

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF

## ADMINISTRATIVE TRIBUNAL

**Appeal No. 471/2011 (Judith BUTLER v. Secretary General)**

The Administrative Tribunal, composed of:

Mr. Georg RESS, 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. Ms. Judith Butler lodged her appeal on 27 January 2011, and it was registered on that day as No. 471/2011.
2. On 25 February 2011, the appellant submitted a supplementary memorial.
3. On 8 April 2011, the Secretary General submitted his observations on the appeal. The appellant submitted a memorial in reply on 6 May 2011.
4. The public hearing on the appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 22 June 2011. The appellant was represented by Mr Jean-Pierre Cuny, of the Paris Bar, and the Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, assisted by Ms Maija Junker-Schreckenber and Ms. Sania Ivedi, assistants in that department.

### **THE FACTS**

#### **I. THE FACTS OF THE CASE**

5. The appellant is a British national, and was born in 1953. She is a permanent staff member of the Council of Europe.

6. Having received satisfactory appraisals from her hierarchical superiors in previous years, the appellant was transferred to the Secretariat of the Council of Europe Parliamentary Assembly's Committee on Equal Opportunities for Women and Men (hereinafter, "the Committee") in 2009, and was given a new appraiser, the Secretary to the Committee. She states that, from the time when they first began to work together, relations between them were difficult, and that the Secretary criticised her constantly, indeed daily. This soon had negative effects on her morale, and she began to suffer from severe psychosomatic disorders. However, in 2009, she restricted her absence on sick leave to a minimum, i.e. twelve days, to avoid attracting further criticism from her appraiser.

7. On 29 June 2009, having been appraised for the first six months of that year, the appellant submitted her comments, specifically noting that:

"... My perception is that [the objectives and mid-term appraisal] have been used as tools of control rather than a constructive event to help the communication process between appraiser and appraisee.

I recently accepted new objectives and hoped it would be an occasion to move on. However, the mid-term appraisal I have received raises some concerns with me. I particularly contest the statement that I make mistakes deliberately – I have moral standards and integrity and find this comment objectionable. I accept that in terms of accuracy and knowledge I can improve and wish to do so. ...

My motivation on arriving in the committee centred around being in a younger team which I welcomed in that my working methods would evolve and I would stay in touch with a younger world of work. I believed I expressed my motivation further by applying for a vacant position which, unknown to me when I accepted to move to the committee, had arisen. Following the outcome of this vacancy filling procedure, in April, I received no feedback or communication from my manager concerning my application. I would have welcomed such feedback or encouragement at this point.

It appears that from the start of my recent arrival in the committee my manager has kept 'files' since April ... of my alleged misdemeanours. In my opinion this has had a negative effect on my integration. I would have preferred that the manager express herself more in terms of encouragement and support to help me find my place and confidence in the team, in learning the requirements of the work and tasks and to encourage my motivation whilst respecting my persona and my past experience.

During my short time in this committee I have felt undermined, repeatedly criticised and judged in advance. Now communication with my manager does, occasionally, trigger panic and distress. My feeling is that there is a culture of blame which means that I feel constantly on the defensive and unable to progress. I would wish the hierarchy to note that I do not wish to be subject to this in the future and to find a solution.

I now have a much better overview of the PACE and its work and feel that in terms of knowledge and precision my work has and will improve.

I would welcome the opportunity to resolve the current difficulty with my appraiser so that I can regain confidence and further develop my contribution in a positive environment."

8. The appellant consulted a gastro-enterologist who, on 12 October 2009, noted that she had had a series of functional intestinal disorders of which “stress was very certainly the underlying cause”.

9. On 27 November 2009, the appellant wrote as follows to a counsellor:

“... I saw [my HRD contact] this afternoon. She has basically told me that at the meeting with [the hierarchy] on 4 December they will tell me that they are keeping me in the same position with [my appraiser] and that I shall be followed up for under-performance. She says they will tell me other things, but she cannot divulge what they are .... I am shocked at this decision. She has agreed to come to the meeting with me. [My HRD contact] has told them that my performance was affected by my stress I was suffering but that they did not want to hear it. She has told me to prepare myself well with some notes. ...”

10. The following day, the counsellor replied as follows:

“... Try to cast your mind back to [your appraiser]’s talk of under-performance at the beginning of the year. Was this the first time someone mentioned under-performance? ... I will do some more internet surfing to bring together elements of what constitutes harassment, bullying, victimising, office witch-hunts, etc.”

11. Later that day, the appellant wrote to the counsellor:

[My HRD contact] knows what is going to be said to me because she and [the Director of the HRD] went to see my hierarchy. She says several possibilities will be offered to me, but I have understood that one will be that I stay with [my appraiser].

...

I shall make the preparatory notes but wonder at this stage how much I should say about ill health or does it sound as though I am a wimp? ...”

12. The reply contained the following passage:

“...judging from what I’ve read and learnt in training, you might very well be entitled to feel bad after being on the receiving end of things you’ve experienced so far. It’s nothing to do with being a wimp. More stuff ‘cause and effect’. ...”

13. On 5 November 2009, there was an exchange of e-mails between the appellant and the Council of Europe mediator. This showed that the latter was taking a close interest in her case, and had raised it with all her superiors, i.e. the Secretary General of the Parliamentary Assembly, the human resources officer in the Assembly Secretariat, an administrator in the DRH, and also her appraiser. The appellant states that her appraiser, having first refused to meet the mediator, eventually agreed to talk to him.

14. On 4 December 2009, the appellant told her counsellor:

“(...) I have had my ‘interview’ with [my hierarchy]. It was as Louise warned me. I had asked for Louise to be present and Horst had said yes. But Louise called just before the meeting to say they did not want her to be there as they wanted it to be ‘informal’. I tried to stick to facts and nothing emotional, but don’t think I did very well. But I think that does not matter, as clearly they had decided on their course of action. Basically they have warned that I shall get either level 4 or 5 of the appraisal. That means the under-performance exercise. It depends on my appraiser which level I get. They asked me to explain my side of things, but

dismissed all that I said. They said I need to ask for 'help'. When I asked what they meant, they said from DRF, courses, etc. I said I have already done that. I said if I was to improve my performance could I be put in a context in which I felt I could do that and they said only in the context I am now in. I said I was willing to do any manner of 'tests' to prove my competencies but they did not want that. I feel that they are warning me to toe the line. I asked how I might redeem myself and they said by proving that I could perform in the job I am currently in. They warned me that this performance thing could lead to a sacking ...

So I have my appraisal on 15 December, and the new task set by [my appraiser], which is to prepare a website following the training I have just done. However, she printed out a website which a friend of hers has done for committee and I am wondering whether I should just copy it, even though it is not what the trainer taught us this week. The mediator said I should have received clear and written guidelines, which I have not received as all has been done orally, and I wonder if I am going to fall into another trap of not getting this task right.

[...]

When asked if I would like to work for [my appraiser], I had a meeting with her. I went to see her as a counsellor and told her that my former manager had not integrated me into the team and that I had asked for training which had been refused, and what should I do about it. For some reasons at that meeting (last December) she told me at length about under-performance (I presumed she told me this in her capacity as a counsellor). Then she told me that she had asked for me to go to work for her and I was so delighted! I did not really take it in, all the under-performance stuff, as I had not even had the last appraisal then (with my former manager) which turned out to be under par and I remember wondering why she was saying this to me. Then I was told about 2 months ago by [my hierarchy] that because of the mistakes I was making I was to be subject to under-performance. I said I would do my best to turn the situation around but I have been unable to do so because I cannot do anything correctly because of my panics under the constant criticism and upset I am feeling. Also because I think that everything I am given to do is turned around so that I am unable to achieve the task correctly.

I cannot see the counsellor I saw before, because she is not doing this any more, so would be grateful to be put in touch with the person you have mentioned, who can give technical and legal advice.

... I am genuinely sorry that the situation is as it is, but I am beginning to think more and more that it has been deliberately contrived. I really do not know what I could have done which has been so bad apart from challenging the way I have managed (ie by asking for team trainings in my last position). Also perhaps because I have involved the mediator. I have not spoken disrespectfully, I have not taken time off work. I am searching in my mind what I could have done ... I am not a paragon of virtue, but I cannot understand what I could have done which was so unacceptable. I do know that I went into the job with the best of intentions and that I have not deliberately sabotaged things, as [my appraiser] says.

[...]

You can see I am beginning to panic. I shall try to get myself under control and believe in myself again, and that right will prevail at the end of the day."

15. The counsellor replied the same day, suggesting a meeting with the appellant.

16. The appellant's doctor noted, on 7 December 2009, that she was suffering from "depression [...] brought on by problems at work".

17. In a certificate issued on 10 December 2009, a psychologist spoke of "anxiety crises from which she has never previously suffered, and which are therefore caused by severe stress affecting her everyday life".

18. On 21 December 2009, her appraiser, having first interviewed her, finalised her appraisal for 2009. She considered that the appellant did not satisfy the requirements of her post, and made various criticisms regarding her output, commitment and general attitude. In her conclusions, she made the following points, among others:

"Output – the quantity of the appraisee's output can be estimated at 10-20% of that required for the post. The quality of the output is also very poor ....

2. Commitment – the appraisee lacks professional commitment. She has made little effort to understand the functioning of the Committee and the Assembly, which impacts negatively on her performance. ...

3. Behaviour/attitude – I have received a constant stream of complaints from both team-members and other staff members, and even two parliamentarians. The appraisee has made no effort to integrate into the team ...

I regret I have to conclude that, despite training and on-the-job coaching, the appraisee has failed to meet the basic requirements of the post."

19. The appellant was examined by a psychiatrist who reported, on 4 January 2010, that psychotherapy and medicinal treatment had started, and recommended "a change of department (or team)".

20. On the following day, 5 January 2010, the appellant signed the appraisal report. Her comments, running to over five pages, included the following:

"I consider that the result of the appraisal is the culmination of the treatment to which I have been subject during the course of the one year I have spent with this manager. From an early point, the 'pressure' became hard to bear. I have never in my 36 years of working both as a permanent and temporary member of the staff been subject to such an experience. It has had a significant effect on my performance and the result is that I appear to be unable to do any work successfully. It would have sufficed for me to have had some encouragement and coaching (which I would have really welcomed) in order for me to adapt to the methods of the appraiser. The position is no one in which I need to get my health back on track which will take time as I have lost all confidence."

21. The stress from which she was suffering subsequently worsened very rapidly. On 6 January 2010, she was granted sick leave.

22. While on sick leave, the appellant was monitored and examined at regular intervals by the medical officer of the Organisation's insurers who noted, on 23 September 2010, that she was suffering from "a severe decompensated depression-anxiety syndrome, caused by a serious conflict situation at work, leading to the granting of extended sick leave on 06/01/2010, which has lasted without interruption to the present time". He further noted that "her condition has improved, without being fully stabilised, since it clearly remains very fragile". He concluded that she could

return to work only “on the one condition – medically justified and necessary, and humanly desirable – that she be assigned to other duties”.

23. On 24 September 2010, the Organisation’s insurers notified the appellant by letter of their medical officer’s conclusions, telling her that he had confirmed that her condition would allow her to return to work part-time for therapeutic reasons for a period of three months, starting on 15 October 2010, and that full-time work might then be envisaged from 16 January 2011, if no new developments occurred.

24. On 15 March 2010, the appellant contacted the Director of Human Resources, referring to the difficulties she had encountered in 2009, and requesting a meeting, to discuss returning to work when her sick leave expired. The Director saw her on 4 May 2010.

25. On 5 July 2010, the appellant wrote to the Secretary General of the Parliamentary Assembly, referring to a meeting with the Assembly Secretariat’s human resources officer, who had told her that her return to the same post in the Assembly Secretariat might be envisaged, subject to the “under-performance” procedure’s being applied to her.

26. On 27 September 2010, the appellant formally requested the Secretary General, under Article 59, para. 1 *in fine* of the Staff Regulations, to move her to another administrative entity, with her own post, to a vacant post, or on transfer. She also asked to be exempted from the individual performance enhancement process, provided for in Rule No. 1285, arguing that this would be unlawful, since the appraiser had not respected Article 2 of the said Rule.

27. On 3 November 2010, the Director of Human Resources replied as follows to her request:

“[...] I wish to point out that, contrary to what you say, your letter to me of 15 March 2010 did receive a response, since I saw you on 4 May 2010.

You have been on sick leave since 5 January 2010. In the meantime, you have been regularly monitored by the medical officer. [...]. Your state of health has now been judged compatible with your returning to work part-time for therapeutic reasons from 2 November 2010.

You state that certain doctors see a direct link between your medical problems and the “harassment” allegedly inflicted on you by your appraiser. You wish to resume work in another department, with a view to reducing the dangers to your health which might, in your view, result from renewed contact with your appraiser.

I would remind you that the Secretary General is committed to promoting a working atmosphere in which mutual respect prevails between men and women, and creating a harassment-free working environment. Articles 5, 6 and 7 of Instruction No. 44 of 7 March 2002 on the protection of human dignity at the Council of Europe allow victims of certain types of behaviour to refer the matter to certain anti-harassment authorities, for the purpose of establishing the facts, defining their nature, and putting an end to harassment. So far, however, you have taken no steps to involve any of those authorities. Since none of them has thus had occasion to decide whether the behaviour of which you complain constitutes harassment, use of that term is inappropriate. Nor is it possible for you to return to work in another department.

I am, however, pleased to be able to wish you a successful return to work, and confirm that you will have a new office, that your team will be partly different, and that you will henceforth be appraised by [another person].

Since you will no longer be exposed to the dangers which you mention, I consider that your wishes on this point have been satisfied.

You further state that you were “threatened” with an individual performance enhancement process under Article 22bis of the Staff Regulations and Rule No. 1285 [...].

Your last appraisal report, signed on 21 September 2009 and countersigned on 5 January 2010, indicates that you failed to satisfy the requirements of your post in 2009.

Under Article 1 of Rule No. 1285, if the appraisal report concludes that you have not satisfied the requirements of your post, an individual performance enhancement process may be initiated.

Since the conditions specified in the regulations have been satisfied, application of this process cannot in itself be unlawful, and use of the term “threatened” is inappropriate.

You request that a decision not to activate the process be taken. However, under Article 2ff. of Rule No. 1285, the appraiser sends the last appraisal report, within three working days of its having been signed by the staff member concerned, to the Head of his/her Major Administrative Entity, who then interviews him/her and decides whether to accept the findings and initiate the process. This means that, under the regulations, activating the process is a matter solely for the Head of the Major Administrative Entity, and the Secretary General may not intervene at this juncture.

When he takes a decision, the Secretary General of the Parliamentary Assembly [...] will obviously be required to take full account of the circumstances, both unfavourable and favourable to you. At all events, if a decision to activate the process were taken, the DRH would ensure that the regulations were respected.

I invite you to prepare for your interview with the Head of the Major Administrative Entity. If the process is applied, I would urge you to co-operate fully and derive maximum benefit from it.”

28. On 8 November 2010, the Secretary General of the Parliamentary Assembly decided, having interviewed the appellant, to initiate the performance enhancement process.

29. On 26 November 2010, the appellant submitted an administrative complaint concerning this decision to the Secretary General. This was rejected on 20 December 2010 for the following reasons:

“You consider that (the decision taken by the Secretary General of the Parliamentary Assembly on 8 November 2010) violated Article 2 of Rule No. 1285 on staff under-performance, which requires, in your view, that appraisal reports specify the appraiser’s reasons for considering that a poor rating is not due to structural deficiencies, inadequate management, or medical or family problems. You state that your appraisal report contains no statement of the kind required by Article 2 of Rule No. 1285, and that your appraiser gives no reason for her opinion on the causes of lack of effort, professional commitment or competencies.

[...]

The provisions (of Articles 1 and 2 of the Rule) are intended to establish a causal link between a poor rating in the appraisal exercise and a lack of effort, professional commitment or competencies on the part of the staff member concerned. They are also intended to ensure that the giving of a poor rating is not due to structural deficiencies, inadequate management or medical or family problems affecting the appraisee.

It is not correct, as you conclude, that appraisers are required to declare formally that a rating is not due to structural deficiencies, inadequate management or medical or family problems. They must, however, give reasons for ascribing this rating to a particular cause, and those reasons must be stated on the appraisal form.

Examination of your appraisal report for the period from 1 January to 31 December 2009 shows that appraisal was based on detailed analysis of your performance during that period. The appraiser's conclusions concerning each of the objectives and competencies are illustrated with numerous examples, and specifically refer to a lack of competencies and professional commitment. Moreover, on the part of the form devoted to overall evaluation, the appraiser repeats the main reasons for the decision to give you the lowest rating.

In view of the above, it must be concluded that the decision to activate the individual performance enhancement process in your case was justified, and taken in accordance with the provisions of Rule No. 1285 on staff under-performance.

[...]"

30. On 27 January 2011, the appellant lodged the present appeal. Subsequent to her doing so, the performance enhancement process was applied to her. In this connection, she received, on 18 January 2011, the first interim appraisal report for the period from 18 November 2010 to 18 January 2011, which was very positive.

## II. THE RELEVANT LAW

31. Article 22bis of the Staff Regulations:

"1. The Head of a Major Administrative Entity further to the results of appraisal concluding that the performance of one of his/her staff members is not satisfactory shall initiate an individual performance enhancement process for the benefit of the staff member. This process, which shall be run with the assistance of the Directorate of Human Resources of the Directorate General of Administration and Logistics, shall involve regular monitoring of the attainment of appropriate objectives by the staff member concerned. It shall last at least six months and cannot exceed one year. If at the end of the process, noting that the performance of the staff member in question remains unsatisfactory, the Head of the Major Administrative Entity shall propose an under-performance measure to the Secretary General."

32. Rule No. 1285 of 28 November 2007 on staff under-performance, as amended by Rule No. 1305 of 13 July 2009, with effect from 1 August 2009:

"Having regard to Article 22bis of the Staff Regulations on under-performance;

Considering that the provision in question concerns the procedure to be followed after the conclusion has been drawn that under-performance is the result of lack of effort, professional commitment or competencies on the part of the staff member concerned;

[...]

1. An individual performance enhancement process (hereinafter "the process") shall be initiated for the benefit of staff members who, having been found lacking in effort, professional commitment or competencies, have received the lowest rating in the last

appraisal exercise completed after the entry into force of this Rule or the next lowest rating in the last two appraisal exercises completed after the entry into force of this Rule.

2. The reasons why it is considered that the low rating(s) must be attributed to the staff member's lack of effort, professional commitment or competencies - and not to structural deficiencies, inadequate management or medical or family problems - shall be contained in the relevant appraisal reports. The appraiser shall transmit the last appraisal report, within three working days of its signature by the staff member concerned, to the Head of his/her Major Administrative Entity.

3. Within fifteen days of receipt of the appraisal report:

(i) the Head of the Major Administrative Entity of the staff member concerned shall have an interview with the latter; and

(ii) if s/he agrees with the findings under paragraph 2, s/he shall initiate the process and inform the Director of Human Resources of the Directorate General of Administration and Logistics and the staff member concerned of this decision; if s/he does not agree with the findings under paragraph 2, s/he shall inform the Director of Human Resources of his/her reasons for not doing so."

33. Article 9 of the Charter on Professional Ethics of 15 July 2005 (Internal regulatory text SG/CHAR(2005)01:

### **Managerial practices**

Hierarchical superiors, by virtue of their position and their high profile, should set an example.

They should ensure harmonious working relations and foster team spirit by guiding, coaching and motivating their subordinates and proposing appropriate training. They have a duty of care in respect of the latter and should listen to them, and ensure that merit is objectively acknowledged and favouritism and prejudice are eschewed.

Superiors should clearly explain to their subordinates what work is expected of them and provide feedback on the quality of their work, so that the latter may, if necessary, remedy any shortcomings or continue to improve.

The hierarchical relationship applies only to instructions of a professional nature, and superiors should not ask their subordinates to carry out tasks of a private nature. In a case where they do so, their subordinates may refuse to perform such tasks.

Instruction No. 44 on the protection of human dignity at the Council of Europe, repealed on 1 October 2010 by Rule No. 1292

### **Article 1**

All conduct infringing the dignity of men and women in the workplace and/or in connection with work at the Council of Europe shall be prohibited.

### **Article 2**

Everyone working at the Council of Europe, regardless of status or employment contract, has the right to effective protection against sexual and psychological harassment, irrespective of the person perpetrating such conduct.

[...]

### **Article 3**

#### **Definitions [...]**

#### **Psychological harassment**

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.

#### **Informal procedure**

### **Article 4**

Persons confronted with a conflict situation or sexual or psychological harassment are advised, as far as possible, to discuss the matter directly with the other party to ensure that the situation is not the result of a misunderstanding and to put an end to the conflict or unwanted behaviour.

### **Article 5**

#### **Assistance and advice**

#### **“Counsellors”**

“Counsellors” shall be appointed from within the Secretariat by the Secretary General on the basis of parity, on the proposals of the Directorate of Human Resources and of the Staff Committee, for a period of two years, renewable not more than twice.

“Counsellors” shall be chosen among staff members at all grades, on a voluntary basis, and by reason of their motivation and personality. They shall be given special training. The list of “counsellors” shall be provided to staff members and shall be available on the Council of Europe's Intranet site.

Persons confronted with a conflict situation or who believe themselves to be the victims of sexual or psychological harassment may request the assistance of a “counsellor” among those appointed in the Secretariat.

The role of the “counsellors” is, in addition to providing support to the persons who seek their assistance, to inform them about the procedures available to them in the framework of the policy to eliminate harassment and, if necessary, to accompany and help them in the steps they take to resolve the problem.

All information given by the victim to a “counsellor” in that capacity shall be considered as confidential and may not be used for any purpose whatsoever without the victim’s consent.

“Counsellors” may also be contacted by anyone who has witnessed harassment and who wishes to discuss it in order to understand more readily how to deal with the situation without, at this stage, wishing to reveal the names of the people concerned.

### **The Director of Human Resources, the Equality Administrator and specialists from the medical, psychological and social team**

The Director of Human Resources, the Equality Administrator and the psychological, medical and social team – the social worker, the medical team (medical officer and nurses), and the psychological counsellor – are available to offer their specialist assistance to staff members, on their request, to listen to them and offer advice. As such, they may be contacted by people faced with conflict situations or sexual or psychological harassment.

## **Article 6**

### **Mediation**

Persons confronted with a conflict situation or who believe themselves to be the victims of sexual or psychological harassment may, if required with the help of a counsellor, refer the matter to one of the following authorities (providing that the post-holder is not implicated): the victim’s hierarchical superior, the Director of Human Resources or the Mediator.

[...]

### **Formal procedure**

## **Article 7**

Where efforts to find an effective solution to the problem following the mediation procedure have failed within a time limit of 60 calendar days, or where informal attempts at resolution are deemed inappropriate in view of the seriousness of the facts or the stage which the harassment has reached, the person who believes himself or herself to be a victim of sexual or psychological harassment may submit a written complaint to the Director of Human Resources. The latter shall acknowledge receipt, forward it to the commission responsible for dealing with complaints and will inform the alleged perpetrator in writing.

[...]

## **Article 12**

“Where such mediation fails or is deemed inappropriate, the Commission shall ask for an official enquiry to be carried out, under the authority of the Directorate of Human Resources or, in exceptional cases, by another staff member designated to that end by the Secretary General.

A written report detailing the results of the enquiry shall be submitted within 30 calendar days to the Commission which may, where applicable, ask for supplementary enquiries to be made.

[...]

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.

[...]

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

## THE LAW

35. The appellant contests the Secretary General's decision of 20 December 2010 subjecting her to an "individual performance enhancement process" in accordance with Rule No. 1285, and requests that it be set aside. She also seeks award of the sum of €6500 to cover all the costs she has incurred in the present appeal with all its legal consequences.

36. For his part, the Secretary General requests that the Tribunal declare the appeal unfounded and dismiss it.

### I. THE PARTIES' ARGUMENTS

37. The appellant relies on two arguments: violation of Rule No. 1285 on staff under-performance, and violation of the general principles of law.

#### A. Violation of the internal regulations (first argument)

38. The appellant contends that the Secretary General was not entitled to apply the individual performance enhancement process to her, since one of the conditions specified in Article 2 of the Rule had not been respected. That provision requires appraisers to state their reasons for believing that poor performance is due to circumstances for which the appellant is responsible, and not circumstances which are beyond his/her responsibility and control.

39. The appraisal report for 2009 contains numerous criticisms by the appraiser of the appellant's commitment, conduct and competencies. Indeed, it contains only criticisms and complaints, but never considers the essential reason for her under-performance. The appellant accordingly considers that the appraiser did not satisfy her obligations under the Rule, and that an important formality was not observed in her case. Moreover, the appraiser ignored the real situation, as it emerges from the medical certificates.

40. This real situation is corroborated by the fact that, within the context of the performance enhancement process, the appellant carried out tasks identical to those assigned to her in 2009 in a manner now considered entirely satisfactory. This shows that the violation of which she complains is not merely formal, but substantive as well. In fact, the climate of hostility towards her, generated by the appraiser and extending, as the latter admits, to the entire team, resulted in output and performance which inevitably failed to satisfy the appraiser. When the latter was transferred, however, the appellant's new superior treated her without preconceptions and non-aggressively, restoring her confidence and allowing her to give the best of herself, even though her health has still not recovered completely.

41. She adds that any decision to initiate an under-performance process damages the staff member concerned. It provides for sanctions similar to those in disciplinary proceedings, and the fact of its being applied is recorded in the staff member's file, which is made available to the Appointments Board, and counts as a kind of "blot" on his/her career. He/she easily comes to be seen as "difficult", and so finds it harder to secure promotions or mobility transfers.

B. Violation of the general principles of law (second argument)

42. The appellant argues that the general legal principle that authorities which adopt rules must themselves abide by them (*legem patere quam ipse fecisti*) obliges all international organisations to respect the rules which they themselves lay down. She refers to the preamble to the Rule: "Considering that the provision in question concerns the procedure to be followed after the conclusion has been drawn that under-performance is the result of lack of effort, professional commitment or competencies on the part of the staff member concerned". In her view, this introductory clause makes it clear that appraisers must comply with the obligations specified in Article 2, i.e. attempt to ascertain, and reflect on, the reasons for under-performance. However, the Administration is not prepared to enforce to the full this duty of care and reflection, and this implicitly authorises appraisers to ignore the text's requirements.

43. The appellant considers that the reply to her request of 27 September 2010, in which the Director of Human Resources told her that she might lodge a complaint under Instruction No. 44 (see his memorandum of 3 November 2010), was tantamount to harassment. He ignores the likelihood that bringing proceedings for harassment would itself put a severe strain on a person who had suffered at work for nearly two years, and might well inflict further emotional, psychosomatic and psychological damage. Moreover, in her previous discussions with senior staff of the Parliamentary Assembly, the appellant had found herself facing a wall: they had shown no willingness either to transfer her or to refrain from initiating the under-performance process.

44. It was thus doubtful that the Organisation had respected the principles it was bound to observe, for the purpose of preventing all forms of harassment. Nor had it done anything to prevent her from being unnecessarily placed in a painful situation. In effect, it was pure chance that the appraiser had been transferred, and that responsibility for appraising her had passed to a senior administrator who had treated her openly and normally.

45. The appellant adds that she did not merely contact the counsellor, but also referred the matter to the mediator, with whom she discussed it thoroughly. It is true that she took no action under Instruction No. 44, since she relied on the objectivity of her superiors and the Administration, and hoped to persuade them to intervene and improve the situation. Her confidence, however, was misplaced. She also refers to the failings of the Committee set up to investigate complaints of harassment, noted by the Tribunal in the *Zikmund I v. Secretary General* and *Zikmund II v. Secretary General* cases, and says that this system cannot easily be regarded as effective.

46. The Secretary General, for his part, argues that appraisal of the appellant relied on a general analysis of her work and performance during the reference period. The report itself was based on careful evaluation, for which adequate reasons were given. The indications were that the appraiser had, in full knowledge of the facts, concluded that the appellant had failed to satisfy the requirements of her post.

47. Referring to the appellant's impression that her work had not been fairly assessed and deserved a better rating, the Secretary General argues that she cannot substitute her own views for those of an official body with the power and skills needed to rate her performance. She is free to

add her own comments to the appraisal report, indicating her disagreement, and explaining why she believes that she deserves a higher rating. The appraisal report was drawn up following a discussion between her and her appraiser, and she had been able to submit comments in reply. The procedure had thus been fully respected, and the fact that some aspects of her performance had been found wanting in no way signified that the appraisal had not been conducted properly and in accordance with the regulations.

48. Referring to Article 22bis of the Staff Regulations, the Secretary General points out that, since the appraisal report had concluded that the appellant had not satisfied the requirements of her post in 2009, it had been sent to the Secretary General of the Parliamentary Assembly who, having discussed the matter with her, had decided that initiating an individual performance enhancement process would be in her interest. He had notified the DRH and the appellant herself of his decision in his memorandum of 8 November 2010.

49. Referring to the appellant's complaint that her appraiser had failed to consider the possible existence of external reasons for her poor performance, the Secretary General points out that the appraiser was unaware of any medical problems, and had no reason to suppose that she had such problems. As the appellant acknowledges, she was not often on sick leave, said nothing to her superior about medical problems and, even in her comments on the appraisal report, did not indicate that she had such problems. Her private life was no concern of the appraiser's, who had no reason to suppose that she suffered from medical problems, and so could only conclude that she was herself to blame for the failings noted. In fact, the DRH and the appraiser did not receive the medical certificates until the appraisal process had been concluded, in January 2010. If the appellant had informed her superior, or at least the DRH, of her medical problems, this would obviously have influenced her appraisal report. It would, for example, have noted that her shortcomings might have been due to causes beyond her control, or perhaps that, in view of the circumstances, she might be regarded as having satisfied the requirements of her post, even though she had failed to achieve her set objectives.

50. It was up to the appellant to inform her superiors of her medical problems. Similarly, if she had felt that she was the victim of harassment, it was up to her to take one of the remedial measures available to her at the Council. In her letter of 27 September 2010, she stated that she was unable to do this for health reasons, but the alleged harassment took place in 2009, at a time when she was well enough to work.

51. The Secretary General points out that, in addition to the procedure provided for in Instruction No. 44, many other kinds of help are available for staff members who consider themselves the victims of harassment. He notes that the appellant did avail of some of these possibilities, which are not "stressful", but never took full advantage of them. On those occasions, she referred to her relational problems, but failed to take the only step which would have allowed the relevant committee to conclude that there had been harassment, thus making it possible for the Administration to intervene and put a stop to this alleged misconduct.

52. The Secretary General acknowledges that the DRH did not discipline the appraiser or transfer the appellant. However, since no formal steps had been taken to establish that the appellant had indeed been harassed by her superior, no disciplinary action could be taken. She could still have been transferred, and this would probably have been done, if the situation had not changed to her satisfaction. Partial restructuring of the Assembly had effectively satisfied her expressed wish for a change of working environment. The Secretary General concludes from this that the Rule was not violated, and that the Administration did not fail in its duty of care.

53. In any case, the performance enhancement process is intended to help staff with problems, and this was the very reason why the Secretary General of the Assembly decided, having talked to the appellant, that initiating this process was in her own interest. He explained this to her and repeated, in his memorandum of 8 November 2010, that this process was intended to help her to improve her performance, and again satisfy requirements – an aim apparently achieved in this case. Having talked to the appellant on 18 November 2010, her appraiser set objectives for her. A first interim appraisal meeting was held two months later. A record of the meeting was signed, and the appellant thanked her appraiser, who encouraged her to continue her efforts and maintain the commitment she had shown.

54. The Secretary General concludes from this that there has been no violation, either of a regulatory text, or of the practice or general principles of law. Similarly, no relevant information has been misinterpreted, no false conclusions have been reached, and no abuse of authority has taken place. He accordingly requests that the Tribunal declare the appeal unfounded and dismiss it.

## II. THE TRIBUNAL'S ASSESSMENT

### A. First argument

55. The Tribunal will first consider the alleged violation of Article 2 of Rule No. 1285. It notes that the appellant's complaints essentially concern failure to explore external reasons for her under-performance, and activation of the individual performance enhancement process.

56. The Tribunal points out that Article 2 of the Rule must be read and interpreted in conjunction with Articles 1 and 3. Taken together and properly understood, these three articles make it clear that the conditions for the preparation of appraisal reports laid down in Article 2 are relevant solely to initiation of the individual and performance enhancement process, whose application in specific cases is entirely a matter for the Head of the Major Administrative Entity concerned (see paragraph 32 above). In this case, the Tribunal notes that the appraisal report on the appellant is very detailed, dealing in turn with all the objectives set by the appraiser for 2009, and the extent to which the appellant achieved them.

57. The Tribunal notes that the appraiser clearly expressed dissatisfaction with the appellant's performance, criticising her failure to fulfil her professional obligations, and refusal to integrate within the team. She also referred to negative comments made on the appellant by other colleagues who had worked with her (see paragraph 18 above). The Tribunal also notes that the appellant detailed her reasons for contesting this appraisal (see paragraph 20 above), emphasising her appraiser's aggressive attitude and hostile treatment of her, which she sees as the real reason why she lost all her self-confidence, with negative effects on her work.

58. As required by Article 3 of the Rule, the Head of the Major Administrative Entity concerned, i.e. the Secretary General of the Parliamentary Assembly, had seen the appraisal report, setting out the positions of both parties. He had, in other words, a full picture of the various points made in that report. He accepted the appraiser's conclusions and decided to apply the individual performance enhancement process to the appellant.

59. In view of the above, the Tribunal considers that Article 23 of Rule No. 1285 was formally respected, since the appraisal report on the applicant for 2009 gave adequate reasons for activating that process.

60. This argument must therefore be rejected.

## **B. Second argument**

61. The appellant also alleges violation of the general legal principle that authorities which adopt rules must themselves abide by them (*legem patere quam ipse fecisti*), unless those rules provide for derogations.

62. The Tribunal has already ruled that the appraisal report on the appellant for 2009 gives adequate reasons for initiating the individual performance enhancement process (see paragraph 59 above).

63. It is true that the Secretary General of the Parliamentary Assembly decided to apply that process to the appellant on 8 November 2010, i.e. 11 months after the appraisal report (see paragraphs 20 and 28 above), and although her relations with her superiors were clearly conflictual, which might have accounted – at least partly – for her unsatisfactory performance in 2009.

64. It is also true, however, that the appellant had been absent on sick leave for several months (see paragraphs 23 and 27 above), and that the Secretary General of the Parliamentary Assembly took his decision several days after she had returned to work (see paragraph 28 above).

65. The Tribunal acknowledges that the appellant's superiors might, in this case, have done more to "ensure harmonious working relations and foster team spirit by guiding, coaching and motivating their subordinates", and to exercise their "duty of care in respect of the latter and [...] and listen to them", as required by the second paragraph of Section 9 of the Charter on Professional Ethics.

66. Nonetheless, the Organisation cannot be accused of doing nothing: the appellant's appraiser, the Director of Human Resources and the other parties involved all joined in trying to find a suitable solution for her. Moreover, although the appellant did contact the counsellor and the mediator, she never complained formally of harassment. The Tribunal also notes that, when she returned to work, some members of her team, including her superior, had moved to other duties (see paragraph 27 above).

67. As the Tribunal has already mentioned, the Secretary General of the Parliamentary Assembly decided to apply the individual performance enhancement process to the applicant on the basis of the appraisal report stating the positions of both parties, and having discussed the matter with her. He accepted the appraiser's conclusions (paragraph 58 above). The Tribunal takes the view, however, that he acted in full compliance with Article 3 of the Rule.

68. The Tribunal adds that the individual performance enhancement process is not a punitive or disciplinary measure, but is intended, on the contrary, to help Council of Europe staff to whom it is applied to improve their performance. At all events, the Tribunal notes that the unquestioned improvement in the appellant's performance at work, once that process had been applied (see paragraph 30 above), is proof of its effectiveness.

69. In conclusion, this argument must be rejected.

For these reasons, the Administrative Tribunal:

Rejects the appeal;

Decides that each party is to pay its own costs.

Adopted by the Tribunal on 2 November 2011, and delivered in writing, in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure, on 8 December 2011, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Deputy Chair of the  
Administrative Tribunal

S. SANSOTTA

G. RESS