

CONSEIL DE L'EUROPE—————

—————**COUNCIL OF EUROPE**

**TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL**

Appeal No. 316/2003 (Anne KLING (I) v. Secretary General)

The Administrative Tribunal, composed of:

Mr Pieter Van DIJK, Deputy Chair,
Mr José da CRUZ RODRIGUES,
Mr Angelo CLARIZIA, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Ms Marialena TSIRLI, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Ms Anne KLING lodged her appeal on 7 August 2003. On 13 August, the appeal was registered as file no.316/2003.
2. On 22 September, the appellant's representative, Professor M. Piquemal, lodged supporting observations.
3. On 22 October, the Secretary General submitted his observations on the appeal. The appellant lodged observations in reply on 21 November.
4. The public hearing in the appeal was held in the Administrative Tribunal's hearing room on 22 January 2004. The appellant was represented by Professor M. Piquemal and the Secretary General by Mr J. Polakiewicz, Deputy Head of the Legal Advice Service, Directorate General I – Legal Affairs, assisted by Ms Maija Junker-Schreckenber, assistant in the same department.

THE FACTS

5. The appellant is a permanent Council of Europe staff member with French nationality who was removed from post after disciplinary proceedings. Having been recruited in 1972, at the time of her dismissal she was working in the Directorate General of Political Affairs as a

principal administrative assistant (grade B5). Previously she had held posts of assistant (grades B4 and B5) in the Directorate of Press and Information.

A. The facts which gave rise to the disciplinary proceedings

6. In March 2002, a leaflet entitled “Insécurité, immigration, islamisme” (Immigration, Islam and the Threat to Law and Order), issued by the association Défendons Notre Identité (Defend Our Identity) and signed by Ms Kling among others, was distributed in Strasbourg in connection with France’s presidential election campaign. The leaflet contained the following passage (translation): “Chirac, the RPR and the UDF, like the Socialists and the far left, are in favour of Turkish entry to the European Union. This is a disaster in the making. Another 64 million Muslims will be making themselves at home all over Europe”. The leaflet also showed a map of Alsace covered in mosques, on each of which perched a stork wearing the Islamic veil.

7. On 21 March 2002, the Council of Europe Staff Committee published a statement on the Council’s intranet strongly deploring the leaflet and commenting on the fact that it had been signed by a staff member. On 28 March Ms Kling exercised her right of reply on the intranet. She said that her activities as a member of a political organisation took place outside the Council and that the Council was in no way liable for them.

8. On 22 March 2002, a number of Council of Europe staff wrote to the Secretary General complaining about the “racist and xenophobic” tone of the leaflet and asking him to use his administrative powers to ensure there was no recurrence of words and actions that seriously harmed the Council of Europe’s image and credibility.

9. On 26 March 2002, the Director of Human Resources set the appellant an appointment to see the Secretary General on 3 April 2003. He wrote (translation):

“You were one of the signatories of a leaflet, “Immigration, Islam and the Threat to Law and Order”, recently distributed in Strasbourg.

In particular the leaflet refers to Turkish membership of the European Union as a disaster in the making: “Another 64 million Muslims,” it says, “will be making themselves at home all over Europe”.

Xenophobic statements of this kind are totally at odds with the Council of Europe’s values and principles.

In mentioning Turkey, a Council of Europe member country, by name, you also attack the Turkish Government, Turkish parliamentarians and your Turkish colleagues in the Secretariat, an attitude which is incompatible with your position as a Council of Europe staff member.

Adoption of that public stance, after a number of similar occurrences which prompted cautionings on our part, is of unacceptable seriousness.

To give an explanation of these matters and the circumstances in which you breached your duty of discretion, I would ask you to come and see the Secretary General ... at 3 pm on 3 April 2002. On receipt of this note, please send my secretary confirmation that you will attend as requested.

You may, if you wish, be accompanied at this interview by a person of your choice from the Council of Europe Secretariat.”

10. On 27 March, the Permanent Representative of Turkey wrote to the Secretary General complaining about the distribution of the leaflet, co-signed by Ms Kling and attacking Muslims and Turks. A member of the Turkish Permanent Delegation independently sent a copy of the offending leaflet to the Director General of Political Affairs, Mr S., with a handwritten note

expressing surprise that one of the leaflet's co-signatories was a Council of Europe staff member working in his directorate general.

11. On 1 April, the *Dernières Nouvelles d'Alsace* published an article entitled "Problem employee at the Council" which reported the exchange of notes between the Staff Committee and Ms Kling. Ms Kling was referred to as the staff member who had signed the leaflet.

12. On 3 April 2002, the Secretary General saw Ms Kling.

At the interview Ms Kling denied that she had contravened her duty of discretion, having made no reference, in accordance with Article 27 of the Staff Regulations, to her position as a Council of Europe staff member. She contended that she had therefore not done anything to infringe the Staff Regulations and that she had expressed her opinions in the context of activities as a member of a political organisation on which the Staff Regulations did not place any restriction.

The Secretary General said that he was in no way criticising her taking part in political debate about Turkey's joining the European Union. Nor was he criticising her political opinions. He took the view, however, that the language used in the leaflet was "unacceptable, particularly from an employee of the Council of Europe, which is an organisation that upholds basic values, of which non-discrimination is one, in all its member states including Turkey". The language in the leaflet was incompatible with Council of Europe staff members' obligations under the Staff Regulations.

The Secretary General also stressed that the xenophobia charge related not to Ms Kling's opinions but to the language of the leaflet. That language was completely at variance with the work of an organisation which was endeavouring to develop links with the Islamic world in the context of international counter-terrorism action. The Council was also taking part in a joint programme with the European Union to assist Turkey, in particular with a view to European Union membership. Lastly, although the leaflet did not mention that Ms Kling worked for the Council of Europe, her employment there was probably not unknown in view of her political prominence.

13. On 6 May 2002, the appellant informed the Secretary General that she intended standing as a candidate in France's general election that June and she requested permission to take her annual leave in order to conduct her campaign.

On 13 May, the Secretary General replied that he would grant her leave for personal reasons for the duration of the electoral campaign. The next day Ms Kling informed him that she had changed her mind about standing as a candidate.

B. The disciplinary proceedings

14. On 10 June 2002, the Secretary General instituted disciplinary proceedings against the appellant (under Articles 54 to 58 of the Staff Regulations and Appendix X to the Staff Regulations) by laying before the Disciplinary Board the report which constitutes the decision to take proceedings.

The referral report was composed of a first part, "The facts", and a second part, "Conclusion". The first part set out in table form the facts from January 1999 to 14 May 2002. They included – in addition to the above-mentioned leaflet and the events which followed

(see paragraphs 6 to 13 above) – the fact that, in a January 1999 leaflet, the appellant had given her office telephone number; distribution in April 2000 of a leaflet, “Grande Mosquée” (Great Mosque), that treated Islam as retrograde; an October 2000 complaint against the appellant by the Ligue contre le Racisme et l’Antisémitisme (League against Racism and Antisemitism) (LICRA) and the appellant’s subsequent acquittal; and a minute of an interview, a newspaper article and a letter from the head of the Secretary General’s Private Office granting the appellant three days’ special leave during the election campaign and reminding her that she must not mention that she was a Council of Europe employee or do anything that was incompatible with her Council of Europe employment or that was materially or morally damaging to the Organisation.

15. The Conclusion read:

“Ms Kling’s attitude is totally unacceptable. Working for an organisation which seeks to protect and promote human rights is morally irreconcilable with promoting totally opposite principles outside that organisation.

In addition, an attack of this violence on one of the Council’s member countries is incompatible with staff members’ duty of discretion.

The staff member’s recurrent actions of this kind demonstrate that mere interviews or remonstrations have no effect on her conduct.

On account of the seriousness of the facts the Secretary General is contemplating the penalty laid down in sub-paragraph f. of Article 54 (2) of the Staff Regulations, namely removal from post.”

16. On 2 July 2002, Ms Kling was given a hearing by the Disciplinary Board.

17. On 8 July, the Board delivered its opinion. On the matters with which she was charged, the Board expressed the view that, in the interests of presumption of innocence and *res judicata*, the disciplinary proceedings should discount any matters raised by the Secretary General which preceded the period 1999-2001. The Board further stated that it could not see how those matters could give rise to a charge of repetition of identical misconduct.

The Board’s finding was that the offending material had not been issued by Ms Kling in her capacity as a Council of Europe staff member but in connection with political activities in her own time that were permitted by the law of the host country. While deploring that information about internal exchanges between the Staff Committee and the appellant had been given to the press and her position as a Council of Europe employee thereby made public, there was no indication in the file of who had been the source of the mischievous leak, which could not be imputed to the appellant.

The Board considered the Secretary General’s reasons for taking disciplinary proceedings against the appellant to be pertinent. However, it did not regard them as justifying removal from post, such a penalty being disproportionate to the legitimate aim pursued, quite apart from the fact that the appellant had not been given any previous, clear and explicit warning.

In the Board’s view the charge against Ms Kling – distributing in March 2002 a leaflet, “Immigration, Islam and the Threat to Law and Order”, to which she had put her name – warranted the disciplinary penalty of a reprimand.

18. The Disciplinary Board’s opinion was submitted to the Secretary General on 9 July 2002.

19. By memorandum of 5 July, the Director of Human Resources, in accordance with Article 8 of Appendix X to the Staff Regulations, gave the appellant an appointment to see the Secretary General on 16 July.

She replied the same day, by note handwritten on the Director's memorandum. The note read:

"I made a leave application some time ago for the period from 8 to 19 July. I shall be in Sri Lanka for that period and it will therefore be quite impossible for me to keep the appointment. My sincere apologies."

To this she added:

"As it will be physically impossible for me to attend, I agree to disregarding the procedural requirement and undertake not to use it as a possible argument."

20. On 5 July 2002, a typewritten note was signed by Ms Kling and a member of the Directorate General of Administration and Logistics on the Secretary General's behalf. It read:

"It is physically impossible for Ms Kling to attend for interview with the Secretary General.

Purely physical circumstances therefore prevent the Secretary General from giving Ms Kling a hearing within the time limit laid down in Article 8 (2) of Appendix X to the Staff Regulations.

It is therefore agreed that the interview prescribed in Article 8 will take place at a later date, and not meeting the prescribed time limit will not be used as a possible argument".

21. On 27 August, the Director of Human Resources asked the appellant to see the Secretary General on 10 September "in accordance with Article 8 of Appendix X to the Staff Regulations and further to her handwritten note on the original call for interview on 16 July 2002".

The interview took place on 10 September. The appellant told the Secretary General that in her view he was now debarred *ratione temporis* from taking any disciplinary measure against her. She expressed the view that the criticisms made of her in the Disciplinary Board's opinion were unfounded.

22. On 11 September 2002, the Secretary General delivered an *ad personam* decision removing Ms Kling from post with effect from 30 September 2002. The decision was worded as follows:

"The Secretary General,

HAVING REGARD to Article 54 of the Staff Regulations;

HAVING REGARD to the Secretary General's report of 10 June 2002 (transmitted on that date to the Chair of the Disciplinary Board, Mr H. de J.), as provided for in Article 55 (3) of the Staff Regulations and Article 2 (2) of Appendix X to the Staff Regulations and drawn up after a hearing of the staff member in accordance with Article 56 (1) of the Staff Regulations and Article 2 (1) of the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations);

HAVING REGARD to the memorandum of 25 June 2002 from the Director General of Administration sending an additional document, numbered 18, to the Chair of the Disciplinary Board;

HAVING REGARD to the Disciplinary Board's opinion dated 8 July 2002;

After hearing the staff member on 10 September 2002, in accordance with Article 8 (2) of the Regulations on Disciplinary Proceedings;

WHEREAS it is established that the staff member on several occasions (April 2000, March 2001 and March 2002) issued leaflets containing statements (discrimination on grounds of national origin and religious background, incitement to rejection on ethnic grounds) contrary to the Council of Europe's principles;

WHEREAS, noting that the March 2002 leaflet with the staff member's signature:

'described Turkish entry to the European Union as a 'disaster in the making' and justified the use of those words by saying that another 64 million Muslims would be making themselves at home all over Europe',

the Disciplinary Board expressed the view that:

'that stance, quite apart from the hostility of the language and the total lack of any qualification of the assertions, is completely at odds with the Council of Europe's ideals, its purpose and the values which it has upheld since its inception';

HAVING REGARD to the Secretary General's duty to ensure observance within the Council of human rights and the basic principles of democracy and tolerance;

WHEREAS the conduct of the staff member is contrary to Article 25 of the Staff Regulations (the requirement to refrain from any action which might reflect upon the individual's position as a staff member or which might be prejudicial morally or materially to the Council), her behaviour having disregarded the Council of Europe's interests;

WHEREAS the attitude shown by the staff member is likewise clearly contrary to the rules of conduct for Council of Europe staff as set out in Office Circular No.308 (staff members' political activities or views must not, to any degree, conflict with the Council of Europe's aims and objectives);

HAVING REGARD to the various comments, observations and cautionings to Ms Kling in the past, viz.:

- an interview on 18 December 2000 with Mr M. S. and Ms B. O'L;

- a letter dated 31 January 2001 from Mr J. K.,

despite which she has repeatedly persisted in her conduct;

WHEREAS the nature and seriousness of such misconduct must be apparent to any reasonably conscientious member of staff;

WHEREAS Ms Kling's conduct, on account of its seriousness, has irremediably broken the trust which must exist between the Organisation and its staff;

Having taking cognisance of the observations and documentary evidence which the staff member handed over on that same date,

HEREBY DECIDES:

Article 1 – For the aforementioned reasons, and on the basis of the facts as established by the Disciplinary Board, an organisation such as the Council of Europe, upholding human rights and the principles of democracy and tolerance, cannot retain a staff member who repeatedly makes statements of the above kind;

Article 2 – The penalty of removal from post is accordingly imposed on Ms Anne KLING for conduct incompatible with her position as a Council of Europe staff member and failure in her duty of loyalty to the Secretary General, and for thus having contravened her obligations under Article 25 of the Staff Regulations;

Article 3 – The removal from post takes effect on 30 September 2002.”

C. The disputes procedure

23. On 13 September 2002, the appellant lodged an administrative complaint. She alleged firstly that the decision was out of time. On the merits, she denied having caused the Organisation any damage whatever. She contended that the decision was contrary to Article 10 (2) of the

European Convention on Human Rights (the right to freedom of expression) and to *res judicata* and that the penalty was disproportionate. She sought annulment of the decision to remove her from post.

As she requested, the administrative complaint was submitted on the same date to the Advisory Committee on Disputes.

24. On 16 September, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution of the decision to remove her from post. In an order dated 27 September, he refused her request on the ground that most of her arguments came under examination of the merits, which it was inappropriate to pre-judge.

25. On 4 July, the Advisory Committee on Disputes delivered its opinion. It held that Ms Kling's administrative complaint was founded with regard to disproportionateness of the disciplinary penalty and unfounded with regard to the other heads of complaint. Firstly, on the lawfulness of the disciplinary proceedings, it expressed the view that it was legitimate in the circumstances of the case to extend the time limit laid down in Article 8 of Appendix X to the Staff Regulations (see paragraphs 19 to 21 above). With regard to the merits of the contested *ad personam* decision, the Committee's view was that the Secretary General had not previously taken any actual disciplinary steps on matters earlier than March 2002. Consequently, there had not been any "recurrent actions" (see paragraph 15 above, conclusions of the report referring the matter to the Disciplinary Board) and the Committee, like the Board before it, therefore had to confine itself to the distribution of the leaflet in March 2002. On the question whether this constituted conduct contrary to the staff member's obligations under the Staff Regulations, its opinion contained, among others, the following findings:

"In the present instance, objecting to Turkey's admission to the European Union is in itself neither a racist act nor discrimination based on religion or ethnic origin nor evidence of xenophobia. It expresses a political opinion ...

However, an international civil servant, like any civil servant, does not have as wide freedom of expression as the ordinary citizen. The civil servant has a duty of discretion and neutrality. In addition, the Council of Europe is entitled to expect its staff to act, both at work and outside, in accordance with its basic values and purpose. The Committee accordingly agrees with the Secretary General that the manner in which the statements were made was excessive. The reference in the leaflet to an invasion of Europe by 64 million Muslims connotes denigration of a religion, as do the connection made in the leaflet between Islam, Turkish immigration and law-and-order problems and the drawing reproduced in the leaflet. The leaflet as a whole presents an adverse and unpleasant picture of Turkey and its nationals and does so in strong language. Even without being racist or xenophobic, the statements it contains may constitute an infringement of staff members' duty of discretion. As regards the duty of neutrality, the Secretary General was entitled to be concerned about a staff member's involvement in public controversy that called in question the "European" aspirations of a Council of Europe member country, even had no insulting language been used.

In the Committee's view the manner in which Ms Kling expressed her opinions was bound to stir up controversy and did so. It was foreseeable that statements of that kind would be harmful to the Council of Europe simply on account of being blatantly at odds with the Council's basic values as laid down in its Statute. In lending her name to the leaflet, Ms Kling involved herself in a debate that was liable to harm the Council's image. In doing so she infringed one of the obligations which had been made clear to her in her interview with Mr S."

With regard to the choice of disciplinary measure, the Advisory Committee on Disputes added:

"In deciding what disciplinary measure to impose the Secretary General has some discretion, subject to review by the Administrative Tribunal (see ATCE, decision of 20 May 1999, Appeal No.245 and 249/1998 Bouillon III and IV v. Secretary General, paragraph 79). It is not for the Committee to substitute its own assessment for that of the Secretary General and decide what penalty it would have imposed if it had been in the Secretary General's position. The Committee can merely satisfy itself that the Secretary General did not

exceed his latitude in the matter, and in particular did not adopt a measure disproportionate to the misconduct.

Adopting the Administrative Tribunal's approach in the case cited, and regard being had in particular to the fact that the Secretary General did not follow the Disciplinary Board's recommendations, the Committee considers it appropriate to examine the "proportionality of the disciplinary decision ... in the light of the particular conditions pertaining to this case" (*ibid*).

The Committee observes at the outset that the penalty imposed on Ms Kling is the severest of the penalties available: it deprives the staff member of his or her livelihood, quite apart from the humiliation which he or she may experience as a result of dismissal. That category of penalty should therefore be reserved for extremely serious misconduct and cases where the staff member's conduct is so shocking that – to quote the Secretary General's decision – the trust which must exist between the Organisation and its staff is irremediably broken. Despite some hesitancy, the Committee, like the Disciplinary Board, is not convinced, in the light of the facts, that that was the case here.

The Committee finds, firstly, that while the leaflet was reprehensible on account of its strong language and somewhat xenophobic tone attracting media attention, it nonetheless did not directly incite to racial hatred (see *mutatis mutandis* European Court of Human Rights, Yasar Kemal Gökçeli judgment of 4 March 2003, paragraph 38). Secondly there was no "recurrence" of identical actions. Above all, there was no warning to the staff member that she risked the severest disciplinary penalty. Lastly, she was not informed in advance of part of the legal basis for the penalty.

The Committee understands the anger of the Staff Committee and the Secretary General at the language and illustration with which Ms Kling associated herself but considers dismissal to be an overreaction which the facts do not justify when examined objectively and dispassionately.

In the light of the foregoing, the Committee considers it disproportionate in the present case to react to the misconduct with which Ms Kling was charged by dismissing her. In its view a penalty of such severity is unjustified."

Lastly, the Committee took the view that the decision under challenge gave insufficient reasons for the Secretary General's rejection of the Disciplinary Board's recommendation regarding the penalty.

26. On 25 July 2003, on the Secretary General's behalf, the Director of Administration rejected the administrative complaint. The reasons he gave for his decision included the following:

"As regards the alleged illegality of the decision, I would point out that the decision is based on your having several times, despite various comments, observations and cautionings to you, circulated leaflets containing statements which, contrary to the Council of Europe's principles, discriminated on the ground of national origin and religion and incited to ethnic rejection. The decision to remove you from post is also based on a number of serious infringements of your professional obligations, which may be summarised as follows:

- failure to refrain from any action which might reflect on your position as a Council of Europe staff member or which might be morally prejudicial to the Council of Europe;
- failure to refrain from political activities or views conflicting to any degree with the Council of Europe's aims and objectives;
- breach of your duty of loyalty towards the Secretary General.

In this connection, I note that the Advisory Committee on Disputes came to the conclusion that you had been duly warned, and with sufficient precision, of your obligations as a staff member as laid down in the Staff Regulations. Although the Advisory Committee on Disputes held that the warnings "were not of a disciplinary nature", the Secretary General considers that the actions infringing your obligations were repeated, despite explicit cautionings to you about complying with them, and that this renders your misconduct very serious.

I note your contention that Office Circular No.308, which lays down the principles of Council of Europe staff conduct, no longer has any legal existence in that the Staff Regulations have been amended since it was issued. Nevertheless, the basic principles in the Staff Regulations are unchanged and the circular consequently remains legally valid. In this connection, even though the circular was referred to for the first time in the decision imposing the disciplinary penalty, as a member of staff you are supposed to be familiar with the regulations and the circular is on the Council's intranet portal.

As to the penalty's proportionateness to the offences (offences acknowledged both by the Disciplinary Board and the Advisory Committee on Disputes), I note that your actions, as already stated, were repeated and of such seriousness, in particular in connection with the March 2002 leaflet ... that the Secretary General was entitled to take the view that the necessary relationship of trust with his staff had been broken in your case. In the Secretary General's view, the Disciplinary Board underestimated the seriousness of the situation, particularly as regards the fact that you persisted in your misconduct despite clear, detailed admonitions. In the circumstances the Secretary General could not confine himself to a mere reprimand, and a warning would clearly not have had any effect.

The Secretary General cannot be compelled to keep on the Secretariat a staff member who, despite being informed that her actions were contrary to her duties, has repeatedly and publicly expressed opinions which run counter to the Organisation's basic values, and it would have been remiss of him not to impose removal from post.

The Secretary General would also make clear that, in taking the decision, he in no way yielded to pressure from a member state. The letter from the Permanent Representative of Turkey dated 27 March 2002, to which you refer in this connection, is merely tangible evidence that you did indeed morally damage the Council of Europe."

27. On 13 August 2003, the applicant lodged the present appeal against the rejection of her administrative complaint.

THE LAW

28. The appellant asks the Tribunal to set aside her removal from post. She also seeks payment of unpaid salary, upvalued by 4 % per year to compensate for material damage, plus a sum of € 300,000 for non-material damage. Lastly, she claims € 5,000 in costs.

29. The Secretary General asks the Tribunal to declare the appeal ill-founded and dismiss it.

I. THE PARTIES' ARGUMENTS

A. The appellant

30. The appellant mainly alleges a procedural defect arising from contravention of Article 8 (2) of the Regulations on Disciplinary Proceedings. Alternatively, she alleges breach of the general legal principle of *nullum crimen sine lege*, misuse of authority, contravention of Article 10 of the European Convention on Human Rights and lastly contravention of the proportionality principle.

31. She notes that the Disciplinary Board's opinion was transmitted to the Secretary General on 9 July 2002 (see paragraph 18 above). She maintains that the Secretary General should have taken any decision by 8 August 2002. Article 8 (2) of the Regulations on Disciplinary Proceedings provides that the Secretary General is to take his decision "within one month" after transmission of the Disciplinary Board's opinion, and that "he shall first hear the staff member concerned".

She disputes the argument – advanced by the Advisory Committee on Disputes and shared by the Secretary General – that that time limit is purely indicative. The time limit, she argues, is mandatory and could have been met if a staff member had been delegated the responsibility of conducting the interview. In addition, she says, her agreement not to insist on that procedural requirement carries no weight and cannot have any effect as the Staff Regulations apply no less to the Secretary General than to the staff and no deals are permissible regarding compliance with procedure, and in particular time limits”.

32. As regards her alternative arguments, she notes that legal theory and case law on the international civil service recognise that, in disciplinary matters, general legal principles closely modelled on those in criminal law must be applied. The principle that offences and punishments must be strictly defined in law (*nullum crimen sine lege*) requires that any disciplinary offence be explicitly laid down in a staff regulation. In addition, within the Council of Europe, regard must be had to European Convention on Human Rights case law. The Secretary General, however, has not stated which regulations were contravened by the three offences which he ascribes to her. She maintains that the matters held against her to do not amount to misconduct. Those matters are: a. failure to refrain from any act which might reflect on her position as a Council of Europe staff member or which might be morally prejudicial to the Council; b. not refraining from political activities or views conflicting to any degree with the Council of Europe’s aims and objectives; c. breach of the duty of loyalty towards the Secretary General.

33. In addition, the appellant maintains that her removal from post amounts to abuse of authority in that it was imposed to achieve a main objective and a secondary one which were incompatible both with the rules in force and with the purpose of the disciplinary procedure. The main objective was to dismiss a staff member who was engaging perfectly legally in political activities wrongly regarded as reprehensible in themselves. The secondary objective was to please the Turkish authorities.

34. She further alleges a breach of Article 10 of the European Convention on Human Rights, which reads:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The appellant notes that, in dismissing her administrative complaint, the Secretary General did not deal with this ground of appeal. She maintains that the Convention is directly applicable in the Organisation’s internal legal system. She contends, firstly, that the lawfulness principle was not complied with. In particular she argues that Article 25 of the Staff Regulations does not meet the standard of foreseeability which European Court of Human Rights case law requires and which is necessary if an interference is to be considered “prescribed by law” (*Eur. Court H.R., Sunday Times v. United Kingdom*, judgment of 26 April 1979, Series A No.30, p.31, paragraph 49). Secondly the interference was not “necessary in a democratic society”. The appellant points out lastly that, under European Court of Human Rights case law, freedom of expression applies not only to information or ideas that are favourably received or regarded as

inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population (*Eur. Court H.R., Handyside v. United Kingdom*, judgment of 7 December 1976, Series A No.24, p.23, paragraph 49).

35. Lastly, she alleges disregard of the proportionality principle, which has to do with striking a fair balance between protecting the individual and protecting the general interest. Under European Court of Human Rights case law on protecting freedom of expression, she says, freedom of expression has to be balanced against the interest which the law seeks to protect. International tribunals have always taken care that the penalty imposed is not disproportionate to the matters of which the civil servant stands accused.

36. She observes that the Disciplinary Board considered the question and expressed the view that the reasons which the Secretary General had given for contemplating removing her from post were not adequate justification for that penalty, which was disproportionate to the legitimate aim pursued. The Secretary General nonetheless opted to remove her from post and without stating why he had departed from the Disciplinary Board's opinion. That was why the Advisory Committee on Disputes decided that, on this head, the complaint was founded (see paragraph 25 above). The Secretary General's decision dismissing the administrative complaint argues that the penalty is proportionate, but the arguments are obscure, particularly the references to "cautionings" and to the appellant's "actions" being "repeated". In short, she maintains that the Secretary General broke the proportionality principle, gave no justification for his radical departure from the Disciplinary Board's recommendation and lastly ascribed to her after the event offences which she did not commit.

B. The Secretary General

37. The Secretary General maintains that the time limits in the provisions in question are not mandatory. He refers to established European Community case law that a time limit of that kind is not to be regarded as mandatory but as a rule of sound administration, whose purpose, in the interests both of the administrative authority and the civil servant, is to avoid unjustified delay in taking the decision which ends disciplinary proceedings (see Court of First Instance of the European Communities, Judgment No.24/98 of 3 July 2001). The Secretary General adds that he endeavours to comply with time limits and that he failed to do so in the present case only because it was physically impossible for the appellant to keep the appointment he had given her to see him. In addition, the appellant had consented to exceeding the time limit. Lastly, he could not delegate conducting the interview to a staff member because a decision in a case of such seriousness had to be taken by the Secretary General himself.

38. Secondly, the Secretary General disputes that there was any breach of the general legal principle of *nullum crimen sine lege* and maintains that the leaflets which the appellant issued contained statements contrary to Council of Europe principles. He contends that the decision to remove the appellant from post and the decision dismissing her administrative complaint make clear the charges against her and the staff rules contravened. The decision removing her from post contains an introductory reference to Article 25 of the Staff Regulations. The appellant's actions breached her duty of loyalty, as set out in paragraph 1 of Article 25. It reads:

"Article 25 – Loyalty and integrity

1. On taking up their duties, staff members shall sign the following declaration in the presence of the Secretary General:

"I solemnly declare that I will carry out the duties entrusted to me as a member of the staff of the Council of Europe loyally and conscientiously, respecting the confidence placed in me. In discharging these duties and

in my official conduct I will have regard exclusively to the interests of the Council of Europe. I will not seek or receive any instructions in connection with the exercise of my functions from any government, authority, organisation or person outside the Council. I will refrain from any action which might reflect upon my position as a member of the staff of the Council or which might be prejudicial morally or materially to the Council.”

2. Staff members may not, without the permission of the Secretary General, accept either directly or indirectly any material or other advantage offered in relation to the performance of their duties. This prohibition shall continue after the staff member’s employment has terminated.”

The Secretary General observes that Office Circular No.308 of 20 March 1959 on the principles of conduct by Council of Europe staff clarified the meaning and scope of the general terms used in Article 25. Office Circular No.444 of 15 November 1968 on participation of staff members in political activities reminded staff of the principles in the first circular.

In the Secretary General’s view, the leaflets to which the appellant has several times lent her name contain statements contrary to Council of Europe principles (discriminating on grounds of national and religious origin and inciting to rejection for ethnic reasons). Having scrutinised the three leaflets (see paragraph 14 above), he reached the conclusion – like the Disciplinary Board and the Advisory Committee on Disputes before him – that issuing the leaflets, containing as they did statements fundamentally at odds with the aims, ideals and values which the Organisation pursued and proclaimed, contravened Article 25 (1) of the Staff Regulations. As a result, the appellant had placed herself in a position which was incompatible with the very principles and basic aims of the Organisation to which she was required to help give effect as a matter of loyalty. Consequently, she had “irremediably broken the trust which must exist between the Organisation and its staff” and she had therefore made it impossible to maintain an employment relationship.

39. In addition, he argued, the allegation of misuse of authority must be rejected since the appellant had failed to prove that, in imposing the penalty, he had pursued any aim other than that of maintaining internal order within the Council of Europe.

40. With regard to infringement of Article 10 of the European Convention on Human Rights, the Secretary General points out that in the present case that provision has to be read together with Article 17 of the Convention, which provides:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

He says that the European Court of Human Rights has in fact always applied Article 17 in cases to do with distribution of material contrary to the spirit of the Convention and the key values of democracy and human rights.

41. Finally, he maintains that the penalty is not disproportionate. It must be taken into account that the matters with which the appellant is charged are established fact and that their seriousness results from the hostility of the language used. Further, the appellant’s conduct caused widespread anger among Council of Europe staff. There is no requirement to warn a staff member before imposing a disciplinary penalty. In conclusion the Secretary General takes the view that he acted with considerable restraint and that the final penalty was not imposed until the appellant had actively and repeatedly conducted herself in a disloyal manner. Thus, there was no disproportion

42. On the alleged failure to give reasons, the Secretary General maintains that his decision to remove the appellant from post gave ample reasons and was consistent with Tribunal case law (see ATCE, Appeal No.248/1998, X v. Secretary General, decision of 20 May 1999). He stated why he was unable to adopt the Disciplinary Board's opinion. In his decision he stressed two points which the Board had not taken into account: the repeatedness of the appellant's actions and her persistence in her conduct despite comments, observations and cautionings made to her. Further, in dismissing the administrative complaint, he had stated his view that "the Disciplinary Board [had] underestimated the seriousness of the situation, particularly as regards the fact that [she] persisted in [her] misconduct despite clear, detailed admonitions. In the circumstances the Secretary General could not confine himself to a mere reprimand, and a warning would clearly not have had any effect."

II. THE TRIBUNAL'S ASSESSMENT

A. The main ground of appeal (contravention of Article 8(2) of the Regulations on Disciplinary Proceedings)

43. In the Tribunal's view, the time limit in question is not a mandatory one. Firstly, in the case of the present time limit, unlike that of the time limit where a staff member is suspended, no "penalty" is specified for non-compliance. Secondly, no interests of third persons were involved. In addition, the Tribunal takes into consideration firstly that the time limit was exceeded because the appellant had informed the Secretary General that it was quite impossible for her to keep the appointment as she would be in Sri Lanka from 8 to 19 July (see paragraph 19 above) and secondly that extending the time limit so that an interview could be held was in the appellant's interests. The Tribunal further observes that, having of her own accord said that she would not insist on the time limit, the appellant is not now entitled to use lateness as a ground for objecting to the Secretary General's decision.

B. The secondary grounds of appeal

44. On the question of legal basis, the Tribunal holds that the legal basis used by the Secretary General creates an adequate foundation for imposing a disciplinary penalty. It is to be found in Article 25 of the Staff Regulations, under which staff make a declaration of loyalty to the Organisation. The duty of discretion is one aspect of loyalty to the Organisation. As to whether the appellant's conduct broke the loyalty requirement, the Tribunal holds that it was reasonable for the Secretary General to object to the appellant's conduct but that, in accordance with the case law which the parties cite, it was necessary for the Secretary General to give sufficient reasons for his view as to the degree of the appellant's contravention of her declaration under Article 25 of the Staff Regulations and the consequent justification for the penalty imposed.

45. The Tribunal must therefore firstly consider the complaint that insufficient reasons were given for the disciplinary penalty, as failure to give reasons or to give sufficient reasons would prevent the Tribunal from checking whether the appellant's conduct so seriously infringed Article 25 of the Staff Regulations that the penalty imposed was proportionate.

46. On the question of failure to give sufficient reasons, the Tribunal observes that while the Secretary General is obliged to consult the Disciplinary Board, he may reject its findings only if he gives detailed and convincing reasons for doing so. The Tribunal has already drawn the Secretary General's attention to "the importance and value of giving detailed reasons when he differs from the conclusions reached by the Disciplinary Board, whether in his assessment of the facts or on the measures to be taken, after a case has been investigated. This is moreover the rule

that applies in the Council of Europe's member states" (ATCE, Appeals Nos 245 and 249/1998, Bouillon III and IV v. Secretary General, decision of 20 May 1999). In the present decision the Secretary General did not give a detailed or convincing explanation as to why he disagreed with the penalty recommended by the Disciplinary Board or why, in his view, removal from post was the only penalty possible.

Article 54 of the Staff Regulations reads:

"1. Any failure by staff members to comply with their obligations under the Staff Regulations, and other regulations, whether intentionally or through negligence on their part, may lead to the institution of disciplinary proceedings and possibly disciplinary action.

2. Disciplinary measures shall take one of the following forms:

- a. *written warning;*
- b. *reprimand;*
- c. *deferment of advancement to a higher step;*
- d. *relegation in step;*
- e. *downgrading;*
- f. *removal from post.*

(...)."'

The Tribunal has already had to deal with cases in which the penalty imposed was harsher than the Disciplinary Board had recommended. It goes without saying that the requirement to give detailed reasons for a disciplinary decision is more important when the penalty ultimately selected is the severest of those possible. In this respect the present case differs from the case of X v. Secretary General (Appeal No.248/1998), where the penalty was relegation in step.

In addition, in the present case the Disciplinary Board contemplated a lenient penalty which did not even require that the matter be referred to it (see Article 2 of the Regulations on Disciplinary Proceedings – Appendix X to the Staff Regulations).

The Secretary General, rejecting the Disciplinary Board's lenient penalty, opted instead for the most serious penalty of all without explaining why he was compelled to do so. Nor did he explain why he partly based his decision on matters which the Disciplinary Board had not regarded as amounting to misconduct.

As the Administrative Tribunal of the International Labour Office has observed, although an explanation of the reasons for an administrative decision affords an essential safeguard of the staff member's rights, the form the explanation takes will depend on the nature of the decision and the context in which it is taken (Judgment No.1441 of 6 July 1995, Sock v. UNESCO). It follows that the seriousness of the penalty imposed by the contested decision and the fact that the Secretary General took action substantially different from that recommended by the Disciplinary Board required a fuller statement of reasons.

In this context, it was not sufficient that the Secretary General, in the second preambular paragraph of his decision to remove the appellant from post, quoted from the Disciplinary Board's assessment of the sole charge levelled against the appellant. The passage – already quoted in paragraph 22 above – ran:

"WHEREAS, noting that the March 2002 leaflet with the staff member's signature:

'described Turkish entry to the European Union as a 'disaster in the making' and justified the use of those words by saying that another 64 million more Muslims would be making themselves at home all over Europe',

the Disciplinary Board expressed the view that:

‘that stance, quite apart from the hostility of the language and the total lack of any qualification of the assertions, is completely at odds with the Council of Europe’s ideals, its purpose and the values which it has upheld since its inception’.

On the contrary, having drawn different conclusions as to the penalty, the Secretary General should have given detailed reasons for his decision to dismiss the appellant. It is not enough to assert, as the Secretary General did in the Tribunal hearing, that removal from post was the only possible penalty as the other measures available punished professional negligence and the least serious offences (record of the hearing of 22 January 2004 – see paragraph 4 above).

The decision to dismiss the appellant’s administrative complaint doubtless contains fuller reasons on one or two points. However, the additional explanations cannot remedy the defect found, not being such as to render the statement of reasons adequate. The Tribunal would point out here that the Secretary General referred in particular to two aspects of the case in support of his decision to impose a severer penalty than the Disciplinary Board had recommended and one which the Advisory Committee on Disputes thought unduly harsh: the repeatedness of the appellant’s actions and her persistence in her conduct despite clear, detailed warnings. The Advisory Committee on Disputes rejected those two points in its opinion, yet the Secretary General did not explicitly or persuasively refute the Advisory Committee opinion.

47. In the circumstances the Secretary General’s decision to remove the appellant from post does not give sufficient reasons.

The removal from post is therefore legally flawed and must be set aside.

48. In view of that conclusion, the Tribunal does not think it necessary to consider the other grounds of appeal.

49. As compensation for material damage the appellant claims back pay upvalued by 4 % per year. As this is a dispute which also has a pecuniary aspect the Tribunal has unlimited jurisdiction (Article 60 (2), second sentence, of the Staff Regulations) to order such payment. However, it takes the view that the requested upvaluation must be set at the rate of inflation in France over the relevant period.

50. The appellant claims € 300,000 in non-material damages. Given the facts of the case, the Tribunal does not consider it appropriate to award non-material damages as the appellant’s behaviour undoubtedly played a part in creating the situation from which the present dispute arose.

51. The appellant, having used the services of a lawyer, claims € 5,000 in costs and expenses. The Tribunal considers that claim reasonable within the meaning of Article 11 (1) of the Statute of the Administrative Tribunal.

For these reasons, the Administrative Tribunal:

Declares the appeal founded and sets aside the disciplinary decision to remove the appellant from post;

Orders the Secretary General to pay her the back pay to which she is entitled, upvalued by the rate of inflation in France for the relevant period;

Dismisses the claim for non-material damages;

Orders that the Secretary General reimburse 5,000 € in costs and expenses.

Delivered at Strasbourg on 7 May 2004, the French text of the decision being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

P. Van DIJK