

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 470/2011 (R.V. v. Governor of the Council of Europe Development Bank)

The Administrative Tribunal, composed of:

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

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr R. V. lodged his appeal on 3 January 2011. It was registered on the same day under number 470/2011.
2. On 3 January 2011, Maître Christine Hillig-Poudevigne, counsel for the appellant, submitted further pleadings.
3. On 14 February 2011, the Governor forwarded his observations on the appeal. The appellant filed observations in reply on 1 March 2011.
4. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 11 April 2011. The appellant was represented by Maître Christine Hillig-Poudevigne and the Governor by Maître Jean-Michel de Forges, both barristers practising in Paris.

THE FACTS

I. BACKGROUND

5. The appellant, who is of French nationality, is a permanent member of the staff of the Council of Europe Development Bank (“the Bank”). He holds grade A6 and is Director for General Administration. Among other things, the appellant was responsible for the Human Resources Department.

6. On 21 June 2010, the Governor of the Bank decided to turn this Department into a Directorate directly answerable to him and to appoint a female staff member as Director. As a result, the appellant no longer performed any duties in that field.

7. The appellant – who says that he was unsettled by the circumstances in which this decision was made and the way in which he was informed of it – states that the decision was the “climax of a campaign of attrition against him” which had been going on for over a year and the reasons for which were unknown to him.

II. THE CIRCUMSTANCES OF THE CASE

8. On 20 July 2010, the appellant submitted a request to the Governor for “protection in his official capacity” based on Article 40 of the Staff Regulations. This request read as follows:

“I hereby refer to the decision notified to all staff on Monday 21 June 2010, in an email from your secretariat and a memorandum of the same date to the Vice-Governors and the members of the General Management Committee, entitled “creation of a Directorate for Human Resources”.

As you know, I lodged an administrative complaint against this decision on 19 July 2010 through the Head of the Directorate responsible for human resources under the provisions of Article 59, §2 of the Staff Regulations.

As you also know, the first paragraph of Article 40 of the Staff Regulations provides that “Staff members may seek the assistance of the Governor 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 Bank”.

Based on all the arguments cited in my administrative complaint (to which this request refers), I feel justified in thinking that I meet the requirements of that article:

- My non-material interests have clearly been harmed, although I was not notified in advance of any fault on my part in the performance of my duties.
- They are harmed by an administrative decision which causes me serious psychological and professional damage.

- I have suffered this damage by reason of being Director for General Administration responsible, prior to that decision, for management of human resources.

I must also mention in this request the remarks you made to me at our very short meeting on 21 June 2010 when I was expressing my dismay at your decision. Those brief remarks referred to information concerning me, which you did not wish to disclose to me. This leads me to believe that I am the victim of defamatory tactics to damage my reputation with you, which I wish to elucidate fully.

All told, I am the victim not only of a discriminatory measure taken on 21 June 2010, but probably also of a campaign to unsettle me (whose initial effects I have painfully experienced over the last few months). Both demand that I should be able to defend myself against these acts which cause me direct harm.

Under these circumstances, I request your assistance to defend my non-material interests in accordance with the first paragraph of Article 40, which were harmed by the decision of 21 June 2010 and the circumstances surrounding it.

I should be grateful if you would let me know the manner in which this assistance is to be provided, in accordance with the second paragraph of Article 40.

Lastly, given the special nature of this case, in which the acts complained of directly concern the position of Governor, I thought it would be appropriate to put the Chief Compliance Officer on copy of this request so that he can shed light on it where necessary.”

9. Having received no reply upon expiry of the sixty-day period provided for in Article 59, paragraph 1, of the Staff Regulations, the appellant lodged an administrative complaint against the implicit rejection of his request for protection in his official capacity (Article 59, paragraph 2, of the Staff Regulations).

10. On 10 November 2010, the Director for Human Resources forwarded to the appellant the reply, dated 9 November, from one of the Vice-Governors, who had been directed by the Governor to deal with the administrative complaint. This reply read as follows:

“Your request of 20 July 2010 for protection in your official capacity was drafted in such a way that it was difficult to identify exactly what the issues were, and did not specify the desired form of protection.

Your administrative complaint of 15 October 2010 includes a whole range of considerations that are unrelated to the protection sought and the manner in which it is to be provided. It seems, however, to clarify the following points:

- you are seeking protection from the Bank in the form of coverage of any lawyer’s fees you may have incurred;

- your request concerns three matters: your administrative complaint of 19 July 2010, alleged defamatory tactics against you, and your “state of work-related nervous exhaustion”.

Regarding your administrative complaint of 19 July 2010, it should be noted that Article 40 of the Staff Regulations (§ 1 and § 2) applies to situations in which the acts harming the material or non-material interests of staff members or their families originate from third parties outside the Organisation.

When a staff member contests an administrative decision adversely affecting him, the rules relating to administrative and judicial remedies apply; in that context, if the contested decision is annulled, the staff member concerned may, among other things, obtain full or partial reimbursement of the costs incurred in bringing proceedings.

In the instant case, the complaint of 19 July 2010 concerns an administrative decision by the Governor, who is clearly not a third party outside the Organisation.

The protection sought cannot therefore be granted.

Regarding the defamatory tactics to which you refer, in the absence of any concrete evidence there are no grounds for payment of lawyers’ fees.

Regarding your “state of nervous exhaustion”, which you say is “work-related”, your comments refer both to medical considerations and to “humiliation” and “discrimination”.

As you know, having already made use of them, the Bank has introduced procedures and mechanisms (medical adviser; therapeutic part-time work; Rule No 1/2003; Code of Conduct) to respond to this type of situation and ensure appropriate protection, financed directly or indirectly by the Bank.

Since staff members have every opportunity to make use of them, there are no grounds at this stage for payment of lawyers’ fees.”

11. On 3 January 2011, the appellant lodged the present appeal.

III. REGULATIONS CONCERNING THE BANK

12. The Council of Europe Development Bank – formerly the Social Development Bank and, before that, the Council of Europe Resettlement Fund – was set up in 1956 under a Council of Europe Partial Agreement.

Under Article 11, Section 1.d. of the Bank’s Articles of Agreement, the Council of Europe Staff Regulations are applicable to the staff of the Bank in any matter not covered by a specific decision of the Bank’s Administrative Council.

In its decisions of 29 September 1995 in Appeals N^{os} 189 et 195/1994, 190, 196, 197/1994 and 201/1995, the Administrative Tribunal briefly described this institution and the rules governing its operation.

13. The protection of staff members in their official capacity is governed by Article 40 of the Staff Regulations, which, in the version applicable to the Bank, reads as follows:

PART IV: Rights of staff members

Article 40 – Protection of staff members in their official capacity

“1. Staff members may seek the assistance of the Governor 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 Bank.

2. Where the Governor 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 Bank 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 Governor considers that legal action may harm the interests of the Bank, he or she may ask the persons concerned not to take such action; in such cases, if they do not take legal action, the Bank shall make good the material damage suffered by the persons concerned, provided that they assign their rights to the Bank.”

14. On 14 January 2003, le Governor adopted Rule No 1/2003 prohibiting all conduct infringing the dignity of men and women in the workplace or in connection with work at the Council of Europe Development Bank, at all levels. This rule refers to Articles 25 (loyalty and integrity), 40 (protection of staff members in their official capacity) and 54 (disciplinary measures) of the Staff Regulations

15. In 2007, the Bank approved an Anti-corruption Charter and introduced a new “compliance” function. The mission of the “compliance officer” is “to ensure that the Bank acts in compliance with its own rules, current legislation, the Code of Conduct, as well as with good practices to avoid the risk of any irregularity in the functioning of the Institution, of its Organs or of its Staff”. The compliance officer’s priority objectives include the application of ethical rules of behaviour in accordance with the Institution’s principles of integrity and good governance.

16. On 1 January 2010, the Code of Conduct of the Council of Europe Development Bank came into force. Article 13 deals with internal relations and with the general principles to be adhered to in working with colleagues, behaviour towards superiors and subordinates, and sexual harassment and blackmail. The Chief Compliance Officer ensures compliance with this Code.

Unlike the Council of Europe – to which, according to its Articles of Agreement, the Bank is attached and, as such, administered under its supreme authority – the Bank has no Mediator or Commission against Harassment.

THE LAW

17. The appellant lodged the present appeal in order to request the annulment of the Bank's decision rejecting his request for protection in his official capacity, first implicitly, then, on 9 November 2010, explicitly.

The appellant also asks to be granted protection in his official capacity and to be awarded damages.

Lastly, the appellant asks that the Bank be ordered to pay all costs.

18. For his part, the Governor asks the Administrative Tribunal to dismiss the appeal.

I. ARGUMENTS OF THE PARTIES

19. The appellant puts forward two arguments concerning the legitimacy of his request for protection in his official capacity and the Bank's failings in this respect, and the denial of protection.

20. On the first point, he relies on the case-law of the Administrative Tribunal under which protection of staff members in their official capacity may apply outside the context of acts committed by third parties (ATCE, Appeals Nos 414/2008 and 459/2009, Zikmund (I) and (II) v. Secretary General). He points out that, in that case, the appellant's request for protection in her official capacity was initiated and accepted in the context of a situation of psychological harassment within the Council of Europe.

21. According to the appellant, the case-file shows that his non-material and professional interests were seriously harmed, although he had not been notified in advance of any fault on his part in the performance of his duties, as a result of acts directed against him (and in particular the administrative decision of 21 June 2010) causing him serious non-material and professional harm.

22. In connection with the acts directed against him in his capacity as Director for General Administration, the appellant reiterates that the acts in question do not necessarily have to come from a third party. According to the case-law of the Administrative Tribunal of the Council of Europe, it is impossible to say that protection of staff members in their official capacity can only apply in the case of acts committed by third parties. In the instant case, the major and most conspicuous act is obviously the administrative decision of 21 June 2010 which, without any prior consultation, quite simply divested the appellant of his human resource management duties, which were his post's primary and essential functions. The circumstances in which this decision was taken show clearly that it was a prejudicial act directed against the appellant and the lack of any pecuniary damage does not mean that no damage at all was caused.

The appellant adds that this administrative decision was the sign of a very serious deterioration of his working conditions, which had been going on for months. The deterioration of his working conditions had been brought about in a very insidious manner. Real psychological violence had gradually materialised in the form of exclusion from decision-making processes, including in fields for which he was supposed to be responsible.

After giving some examples, the appellant says that, taken separately, these examples may seem tolerable. But it was the repeated and systematic nature of these acts which helped to unsettle him and which led gradually to a state of nervous exhaustion. He adds that the decision taken on 21 June 2010 finished him off nervously owing to its sudden and unconcerted nature, which explains why he is now requesting protection in his official capacity.

23. The appellant adds that these acts contributed towards harming his non-material and professional interests, without any fault on his part. In his view, the Bank unquestionably failed to provide the protection which it owes to any staff member who considers himself to be the victim of actions contrary to human dignity. Despite all his warnings, the Bank did not conduct an investigation and did not grant him protection

24. Where the second argument is concerned, the appellant points out that the Bank's Code of Conduct demands ethical professional behaviour and prohibits all forms of discrimination. Unfortunately, unlike the Secretariat of the Council of Europe, the Bank has not introduced a specific procedure for situations involving possible psychological harassment

The appellant points out that, within the Council of Europe, Instruction 44 of 7 March 2002 on the protection of human dignity at the Council of Europe provides for a very specific procedure enabling staff members, among other things, to refer matters to a mediator. The preamble to the Instruction also refers to Article 40 of the Staff Regulations (protection of staff members in their official capacity), which shows that staff members may also request protection in their official capacity in connection with an infringement of human dignity.

25. The appellant adds that, in accordance with the Bank's current internal regulations, he referred these violations as a matter of priority to the Governor, but also to the Director for Human Resources and the Chief Compliance Officer.

After outlining his actions, the appellant asks how he can enjoy the benefit of these procedures if the Governor refuses to initiate them and to help build a dialogue.

The appellant infers from this that he is not only denied the benefit of protection in his official capacity when he is the victim of acts directed against him with the clear aim of unsettling him psychologically and professionally, but is also unable to secure any protection against the repeated infringements of his dignity

In his view, this deadlocked situation proves how necessary and urgent it now is to grant his request for protection in his official capacity so that his interests can be properly protected.

The appellant points out that he was forced to seek legal assistance to defend his interests

which had been harmed by an administrative decision and numerous other actions. This material aspect has an obvious cost, which he is alone in bearing and which is obviously causing him pecuniary damage. It would be fair for the Bank to cover these costs in order to ensure a minimum of equity between a highly developed administrative apparatus and an individual who has deliberately been isolated. This equity might, among other things, take account of the fact that the Governor has appointed a lawyer to represent him in dealings with the appellant's legal counsel – a lawyer whose fees are probably paid by the Bank and not by the Governor himself.

26. In conclusion, the appellant asks the Administrative Tribunal to annul the decision dismissing his request for protection in his official capacity and to grant him such protection.

27. For his part, the Governor observes that the appellant mainly challenges the lawfulness of the decision taken by the Governor on 21 June 2010 to restructure some of the Bank's departments by turning the old department of human resources into a directorate separate from the Directorate for General Administration to which it was previously attached. Yet this decision is contested by means of another procedure and the Administrative Tribunal is not asked to rule on the lawfulness of that decision but only on that of the refusal to grant the appellant protection in his official capacity.

28. In reply to the appellant's argument that Article 40 of the Staff Regulations obliges the Governor to grant him protection in his official capacity in the form of coverage of the mainly legal expenses which he has incurred in contesting the administrative re-organisation measure of 21 June 2010, the Governor submits that such a request could only meet with a negative response on his part. On the one hand, the system for challenging the Governor's administrative decisions is described in full in Articles 59 to 61 of the Staff Regulations; on the other, the question is settled by the fact that the Administrative Tribunal can order the Bank to pay any costs, and particularly lawyers' fees, which an appellant may have incurred in lodging an appeal with it and conducting that appeal. The Governor fails to see how, and on what basis, Article 40 could apply to this kind of challenge.

29. In connection with the alleged defamatory tactics against the appellant, the Governor does not deny the appellant's right, on the basis of the Zikmund case-law (ATCE, Appeals Nos 414/2008 and 459/2009, paragraph 55), to obtain the Bank's protection. Indeed, this protection could be granted to him even if the source of the defamation was persons within the Bank, not on the basis of Article 40 itself but on that of the Governor's Rule No 01/2003 of 14 January 2003, which prohibits violations of the "dignity of men and women in the workplace or in connection with work at the Bank": depending on the circumstances, defamatory tactics within the Organisation might be classed as a violation of dignity.

The reality and origin of such tactics need to be identified if the competent authority is to be able to take appropriate measures.

Yet the information provided by the appellant to the Governor is insufficient to establish the reality and origin of the alleged defamation.

It was therefore rightly stated in the decision of 9 November 2010 that protection could not be granted, and especially not in the form of coverage of lawyers' fees, in the absence of any proceedings.

30. In connection with the complaint concerning the appellant's work-related nervous exhaustion – to be considered as psychological harassment – the Governor re-affirms that Council of Europe Instruction 44 is not applicable to the Bank and that these matters are governed by the Governor's Rule No 01/2003 of 14 January 2003 and the Code of Conduct. However, despite the repeated nature of these allegations and the abundant documentation which is systematically appended to them, the appellant has never provided the least evidence backing up his allegations. It is even the case that the Chief Compliance Officer himself has never provided the Governor with the least evidence (facts, documents, witness evidence) on which the Governor might have been asked to justify himself.

31. The Governor adds that this is therefore a very different legal context from that of the Zikmund case, to which the appellant refers. In that case, the facts relating to the psychological harassment alleged by Ms Zikmund were established by means of internal Council of Europe procedures, so that the Administrative Tribunal was led to consider whether the victim had enjoyed the protection warranted by her situation.

In the appellant's case, the psychological harassment which he alleges has not been recognised and described as such by any internal authority or organ of the Bank, or indeed by any external authority or organ.

32. Lastly, the Governor considers that it is not for him, especially in a case in which he himself is involved, to express a judgment here on the way in which the Chief Compliance Officer has dealt with the appellant's various requests.

Even if, as the number and virulence of his complaints and appeals show, the appellant found it hard to accept the administrative re-organisation of 21 June 2010, he is clearly not in a situation that would justify protective measures other than those from which he has already benefited.

The Governor infers from this that there were therefore no grounds for responding favourably to the appellant's request for protection in his official capacity, and especially not in the form of payment of lawyers' fees.

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

II. THE TRIBUNAL'S ASSESSMENT

34. The Tribunal points out first of all that, under Article 60, paragraph 2, of the Staff Regulations, it is not empowered to grant staff members protection in their official capacity, as requested by the appellant in one of his submissions. In this case the Tribunal only has the power to annul the contested decision. It does not have the power to deal with all aspects of the case as it is not a pecuniary dispute.

35. Secondly, the Tribunal notes that, apart from the judicial procedure established by Articles 59-60 of the Staff Regulations, the Council of Europe Development Bank, unlike the Council of Europe, the international organisation to which the Bank is attached, does not have any bodies responsible for investigating and settling disputes between staff. The Bank does have a Rule (No 1/2003) issued by the Governor and a Code of Conduct under which a Chief Compliance Officer has been given responsibility for verifying compliance with its provisions. However, in view of the limits which have become apparent in this case, which pits the appellant against an elected representative of management, ie a head of the Bank, the Tribunal believes that it would make for less contentious staff management at the Bank if bodies similar to those created by the Council of Europe were set up at the Bank or their jurisdiction was accepted.

36. Regarding the appellant's complaints, the Tribunal accepts that, as argued by the Governor, this case does not concern the question of whether the appellant was or was not entitled to retain the duties – which, moreover, he describes as being his core duties – which were assigned to him prior to 21 June 2010. This question falls outside the framework of the matter referred to the Tribunal and, furthermore, is the subject of another set of proceedings which the appellant initiated under Article 59 of the Staff Regulations and which, according to the information in the Tribunal's possession, have not yet been concluded.

37. However, the Tribunal has a duty to verify whether the procedures by which that decision was taken, considered in isolation or in conjunction with the other acts complained of, constitute acts in respect of which the Bank should have provided the protection to which the appellant, like any other staff member, was entitled on the basis the statutory texts and the Zikmund decision (*ibid*, paragraph 50) cited by the parties.

38. The Tribunal gathers from the indications provided that there is probably a dispute in progress between the Governor and the appellant, whose nature and extent the Tribunal is, however, unable to ascertain on the basis of the information available to it.

39. However, the points raised by the appellant, taken individually or in aggregate, do not allow it to be said that the limits imposed by respect for the individual were exceeded and that action to protect the individual was justified; to date, there is no evidence of any activity towards the appellant which justified his request for protection in his official capacity.

40. Furthermore, the appellant – who, however, mentions a deterioration in his health which, according to him, is a consequence of the problems encountered in the workplace – does not specify the type of protection sought and how that protection should be provided

41. For this reason, the Tribunal cannot conclude that the appellant was harmed in his capacity as Director for General Administration or in his non-material and professional interests.

42. Admittedly, the appellant asks in his request for protection in his official capacity that his lawyers' fees be covered by the Bank. While the Tribunal does not share the Governor's view that this type of measure does not fall within the scope of the protection which can be granted to a staff member and, consequently, that such a request for reimbursement can only be made in the

context of judicial proceedings, the fact remains that the terms in which this request for coverage of costs is made do not provide the Tribunal with any evidence allowing it to conclude that individual rights of protection have been violated to the detriment of the appellant.

43. Since the appellant's rights of protection in his official capacity were not violated, it follows that the Bank did not fail in its duty towards him and that there has been no denial of justice. On the contrary, it is clear that the Chief Compliance Officer did everything in his power to ensure respect for the appellant's rights.

III. CONCLUSION

44. The appeal is ill-founded and must be dismissed.

On these grounds,

The Administrative Tribunal

Dismisses the appeal;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg, on 23 June 2011, and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 26 July 2011, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

L. WILDHABER