Although I filed a request inviting you to take a decision that I feel you are required to take relating to me on the basis of Article 59.1, I note that you reject my request for reasons of both form and substance.

Regarding the form, I filed a request on the basis of Article 59.1 because I did not wish to contest the decision of 25 January 2013 for reasons of which you are aware, namely the general interest as opposed to individual interests. However, as you know from other proceedings that I have initiated against you, what I do contest is the progressive implementation of that decision which has led to a deterioration of my working conditions and undermined my professional and personal dignity since 1 February 2013. This is the reason why I submitted to you the request to be reinstated in the performance of my duties as they were prior to 1 February 2013, because on the pretext of a general reorganisation of the Bank, you have in actual fact deliberately downgraded me, in breach of my professional and personal dignity.

As regards the substance, you are aware that my request is explained in detail in other documents that up until now were confidential. You also know that I am able to provide evidence that contradicts the clarifications that you gave in your answer of 15 October 2014.

Thus, given that you consider the request that I filed on 12 September 2014 to be an administrative complaint based on Article 59.2, I will draw the attention of the Administrative Tribunal of the Council of Europe, within the period of time stipulated by the Staff Regulations, to the rejection of that request announced to me in your letter of 15 October 2014."

14. The Tribunal was provided with information about other proceedings, brought before the Compliance Committee set up within the Bank's Governing Board and the Governing Board itself. The Tribunal does not deem it necessary to summarise those proceedings here since they are irrelevant to the solution of this dispute.

15. On 12 December 2014, the appellant lodged this appeal.

II. RELEVANT LAW

Staff Regulations of the Council of Europe Development Bank

16. Article 59 of the Staff Regulations deals with administrative complaints. 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 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."

THE LAW

17. In the appeal form that must be filled out in order to lodge an appeal, the appellant states that the administrative act against which she is lodging an appeal is the decision of 15 October 2014. She does not give any answer to the questions aimed at identifying the date of the administrative complaint against that act and the date of its rejection. Regarding the grounds for the appeal, the appellant notes "deterioration of working conditions/downgrading/harassment/disciplinary sanction under the guise of a reorganisation".

In her memorial in reply, the appellant asks the Tribunal:

In the first place:

- a) to find that the deterioration of her professional situation constituted a disguised disciplinary sanction and was as such illegal;
- b) to annul the decision of 15 October 2014 whereby the Governor of the Council of Europe Development Bank refused to reinstate her in the normal exercise of her duties as Director of Human Resources;
- c) to order the Bank to pay her the sum of 5 000 euros by way of compensation for the non-pecuniary damage caused to her by the harassment tactics that had led to a deterioration of her professional situation;
- d) to order the Bank to pay her the sum of 5 000 euros in respect of the expenses she had to incur for this appeal.

In the alternative:

- e) to annul the decision of 15 October 2014;
- f) to order the Bank to pay her the sum of 10 000 euros by way of compensation for the non-pecuniary damage caused to her by the loss of her post of Director of Human Resources.

18. The Governor for his part asks the Tribunal:

Firstly, to declare the appeal inadmissible in its entirety, on the following grounds:

- a) Article 59, paragraph 1, of the Staff Regulations is, according to him, inapplicable;
- b) the appellant does not in his view prove a direct and existing interest in bringing proceedings as provided for in Article 59, paragraph 2, of the Staff Regulations;
- c) the administrative complaint was lodged after expiry of the time limit laid down in Article 59, paragraph 3, of the Staff Regulations and is therefore time-barred;

Secondly, if the Tribunal deems the appeal admissible:

- d) to declare inadmissible that part of the appeal that was not the subject of the administrative complaint, and in particular the part relating to the alleged harassment tactics of which the appellant claims to be the victim;

And in any event,

- e) to dismiss the appeal;
- f) the Bank leaves it to the discretion of the Tribunal to decide who is to bear the costs and expenses.

I. SUBMISSIONS OF THE PARTIES

A. Regarding the inadmissibility of the appeal in its entirety

19. According to the Governor, the appeal should be deemed inadmissible on three grounds: inapplicability of Article 59, paragraph 1, of the Staff Regulations, the lack of interest in bringing proceedings and the belated submission of the administrative complaint.

20. According to the Governor, the appellant claims that her complaint is based on Article 59, paragraph 1, of the Staff Regulations in order to circumvent the thirty-day deadline specified in paragraph 3 of the same article.

21. Next the Governor stresses that the appellant, by her own admission when introducing her administrative complaint (paragraph 8 above), gave her free and informed consent to the reorganisation of 25 January 2013. He claims that she therefore has no direct and existing interest in bringing proceedings as provided for in Article 59, paragraph 2, of the Staff Regulations

22. Finally the Governor notes that the appellant lodged her administrative complaint against his decision of 25 January 2013 more than one and a half years after that decision, and hence outside the thirty-day period laid down in Article 59, paragraph 3 (paragraph 14 above).

23. The appellant claims that there was no ambiguity about her request of 12 September 2014: she wished to be reinstated in her previous situation and was contesting not the decision of 25 January 2013 itself but the measures for its implementation. According to the appellant, a decision by the Tribunal would not necessarily mean having to annul the 25 January decision; it would only mean applying the reorganisation in the way explained to her. Hence the aim of her complaint of 12 September 2014 was to ask for her reinstatement and not the annulment of the decision of 25 January 2013.

24. The Governor referred to the judgment of 18 June 2010 in the case *Fiorilli v. the Secretary General* to support his argument that the administrative complaint was time-barred, but the appellant does not consider that reference to be relevant, inasmuch as, unlike the appellant in that other case who was critical of the impugned act from the beginning, she did not contest the reorganisation itself because of the assurances she had received from the Governor.

25. Regarding the alleged lack of interest in bringing proceedings, the appellant states that this objection in fact raises the fundamental question being submitted to the Tribunal. Indeed, she “contests not the reorganisation [of 25 January 2013], but the way in which that reorganisation was progressively implemented, in other words, the gradual downgrading of her status as Director of Human Resources”.

B. On the partial inadmissibility of the appeal

26. After noting that the appellant lodged her administrative complaint in order to be reinstated with the same job classification as prior to 25 January 2013, the Governor asserts that the appeal is based largely on the contents of the file that was submitted to the Compliance Committee (paragraph 14 above) to which, he says, there is no reference in the administrative complaint. The Governor is referring in this regard to the appellant’s allegations of psychological harassment. He claims that this part of the appeal is therefore inadmissible.

27. The appellant for her part stresses that she is not asking the Tribunal to find that she was a victim of harassment but to recognise that the deterioration of her professional situation constituted a disguised disciplinary sanction.

C. On the merits of the appeal

1. Regarding the disguised disciplinary sanction

28. According to the appellant, the question is not whether she was the subject of a statutory disciplinary procedure or whether her administrative situation has changed, but whether in reality she has genuinely remained Director of Human Resources. She considers that there was an objective downgrading of her professional status and that the intention was to sanction her, in particular in connection with related matters pertaining to the Governor’s

social and financial situation and to the relations between the Governor and a third person who had been a temporary staff member of the Bank.

29. The Governor contests the existence of a disguised disciplinary sanction. He adds that the reorganisation that took place in 2013 was undertaken in the Bank's interests and in a manner that fully respected the individuals concerned and the dignity of staff members, and that in any case the appellant's post of Director of Human Resources had not been taken away.

30. Regarding the appellant's duties, the Governor notes, on the one hand, that these did not change, and on the other, that she had no established rights.

2. Regarding the claim of harassment

31. The appellant does not put forward any specific arguments regarding this claim, but confines herself to asking for a sum to be awarded by way of compensation for the non-pecuniary damage caused by the harassment tactics that allegedly led to a deterioration of her professional situation.

32. The Governor for his part states that the appellant provides no proof of her allegations and that her accusations are in any case manifestly wrongful and unfounded

II. THE TRIBUNAL'S ASSESSMENT

33. Before expressing an opinion on the Governor's objections of inadmissibility, the Tribunal observes that there is some confusion between the parties as to the precise legal nature of some of the appellant's correspondence.

34. The Tribunal notes that the provisions of paragraph 1 of Article 59 of the Staff Regulations are designed to allow a staff member to have an administrative act performed that may subsequently be contested by means of an administrative complaint under paragraph 2 of the same article. There can therefore be no chronological overlap between these two procedures, which by definition are distinct: one must follow after the other. Indeed the Tribunal has already addressed the differences between these procedures (ATCE, Appeal No. 340/2004 - Robert DIEBOLD (II) v. Secretary General, judgment of the Administrative Tribunal of 17 June 2005, although this refers to Article 59 in its previous version).

35. Although the appellant's letter to the Governor of 12 September 2014 makes reference to both paragraphs at the same time, despite the verbal sparring it is clear that this letter indeed constitutes an administrative complaint within the meaning of Article 59, paragraph 2, of the Staff Regulations. The Tribunal arrives at this conclusion, because even if at the end of the letter the appellant refers – incorrectly, as it happens – to paragraph 1 of the same article, she is asking to be reinstated in her previous situation. The Tribunal sees that request for "reinstatement" as analogous with the fact of contesting an "individual measure" affecting the appellant, of the kind referred to in paragraph 2. Therefore that letter, which, moreover, was clearly described as an "administrative complaint", had the aim of requesting the annulment of an existing administrative act and not the adoption of an administrative act that did not yet exist.

36. This mix of procedures – which as already explained, is contrary to the system established by the abovementioned Article 59 and should not occur, particularly following the amendments made by the Council of Europe's Committee of Ministers in 2010 (CM/Res(2010)9 of 7 July 2010) in order to avoid any confusion between two distinct procedures – is nonetheless not enough to cast doubt on the real nature of the letter of 12 September 2014.

37. Moreover, the reply of the Vice-Governor, acting on behalf of the Governor for obvious reasons of expediency, constitutes a rejection of that complaint, even if it contains no final conclusion to that effect or – contrary to what happens for decisions by the Secretary General dismissing administrative complaints lodged by Council of Europe staff members – any indication regarding the possibility that the complainant has of submitting the matter to the Tribunal under Article 60 of the Staff Regulations.

38. Finally, even if in her letter of 27 October 2014 (paragraph 13 above) the appellant contradicts that interpretation, the fact remains that she does not contest it *expressis verbis*, but accepts it and, without requesting a reply in accordance with Article 59, paragraph 1, of the Staff Regulations, states that she will take the matter before the Tribunal and draw its attention to the rejection contained in the letter of 15 October 2014. The way in which the appellant filled out the appeal form (paragraph 15 above) is not an element that in any way permits the Tribunal to arrive at a different conclusion.

39. The Tribunal deems it useful to point out that if the letter of 12 September 2014 was not an administrative complaint within the meaning of Article 59, paragraph 2, of the Staff Regulations, but rather a request for an administrative decision under paragraph 1 of that article, then the appeal would have to be dismissed in its entirety on the grounds of non-exhaustion of internal remedies, inasmuch as it is directed against the Vice-Governor's letter of 15 October 2014.

40. The Tribunal will therefore take that conclusion as a starting point for ruling on the Governor's objections of inadmissibility.

A. Regarding the inadmissibility of the appeal in its entirety

41. The Tribunal notes firstly that, as pointed out above, the procedure preceding the submission of the matter to the Tribunal was not effected in accordance with Article 59, paragraph 1, of the Staff Regulations; the first part of the objection must therefore be rejected.

42. Next, according to the Tribunal, the fact that the appellant had accepted the reorganisation of January 2013 does not mean that she cannot contest its implementation; the second part of the objection must therefore also be rejected.

43. As regards the third part of the objection, the appellant is certainly time-barred from complaining about the reorganisation decision of January 2013. However, she claims to be contesting not the decision itself, but its implementation. The Governor's objection must therefore be accepted if the appellant is complaining of the decision itself or action or

behaviour for its implementation falling outside the thirty-day period for the lodging of an administrative complaint, and must be rejected if the appellant is complaining of facts or actions occurring within that time-limit.

B. Regarding the partial inadmissibility of the appeal

44. The Tribunal finds that even if the appellant made no reference in her administrative complaint to the file submitted to the Compliance Committee, the fact remains that the ground of appeal that the Governor deems inadmissible is related to facts that the appellant complains of in her administrative complaint. Indeed, an applicant does not need to develop all his/her arguments at the stage of the administrative complaint: at this point it is sufficient to identify the act or behaviour that is being complained of.

45. The Governor's objection of partial inadmissibility must therefore be dismissed.

C. Regarding the merits of the appeal

46. Regarding the first ground of appeal, the Tribunal finds that the arguments put forward by the appellant do not make it possible to prove that she was the victim of a disguised disciplinary sanction.

47. Admittedly, it has been shown, despite the Governor's assertions, that there was a re-dimensioning of the appellant's role following the 2013 reorganisation, inasmuch as her Directorate was affected by the changes that had been introduced. However there was no breach of her established rights. In particular, the fact that the appellant's post was twin-graded over two different grades as compared with her previous situation does not constitute a violation of her statutory rights, because the statutory texts do not guarantee automatic promotion or the right to be promoted. The loss of opportunity for promotion within the same post – which means a reclassification of the staff member's grade – does not in itself constitute a breach of established rights. And as regards, finally, the fact that the Governor allegedly failed to live up to the assurances that he had given the appellant at the time of the reorganisation, it must be said that the Governor, by virtue of his powers regarding the Bank's organisation, was entitled to do so.

48. The appellant claims that his departure from those assurances was intended as a sanction against her, but it must be said that she offers no proof for that allegation. The difficulties that she allegedly encountered in getting colleagues to testify – for which, moreover, she provides no proof either – does not exempt her from the burden of proof incumbent upon her before the Tribunal.

49. All the arguments put forward by the appellant to support that ground of appeal must therefore be dismissed and the ground must be declared unfounded.

50. Regarding the appellant's second claim, the Tribunal finds that the appellant does not offer evidence in support of her requests for compensation in respect of harassment. The Tribunal for its part finds no proof in the case-file that would allow it to find that there was harassment. For that reason that claim must also be dismissed.

III. CONCLUSION

51. The appeal is unfounded and is dismissed.

For these reasons, the Administrative Tribunal:

Dismisses the objections of inadmissibility raised by the Governor;

Declares the appeal to be unfounded;

Rules that each party will bear its own costs;

Adopted by the Tribunal in Strasbourg on 28 January 2016, and delivered in writing pursuant to Article 35, paragraph 1, of the Rules of Procedure of the Tribunal, on 29 January 2016, the French text being authentic.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. ROZAKIS