

# CONSEIL DE L'EUROPE

# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF

## ADMINISTRATIVE TRIBUNAL

**Appeal No. 283/2001 (Anna POLÁČKOVÁ-ROSSI v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Kurt HERNDL, Chair,  
Mr José da CRUZ RODRIGUES,  
Mr Helmut KITSCHENBERG, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and by  
Ms Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

### **PROCEEDINGS**

1. Ms Anna Poláčková-Rossi lodged her appeal on 21 June 2001. The appeal was registered as No. 283/2001 on the same day.
2. On 6 July 2001, the appellant's representative, Mr Jean-Pierre Cuny, submitted a supplementary memorial.
3. On 3 August 2001, the Secretary General submitted his observations about the appeal. The appellant submitted her observations in reply on 4 September 2001.
4. On 13 September 2001, the Staff Committee, represented by its Chairman, Mr Denis Huber, applied to intervene in the case in support of the appellant's submissions.
5. In an Order issued on 28 September 2001, in pursuance of Article 10 of the Statute of the Administrative Tribunal, the Chairman authorised the Staff Committee to submit written observations.

6. On 3 October 2001, the Staff Committee submitted its written observations, copies of which were disclosed to the parties.

7. The public hearing in the instant appeal was held in the Administrative Tribunal room in Strasbourg, on 10 October 2001. The appellant was represented by Mr Jean-Pierre Cuny, and the Secretary General by Mr Patrick Titium, Administrative Officer in the Legal Advice Department of the Directorate General of Legal Affairs.

## **THE FACTS**

8. The appellant has been a permanent staff member of grade B2 since 1 January 1998. On 3 April 1998 she married Mr Dario Rossi, a permanent staff member of grade C3, who has three children born of his first marriage, which was terminated by a divorce granted on 1 April 1993. In pursuance of the final divorce settlement, Mr Rossi had to pay monthly maintenance of 700 French francs per child. This sum had risen to around 3 000 French francs per month for the three children at the time of the Administrative Tribunal hearing, in accordance with the INSEE cost-of-living index.

9. On 21 April 1998, the Human Resources Division (now the Directorate of Human Resources) granted the appellant the household allowance and the allowance in respect of dependent children for her husband's three children. On the same date, it withdrew from the appellant's husband the same allowances recorded on the entry of 1 October 1993 in his personal file. The Human Resources Division took this action in application of Articles 4 (5) and 5 (1.vi) of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations). These provisions specify that, in the case of two staff members employed by the Council of Europe, the household allowance and allowance in respect of dependent children are paid only to the person whose basic salary is the higher.

10. On 19 March 2001, the Head of the Division for the Administrative and Financial Management of Staff, a division which is part of the Directorate of Human Resources, sent the appellant a memorandum, a translation of which follows:

“A routine check of your file has shown us that you are receiving allowances in respect of dependent children (plus the fixed monthly allowance which is part of the expatriation allowance) for the three children of your spouse's first marriage (...).

Article 5 (ii) of Appendix IV to the Staff Regulations, the Regulations governing staff salaries and allowances, states that ‘dependent child’ means any legitimate, natural, adopted or otherwise dependent child who depends on the staff member's household or on the staff member alone for main and continuing support.

We should be grateful if you would kindly provide us with any material enabling us to assess the amounts of the financial support provided by your spouse and yourself in respect of the aforementioned three children, and we should also be grateful if you would supply us with an attestation stating

whether or not the children's mother receives external family allowances, and specifying the amount of any such allowances.”

11. On 5 April 2001, the appellant replied in a memorandum, a translation of which follows:

“The allowance in respect of dependent children was granted to me in application of the provisions of both sub-paragraphs 1.ii and 1.v of Article 5 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations).

When these allowances were granted, the Administration checked that the presuppositions for its decision did exist, a decision in respect of which, I should remind you, there is an obligation to apply the regulations as they stand, without exercising a discretion. In the memorandum (ie the Administration's memorandum of 19 March 2001), you put questions to me to which the answers are in the files in your possession. In an effort to help through clarification, I can confirm to you that the children's mother has no paid occupation and is in receipt of no family allowances of any kind in respect of the three children. My spouse fulfils his legal obligation to pay maintenance for the three children and also pays directly quite a number of costs, which he does during his frequent trips to Italy, trips which enable him to exercise his right of access to the children.

This being so, and in view of the aforementioned information, I consider that I have provided a satisfactory reply to your request, and I shall not fail to inform you in future of any change which might affect my situation, in the light of the provisions referred to above.”

12. On 10 April 2001, the Head of the Division for the Administrative and Financial Management of Staff visited the appellant in her office. The parties have given the Tribunal different accounts of what happened during this visit.

13. On 4 May 2001, the Head of the Division sent the appellant a memorandum, a translation of which follows:

“In your memorandum of 5 April 2001, you stated that the Administration, when it took the decision to grant you the allowance in respect of dependent children, ‘checked that the presuppositions for its decision did exist’.

Of course the Administration does not deny its responsibility in relation to the decision taken about the grant of the allowance (ie the allowance in respect of dependent children). Nevertheless, when the Administration finds that a mistake has been made, it has a duty to rectify the situation without delay.

The decision was indeed taken, when you were granted the allowance in respect of dependent children, on the basis of your marriage to Mr Rossi. In accordance with the provisions of the Staff Regulations, in the case of two spouses employed by the Council of Europe and both entitled to the household allowance, the said allowance is paid to the one of the two whose basic salary is

the higher. It is also provided that, when both spouses work for the Council of Europe, the allowance in respect of dependent children is paid to the staff member who receives the household allowance.

It was only recently, on the basis of an internal audit, that an examination was made of whether you or your spouse should effectively benefit from the allowance in respect of dependent children for these three children.

In the light of your file, I am obliged to advise you that, according to the wording of the certificate relating to Mr Rossi's divorce from his former spouse:

‘although the children are subject to the joint parental authority of both their parents, it is established that they shall live with their mother for the main part, that they shall form part of the mother's household for fiscal and social purposes, and, finally, that Mr Rossi shall pay monthly maintenance in respect of these three children in the sum of 2,100 FF (to be adjusted in line with the INSEE cost-of-living index).’

It is thus clear from your file that, in accordance with the provisions of the Staff Regulations, in this case Article 5 of Appendix IV thereto (copy attached), the three children are effectively dependent on their mother. Consequently, neither Mr Rossi nor yourself may continue to receive the allowance in respect of dependent children for Mr Rossi's three children.

I invite you to communicate any material which could be taken into account with a view to a review of (the) decision. The said allowances will cease to be paid with effect from 1 June 2001, if appropriate.”

14. The appellant was on leave until 14 May inclusive. On 15 May she received notice of the Administration's decision to withdraw from her, with effect from 1 June 2001, the allowances in respect of dependent children for the three children.

15. On 1 June 2001, the appellant received her June payslip, on which the allowances at issue no longer appeared.

16. On 21 May 2001, the appellant submitted to the Secretary General an administrative complaint in pursuance of Article 59 of the Staff Regulations against the decision of 15 May. On 7 June 2001, she submitted a second complaint, against the June payslip.

17. The Secretary General rejected both complaints on 12 June 2001. After drawing attention to the Tribunal's decision of 30 May 1997 in the appeal of X v. Secretary General (No. 224/1996), the Secretary General pointed out that the Directorate of Human Resources was in possession only of the divorce certificate. He gave the reasons for his decision in the following terms (translated into English):

“This divorce certificate being the only material in the file on which it was possible for the Directorate of Human Resources to base its decision, (the Head of the Division for the Administrative and Financial Management of Staff) had asked you kindly to provide additional information, such as the amount of the

financial support ... reading the divorce certificate in the light of the aforementioned previous decision, it emerges that the children have to be considered to be dependent on their mother. In any case, even if, as you state in your memorandum, a distinction has to be made between a residence and support for the children, it is difficult to take the view that the monthly sum of 700 FF paid per child could be regarded as a sufficient amount for their support.

The information supplied by your memorandum being inadequate to enable the Directorate of Human Resources to continue payment of these allowances in pursuance of the provisions of the Staff Regulations, (the Head of the Division for the Administrative and Financial Management of Staff) advised you that it would be necessary for you to supply additional information. The sole aim of this oral intervention was to invite you to supply the necessary material. Still not having received the additional information on 4 May 2001, (he) advised you that this information was vital to the continued payment of the allowance in respect of dependent children. He also told you that, in the absence of such information, the payment of the allowances would be halted with effect from 1 June 2001. You therefore had a period of three weeks in which to rectify your situation. That period should ordinarily have sufficed. However, the Head of the Division for the Administrative and Financial Management of Staff was unaware that you were absent until 14 May 2001.”

18. On 1 July 2001, the appellant’s spouse sent the Directorate of Human Resources a declaration on his honour stating that (translation into English):

“I, the undersigned, Dario Rossi, hereby declare that I contribute to the support of my three children ... who are resident in Italy, by providing financial assistance averaging approximately 9,000 FF per month. These costs encompass not only the maintenance which I pay each month, but also those costs which I incur in order to exercise my right of access to the children, as well as the bills and other costs relating to the children which I pay directly during my trips to Italy.”

## **THE LAW**

19. The appellant asks the Tribunal to set aside the Secretary General’s decision to reject her administrative complaints, and to order him to reimburse the sums unduly withheld, together with interest at an annual rate of 6%. She also claims the sum of 22,000 French francs as reimbursement of the costs of the present proceedings.

The appellant takes the view that there are several irregularities in the instant case, namely:

- a. defects in the examination of the case, especially a violation of the principle that both parties must be heard;
- b. inadequate statement of reasons;

- c. violation of the Staff Regulations and of Appendix IV thereto (Regulations governing staff salaries and allowances);
- d. disregard for administrative practice;
- e. violation of the principle of good faith;
- f. violation of the principle of the legitimate expectations of the other party and of the right to certainty of the law;
- g. violation of the principle that there shall be no discrimination between staff and of the proportionality rule.

20. Where the first grievance more particularly is concerned, the appellant notes that the administrative decisions contested in her two complaints constitute unilateral administrative acts. When such acts are unfavourable to a staff member in that they deprive him or her of an entitlement, the Administration is duty bound to place the staff member in a position in which he or she can submit his or her defence, and must consequently enable both parties to be heard during the procedure concerned. But, in the appellant's view, while the Administration made an - albeit clumsy and rudimentary - attempt to make it possible for both parties to be heard, these efforts were in vain, and the Administration did not succeed in giving her an opportunity to present her arguments in full.

21. As to the second grievance, the appellant alleges that the Secretary General did not give adequate reasons for his decision, for he failed to indicate which documentary evidence he needed. Furthermore, in his decision to reject the administrative complaints, the Secretary General referred to the "necessary material" without stating what this was, and without specifying its nature. What is more, the appellant disputes the affirmation, made when her complaints were rejected, that the Head of the Division for the Administrative and Financial Management of Staff had asked her orally, on 10 April 2001, to provide this information.

22. As far as the violation of the Staff Regulations is concerned, the appellant takes the view that the Secretary General is under an obligation to apply the regulations as they stand without exercising a discretion. What happened in the instant case was that the Secretary General, following an audit, asked the appellant, and other staff members, to provide the documentary evidence enabling the Directorate of Human Resources to continue to pay the allowance concerned (see the decision to reject the administrative complaints, paragraph 17, above). Yet, according to the appellant, there is nothing that can enable the Secretary General to amend his decision to grant an allowance, and there is nothing enabling him to affirm that the conditions laid down in the relevant provisions of Article 5 of Appendix IV to the Staff Regulations are not being met. The appellant also points out that she had made a declaration that the children's mother had no paid occupation and was in receipt of no family allowances of any kind in respect of the three children. The Administration had nevertheless reached the conclusion that the children had to be regarded as dependent on their mother, without any factual evidence, extrapolating from a previous decision of the Administrative Tribunal (Appeal No. 224/1996, X v. Secretary General, decision of 30 May 1997).

23. The appellant further criticises an abrupt reversal of the Administration's previous administrative practice in this field, without any clear and comprehensive explanation of the reasons for this reversal. The appellant also alleges that certain principles which should have been applied to her case were disregarded.

24. The Secretary General, for his part, denies that the principle that both parties should be heard was violated. He also contests the appellant's affirmation that inadequate reasons were stated for the decision to withdraw the allowance.

Finally, the Secretary General considers that the allegation that he had violated the principle of good faith is completely unfounded. Nor, in his view, could there have been a violation of the principles of the legitimate expectations of the other party or of certainty, for the allowance had been received unduly.

In conclusion, the Secretary General asks the Tribunal to declare the appeal ill-founded, and to dismiss it.

25. In her observations in reply, the appellant, after noting that the Secretary General was giving a new version of the facts at issue, objected to the admissibility of the arguments put to the Tribunal, in accordance with the general legal principle of *allegans contraria non audiendus est*. In her view, no account should therefore be taken of these arguments. As to the merits of the appeal, she reiterated her conclusions.

26. The Tribunal firstly points out that the instant case relates to a decision to withdraw an allowance previously granted, on the ground that the appellant was unable to dispel the doubts raised by the Secretary General following a routine check.

That being so, the Tribunal takes the view that the first question needing to be answered is not that of whether the appellant was, or was not, entitled to the allowance paid, but whether the Secretary General was entitled to check whether the allowance had been properly granted and, if so, whether the methods used to carry out this check respected the appellant's rights as previously established.

27. The Tribunal is of the opinion that the Secretary General may reconsider his decision to grant a given allowance to a staff member if a re-examination of the file justifies such action. There is no reason to specify, in the instant case, the possible limits beyond which the Secretary General may not go when he decides to re-examine a file, for, in the circumstances of the present case - a routine annual check by the Council of Europe internal audit department - the decision to ask the appellant to provide information was not an arbitrary one.

Furthermore, a preliminary examination of the facts in the file shows that it was reasonable for the Secretary General to wonder whether the conditions set for the grant of the allowance in respect of dependent children were met in the instant case, or whether there was cause to re-examine the matter with a view to the future. The Tribunal considers this to be proven by, for instance, the fact that it was not until the oral proceedings that the Secretary General became aware of the sum currently paid by the appellant's husband as maintenance for the children (see paragraph 8 above).

28. This finding leads the Tribunal to dismiss from the outset certain reasons for illegality put forward by the appellant. Firstly, the Tribunal does not see in this case any sign of a change in administrative practice (letter d. of paragraph 19, above), but rather a check conducted to ascertain whether previous administrative activity had shown concern to comply with the regulations. Secondly, there is no foundation for the appellant's arguments about the violation of the principles of good faith, of the legitimate expectations of the other party and of the right to certainty of the law, of the principle that there shall be no discrimination between staff and of the proportionality rule (letters e. to g. of paragraph 19, above).

29. Before examining the appellant's other arguments, the Tribunal must consider whether, when the check at issue was carried out, the Secretary General placed the appellant in a position in which she could give a clear response to the doubts expressed on 4 May 2001 (see paragraph 13, above).

30. In view of the nature of the exercise which it was carrying out, the Division for the Administrative and Financial Management of Staff should have indicated to the appellant which documents or evidence she could use to support her affirmation that the children depended for their main and continuing support on the appellant's household.

Of course, it was right and proper for the Secretary General to wish to avoid interfering with the appellant's home life and refrain from asking for specific information, so as not to give the impression that he was seeking information "in a manner which might be thought intrusive" (ATCE, Appeal No. 224/1996 - X v. Secretary General, already quoted, paragraph 26).

However, once the appellant's reply of 5 April 2001 had been deemed unsatisfactory, the Secretary General should have explained to the applicant why the answer was not satisfactory and given an indication of the documents or information which would enable him to reconsider his provisional conclusion that the children were dependent on the mother, rather than on the appellant's household. However, the memorandum of 4 May gives no information about this subject, merely asking the appellant to "communicate any material which could be taken into account with a view to a review of (the) decision" that "neither Mr Rossi nor (the appellant) may continue to receive the allowance in respect of dependent children for Mr Rossi's three children".

The Secretary General needed to be more specific, especially as, on 19 March 2001, the Head of the Division for the Administrative and Financial Management of Staff had not stated why the documentation previously supplied was not sufficient to prevent doubt from being cast on the appellant's right to receive allowances. He had in fact merely asked for information. In this context, the Tribunal points out that Mr Rossi's divorce from his former spouse had been granted on 1 April 1993. According to the information available to the Tribunal, Mr Rossi's personal file records, as at 1 October 1993, ie at a date subsequent to his divorce, Mr Rossi's right to receive the allowance in respect of dependent children. The Tribunal thus assumes that Mr Rossi's entitlement to the allowances in respect of dependent children had been established after his divorce. Yet it is not clear to see how the Division for the

Administrative and Financial Management of Staff could ask for information without stating why the information available to it - which, according to its affirmations, consisted solely of the divorce certificate (see paragraph 17, above) - was no longer considered satisfactory.

31. In the Tribunal's view, there is no doubt that the appellant's co-operation with the Division for the Administrative and Financial Management of Staff was minimal. In her memorandum of 5 April 2001, in reply to the request that she produce "material enabling us to assess (the financial support provided by Mr Rossi)", she in fact merely reaffirmed that her entitlement had been recognised, adding - as the only new information - that her husband "also pays directly quite a number of costs, which he does during his frequent trips to Italy, trips which enable him to exercise his right of access to the children". The Tribunal considers that this declaration is not such as to provide the Secretary General with the information he needed. Only during the proceedings before the Tribunal did the appellant complain that the Secretary General had failed to tell her which documentary evidence he needed (see paragraph 21, above).

32. The Tribunal therefore reaches the conclusion that the procedure was illegal. It consequently has no need to examine the reasons for illegality put forward at letters a. to c. of paragraph 19, above.

33. With a view to avoiding over-complication of the procedure, however, the Tribunal has to wonder whether the information supplied by the appellant on 1 July, through the deposit of her husband's attestation dated the same day (see paragraph 18, above), is material which is nevertheless able to satisfy the request for information which the Division for the Administrative and Financial Management of Staff ought to have sent to her. But this declaration is written in terms too general for the conclusion to be reached that the appellant, albeit belatedly, fulfilled her obligation to provide justification for her entitlement to the allowances at issue.

34. Thus there is reason to conclude that the procedure was illegal in the terms stated above.

35. As the Tribunal has reached this conclusion, the question might occur of what kind of information a staff member in such a situation ought to supply. In practice, the parties referred during the proceedings to "documentary evidence", or, more generally, to "material justifying" the information supplied.

It is not, however, for the Tribunal to give an answer to such a question here, for its role is not to stand in for the Secretary General for the purposes of the management of staff members' rights, but to monitor the lawfulness of his activities.

36. The appellant requests that the Secretary General pay her the sum unduly withheld. As the case is of a pecuniary nature, the Tribunal has unlimited jurisdiction (Article 60 (2) of the Staff Regulations).

Having reached the conclusion that the procedure was vitiated, the Tribunal finds reason to order the Secretary General to pay the sum withheld to the appellant. In view of the attitude adopted by the appellant during the re-examination procedure

(see paragraph 30, above), there is no reason to order payment of the interest requested.

37. The appellant, who used the services of a lawyer, has claimed 22,000 French francs for costs. The Tribunal takes the view that it is reasonable for the Council of Europe to reimburse half of this sum (Article 11 (2) of the Statute of the Administrative Tribunal).

For these reasons, the Administrative Tribunal:

Declares the appeal founded;

Sets aside the decision at issue, for the reasons indicated above;

Orders that the Council of Europe pay the appellant the sum withheld and reimburse her 11,000 French francs in costs.

Delivered at Strasbourg, on 5 December 2001, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

K.HERNDL