

CONSEIL DE L'EUROPE ——— ——— COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeals Nos. 469/2010 and 473/2011 (Seda PUMPYANSKAYA (II) and (III)
v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, 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. The appellant, Ms Seda Pumpyanskaya, lodged her appeals on 17 December 2010 and 14 February 2011. On 17 December 2010 and 18 February 2011, the appeals were registered under Nos. 469/2010 and 473/2011 respectively.
2. In a decision of 27 January 2011, the Tribunal refused the request submitted by the appellant in connection with Appeal No. 469/2010 to be granted anonymity in that appeal.
3. On 23 March 2011, the appellant filed further pleadings in respect of both appeals.
4. On 16 June 2011, the Secretary General submitted his observations on the two appeals.
5. On 9 August 2011, the appellant submitted a memorial in reply.

6. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 2 November 2011. The appellant was represented by Maître Jean-Pierre Cuny, barrister practising in Versailles, while 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, administrative officers in the same department.

7. After the oral proceedings, the Secretary General supplied certain information at the Tribunal's request, and the appellant submitted comments in reply.

THE FACTS

I. THE FACTS OF THE CASE

8. The appellant is a Russian national. On 14 March 2005, she was recruited on a fixed-term permanent staff member's contract as Director of Communication (grade A6). At the time of lodging her appeals she had held the position of special adviser, still at grade A6, since February 2010.

9. In accordance with Article 25, paragraph 5a. of the Regulations on Appointments, the appellant was offered three successive employment contracts for the post of Director of Communication, the last of which ran from 14 March 2009 to 13 March 2010.

10. Following contacts and exchanges with the Secretary General and officials of the Organisation to discuss her personal situation, on 3 February 2010 the appellant sent the Secretary General a letter of resignation.

11. On 5 February 2010, the appellant received the offer of a one-year contract for the post of special adviser. Previously, during exchanges between the parties, the question of the duration of the contract and the possibilities of renewal had been raised. The same day, she gave her comments on this offer.

12. On 5 February 2010, the appellant signed the contract for the aforementioned position of special adviser to the Secretary General for a period of one year (4 February 2010 – 3 February 2011). Earlier, in reply to her requests for information, she had been told that unless she signed the contract the same day, the offer of a contract would be withdrawn.

13. On 5 July 2010, the appellant met the Secretary General.

14. On 9 July 2010, the appellant sent the Secretary General a letter summing up her demands.

15. In a letter dated 23 July 2010 which reached the appellant on 20 August 2010, the Secretary General replied to the appellant by notifying her, in particular, of his decision not to renew her contract, and offered to terminate it before expiry against payment of an indemnity equal to the remuneration owing up to the expiry date.

16. Previously, on 8 July 2010, the appellant had lodged an appeal with the Tribunal concerning an earlier dispute over the 2009 appraisal (Appeal No. 467/2010), in which the Tribunal had ruled by decision of 26 July 2011.

17. In a letter dated 16 September 2010 which reached the Directorate of Human Resources on 17 September 2010, the appellant submitted an administrative complaint against the Secretary General's letter of 23 July 2010 (Article 59, paragraph 2, of the Staff Regulations).

18. On 18 October 2010, the Secretary General rejected the administrative complaint as unfounded since the letter of 23 July 2010 was not to be regarded as an administrative act adversely affecting the appellant but as a reply to her letter, and reflected an intention which had not resulted in a decision to refuse the renewal of the appellant's contract.

19. On 17 December 2010, the appellant lodged Appeal No. 469/2010.

20. Meanwhile on 25 October 2010, the Director of Human Resources sent the appellant a letter informing her of the decision not to renew her contract when it expired on 3 February 2011. In particular, he pleaded budgetary difficulties preventing the renewal of the contract.

21. By letter dated 23 November 2010 which reached the Directorate of Human Resources on 24 November 2010, the appellant lodged an administrative complaint against the Secretary General's letter of 25 October 2010 (Article 59, paragraph 2, of the Staff Regulations).

22. On 16 December 2010, the Secretary General rejected the administrative complaint as inadmissible and/or unfounded.

23. On 14 February 2011, the appellant lodged Appeal No. 473/2011.

24. The appellant ceased her employment with the Council of Europe on 3 February 2011.

THE LAW

I. JOINDER OF THE APPEALS

25. Given the connection between Appeals Nos. 469/2010 and 473/2011, the Administrative Tribunal ordered their joinder pursuant to Rule 14 of its Rules of Procedure.

II. SUBMISSIONS OF THE PARTIES

26. In her first appeal, the appellant asks the Tribunal to annul the decision of 23 July 2010 whereas in her second appeal she requests the annulment of the decision of 25 October 2010. In the further pleadings drafted for the purposes of both appeals, she simply asks the Tribunal to annul the Secretary General's decision not to renew her contract. She also seeks payment of

salary and 100 000 euros compensation for non-pecuniary damage, together with a sum of 6 500 euros by way of reimbursement of all costs occasioned by this appeal.

27. For his part, the Secretary General asks the Tribunal to declare both appeals inadmissible and/or ill-founded and to dismiss them.

The Appellant

28. The appellant pleads two grounds in respect of both appeals: the unlawfulness of the non-renewal decision due to a manifest error of fact and law, and abuse of authority. However, before going into these arguments, the appellant comments on two issues of admissibility relating to the first appeal (absence of an administrative act adversely affecting her, and alleged lateness of the appeal), which the Secretary General addressed in his reply to the administrative complaint.

A. Question of admissibility

29. According to the appellant, the form and content of the letter of 23 July 2010 are such that all the necessary conditions are met for it to be regarded as an administrative act adversely affecting her.

30. As to the alleged lateness of the appeal, the appellant disputes that she should have submitted an administrative complaint against her contract: in her view, she had been right to challenge the decision not to renew the contract, rather than the contract itself; consequently, she had observed the statutory time-limits for initiating contentious proceedings.

Insofar as the appellant mentions earlier events to which the Secretary General would raise the objection of lateness, the appellant points out that she does not mention these acts in order to challenge them and have them annulled. She adds that these facts are stated in support of her allegation of abuse of authority.

B. First ground of appeal (unlawfulness of the non-renewal decision due to a manifest error of fact and law)

31. Based on factual evidence, the appellant claims that her contract was meant to be renewed, as the Organisation had clearly given her to understand that renewal of the contract for two more years was an open option. Referring to ILOAT case-law, the appellant says that the Organisation did not even consider whether or not a favourable response to her expectation was in its interests. Besides, neither the text of the contract nor the job description given to the appellant mentioned a one-year “project”. Thus the non-renewal decision was founded on factually as well as legally defective reasoning. She submits that there is an error of fact because the Organisation considers the contract to have been linked with a project lasting one year, and an error of law because the impossibility of renewing the contract purportedly followed from the actual contract and from a decision by the Committee of Ministers which had taken note of the Secretary General’s intention to appoint the appellant for a term of one year. In addition, the memorandum from the Director of Human Resources and the reply to the administrative complaint referred generally to the Organisation’s budgetary situation without going into any

degree of detail. What is more, it was only upon receiving the decision rejecting her administrative complaint that the appellant learnt the principal reason for non-renewal, namely the erroneous consideration that her post was intended not to be renewed. Accordingly, the reasons given by the Director of Human Resources in his decision not to renew the contract are merely subsidiary and secondary. Indeed, if the Secretary General has a mistaken idea of the nature of a post and an activity, that error has repercussions for budgetary decisions.

32. In these circumstances, the appellant requests that the impugned decision be annulled in that the reasons given for it are factually and legally erroneous.

C. Second ground of appeal (abuse of authority)

33. With her plea of abuse of authority, the appellant sets out to demonstrate the unacceptability of the administrative practices applied to her.

34. The appellant firstly refers to the circumstances in which the Secretary General dressed up as a resignation his decision no longer to renew her contract as Director of Communication once it reached its expiry date on 13 March 2010. In particular, she claims that she received no advance notice or information, but was subjected to pressure to resign from her post. Although technically she did resign, the fact remains that she was subjected to psychological pressure to sign the new contract at exceptionally short notice, with psychological coercion in that she was placed under explicit threat of withdrawal of the offer.

35. The appellant then states that she was “lured” by the promise of a Geneva-based post but was subsequently appointed to a different position as special adviser to the Secretary General, and informed that at the end of the first year the Secretary General would consider the possibility of renewing the contract for two further years.

36. Finally, the appellant submits that while taking up her new duties the realisation grew on her that she had been well and truly “sidelined”. She feels that her position did not have specific duties attached to it and that she was in an administrative and professional situation not at all in keeping with that of a staff member of her grade. She continued to hold a position which did not correspond to the reference job for her grade, and the Organisation had thereby failed in its obligation to treat her in accordance with objective criteria. The Organisation had moreover infringed her right to be assigned actual duties. Consequently, this sidelining was incompatible with the Organisation’s interest and with the general principles of law.

37. Finally the appellant pinpoints disturbing coincidences between the events of June 2010 and the lodging of her first appeal.

38. In conclusion, the appellant asks the Tribunal to annul the decision not to renew her contract.

The Secretary General

39. The Secretary General for his part begins by examining the admissibility of the first appeal and goes on to set out his arguments in reply to those of the appellant concerning both appeals.

A. Question of admissibility

40. The Secretary General states that in his letter of 23 July 2010 he was merely advising the appellant, in reply to her letter, of his intention as to the question whether or not the contract would be renewed. Consequently his letter did not contain a decision, and on that account could not adversely affect the appellant. The administrative complaint and the appeal that followed it were therefore groundless and inadmissible.

41. Next, since the appellant did not object to the clauses of her contract when she signed it, the administrative complaint and the appeal were late in that respect.

B. First ground of appeal (unlawfulness of the non-renewal decision due to a manifest error of fact and law)

42. Relying on the wording of the contract, the Secretary General disputes that it was intended to be renewed. He arrives at that conclusion after examining the terms of a letter sent to the appellant on 4 February 2010 by the Director of the Secretary General's Private Office for the sole purpose of indicating that when the contract ended the Secretary General would consider the possibility of renewing it.

43. The Secretary General emphasises that while a contract can indeed be renewed, that does not confer a right to renewal. Besides, the position held by the appellant had been created for one year and she was so informed (see decision taken by the Committee of Ministers at its 1076th meeting). Moreover, even if this was unnecessary, the appellant had been informed by the Director of Human Resources that her contract was not to be renewed.

44. The Secretary General then submits that the appellant received an adequate and coherent statement of reasons. In reply to the contention that in view of the arguments used to reject the administrative complaint he had evidently been misled, the Secretary General asserts that he was fully informed that the position held by the appellant was limited to one year, and that if it had been of a priority nature he would have tried to find the necessary budget with which to renew the contract.

C. Second ground of appeal (abuse of authority)

45. The Secretary General does not dispute that the appellant had been invited to resign from her post. He states that he informed the appellant during an interview that upon expiry of her contract (March 2010) he wished to have, as he is entitled and able, a free choice as to the person appointed to the post of Director in the Directorate of Communication. In that connection, he absolutely denies having given any indication whatsoever of the gender or age of the applicant whom he would appoint.

Further, he could have decided to let the appellant's contract as Director of Communication reach expiry and offer her nothing after 13 March 2010. He nevertheless offered a one-year contract on the basis of a fixed-term project. To substantiate his arguments, the Secretary General refers to the sequence of events and goes on to reply point by point to the facts adduced by the appellant in support of her plea.

46. In reply to the appellant's allegations regarding supposed "offhanded and dubious administrative practices", the Secretary General submits that his attitude amply demonstrates that he acted in good faith and with due regard to the appellant's personal interest. Moreover, he is not required to prove his good faith. He adds that, if the appellant feels there was any misuse or abuse of authority, according to settled administrative case law in the matter the burden of proof is on the party making this allegation.

47. It follows from all the foregoing considerations that the Secretary General has not violated any regulations or any rules of legal practice or general principles of law. Neither have there been any errors in assessing the relevant evidence, faulty conclusions or misuse of authority.

48. In the light of all these elements, the Secretary General requests the Tribunal to declare Appeals Nos. 469/2010 and 473/2011 inadmissible and/or ill-founded and to dismiss them.

II. ASSESSMENT OF THE TRIBUNAL

49. The Tribunal firstly points out that it has to rule solely on the question of non-renewal of the appellant's final contract, viz. the one-year contract for a position of special adviser to the Secretary General. The Tribunal need not rule on questions concerning the earlier contracts for the post of Director of Communication, or on whether or not the contract for the position of adviser was in order, because if the appellant thought that the final offer was not consistent with the "negotiations" between herself and the Organisation she should – irrespective of the ultimatum issued to her on 5 February 2010 – have submitted an administrative complaint to the Secretary General against what she considered to be an infringement of her rights.

A. Admissibility

50. The Tribunal must firstly examine the question of the admissibility of the first appeal even though for practical purposes this question raises no real issue for the parties, as the appellant lodged a second appeal which, although it challenges a different administrative act, refers to the same dispute. The Tribunal considers this proven by the fact that on both appeal forms, in the box "object of the appeal", the appellant stated the same object: "to obtain the annulment of the decision not to renew [her] contract and the award of compensation for the non-pecuniary and professional damage [which she] sustained".

51. The Tribunal accepts the Secretary General's interpretation of his letter of 23 July 2011. Indeed, after the formal reminder of the contract's expiry on 3 February 2012, he stated, "*I feel bound to inform you that I have no intention of renewing your contract.*" He therefore stated an intention rather than a decision. Consequently, in the light of the decisions taken subsequently, she had no need to challenge this decision.

52. The Tribunal therefore comes to the conclusion that the objection is founded because this appeal – which employs the same line of argument as Appeal No. 473/2011 – concerns an administrative act not adversely affecting the appellant.

53. Concerning the objection of lateness raised by the Secretary General, the Tribunal need not rule on the question of whether the appellant ought to have challenged the contract rather than the decision not to renew it, since these were in any case two separate acts and were therefore both open to challenge. The Tribunal considers this proven by the fact that in his memorandum of 25 October 2010, the Director of Human Resources did not merely say that the collaboration was ending because the one-year contract was due to expire, but justified the decision not to renew it by other arguments – whose validity need not be considered at the stage of determining admissibility as consideration of that aspect pertains to the merits of the appeal. Indeed, after specifying that “*due to the heavy budgetary constraints the Organisation is facing, it will no longer be possible to finance this position after 3 February 2011*”, he then added, “*therefore the Secretary General is not in a position to offer you a new contract, and your appointment will thus expire on 3 February 2011.*” The Tribunal considers that there are enough elements in this memorandum to justify challenging the non-renewal decision rather than the one relating to the contract itself a year earlier. Consequently, this objection by the Secretary General would have to be dismissed were the appeal not to be declared inadmissible on the ground of his first objection.

54. In conclusion, Appeal No. 469/2010 is to be declared inadmissible because the appellant was not subject to an administrative act adversely affecting her within the meaning of Article 59, paragraph 2, of the Staff Regulations.

55. The Tribunal must now examine the appellant’s grounds of appeal to the extent that they relate to Appeal No. 473/2011.

B. First ground of appeal (illegality of the non-renewal decision due to a manifest error of fact and law)

56. The Tribunal firstly points out that it has to rule solely on the question of the non-renewal of the appellant’s final contract, namely the one-year contract for a position of special adviser to the Secretary General. The Tribunal need not rule on questions concerning the previous contracts for the post of Director of Communication or whether or not the contract for the position of adviser was in order, because if the appellant had considered that the final offer was not consistent with the “negotiations” between herself and the Organisation, she should – regardless of the ultimatum issued to her on 5 February 2010 – have submitted an administrative complaint to the Secretary General against what she considered to be an infringement of her rights.

57. Having acquainted itself with all the arguments submitted by the appellant and examined them in the light of the, no doubt, unusual facts of this case, the Tribunal comes to the conclusion that the appellant’s complaint is unfounded. Indeed, it is plain that because of the contracts which the appellant received over time – a one-year contract for a position of special adviser to the Secretary General preceded by several fixed-term contracts for the post of Director

of Communication - the appellant was not entitled to the renewal of her final contract. The very nature of this type of contract precludes the existence of any such entitlement.

58. It nevertheless remains for the Tribunal to ascertain whether, at one time or another, the appellant had received any information which could be considered an undertaking – subsequently not honoured – to renew the contract after the first year, and whether the appellant received an adequate statement of reasons for the decision not to renew it.

59. Relying on the information supplied to it, the Tribunal comes to the conclusion that at no time did the Organisation undertake to renew the contract, nor did it give any information suggesting this. As the Tribunal sees it, the indication that upon expiry of the contract the Organisation would review the question had certainly raised the appellant's hopes of obtaining a renewal. However, such indications cannot be equated with statements which could commit the Organisation in the legal sense.

60. Next, having regard to the nature of the post, the Tribunal accepts that the reasons given to the appellant constituted adequate information. Indeed, the Director of Human Resources referred to budgetary difficulties in continuing to finance this position, which difficulties, given the way in which the post was created, do not come as a surprise and require more detailed explanation. The very difficulties that the appellant encountered during her year of service constitute a criterion by which to assess the possibility of renewing her contract in respect of a position whose interest and expediency particularly during a period of budgetary difficulties – are not immediately apparent, as the Tribunal cannot fail to acknowledge.

61. The Tribunal therefore comes to the conclusion that the appellant's ground of complaint is unfounded and should be rejected.

C. Second ground of appeal (abuse of authority)

62. Under this ground of appeal, the appellant complains of the administrative practices which were applied to her and which concern the premature termination of her previous contract as well as developments during the course of the contract which was not renewed by the decision under appeal.

63. As already pointed out, the Tribunal has no need to rule on the first limb of the ground of appeal or on the conduct of the talks for the new contract. As to the second limb, the Tribunal admits to being puzzled by certain facts, particularly those described by the appellant in terms of "sidelining". However, even if these elements raise doubts in the minds of the Tribunal, it has to be observed that they do not prompt the Tribunal to arrive, in this case, at a finding of abuse of authority or a finding of breach of the principle of respect in all circumstances for the principle of good faith. The appellant has indeed raised before the Tribunal the difficulties of substantiating the subjective element, but the fact remains that it was up to her to give the Tribunal irrefutable proof of her assertions.

64. The Tribunal thinks it appropriate to point out that it finds it surprising that the Secretary General proposed to the appellant that she terminate her contract and offered her a "*lump sum*

indemnity” in the event that she agreed to early termination. Of course, this proposal was made in response to signs of discontent given by the appellant. However, given that this was a newly created position in the Organisation, and regardless of the action which it intended to take in the matter of maintaining the position after the end of the first year, the imperatives of good management of the Organisation’s resources dictated that the Secretary General proceed otherwise. But it is not for the Tribunal to examine this aspect of the dispute between the appellant and the Organisation.

65. In the light of this finding, the Tribunal considers that the Organisation cannot be said to have committed an abuse of authority.

66. Consequently, this second ground is also to be rejected.

67. In conclusion, Appeal No. 473/2011 is unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Orders the joinder of Appeals 469/2010 and 473/2011;

Declares Appeal No. 469/2010 inadmissible and dismisses it;

Declares Appeal No. 473/2011 unfounded and dismisses it;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg on 16 April 2012, and delivered in writing pursuant to Rule 35, paragraph 1, of the Rules of Procedure of the Tribunal, on 20 April 2012, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS