

# CONSEIL DE L'EUROPE— —COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 342/2004 (Anne KLING (II) 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,  
Ms Marialena TSIRLI, Deputy Registrar,

has delivered the present decision after due deliberation.

### PROCEEDINGS

1. Ms Anne Kling lodged her appeal on 28 October 2004. On the same day, the appeal was registered as file 342/2004.
2. On 24 November 2004, the appellant's counsel, Professor M. Piquemal, lodged a supplementary memorial.
3. On 10 February 2005, after an extension of the time-limit, the Secretary General submitted his observations concerning the appeal. The Secretary General was represented by Mr P. Titun, Administrative Officer in the Legal Advice Department, Directorate General I – Legal Affairs.
4. The appellant submitted observations in reply on 8 March 2005.
5. On 17 June 2005 the Tribunal decided that there was no need to hold a hearing.

### THE FACTS

#### I. THE CIRCUMSTANCES OF THE CASE

6. The appellant is a permanent member of staff with French nationality. Recruited in 1972, she currently holds a grade B5 post in the Documents and Publications Production Department, Directorate of Logistics.

7. On 10 June 2002, the Secretary General referred to the Disciplinary Board the question of views which the appellant had expressed in the context of her political and voluntary activities. He told the Board that on account of the seriousness of the matter he was considering punishing her by removal from post. On 8 July 2002, the Board delivered its opinion, advising that the facts warranted the disciplinary penalty of a reprimand.

8. On 11 September 2002, the Secretary General delivered an *ad personam* decision (No.2673) removing the appellant from post with effect from 30 September 2002.

9. On 13 September 2002, the appellant lodged an administrative complaint seeking annulment of the removal from post. At her request the complaint was submitted to the Advisory Committee on Disputes on the same day for an opinion. The Advisory Committee delivered its opinion on 4 July 2003, finding that insufficient reasons had been given for the contested decision.

On 25 July 2003, the administrative complaint was rejected on the Secretary General's behalf.

10. On 13 August 2003, after the rejection of her administrative complaint, the appellant lodged an appeal with the Administrative Tribunal which was registered as file 316/2003.

In a decision delivered on 7 May 2004 the Tribunal annulled the disciplinary decision on the ground that the Secretary General had not given sufficient reasons for his decision to remove the appellant from post.

11. On 14 May 2004, under Article 11 of the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations), the appellant claimed reimbursement by the Secretary General of the defence fees which she had incurred in the preliminary stage of the case, which came to 5,000 euros).

12. On 18 June 2004, having been called before the Secretary General, the appellant was given a hearing by him. He informed her that he was planning to resume the disciplinary proceedings and asked her if she had any comments on the substance of the case. The appellant said that she had nothing to add.

13. On 9 August 2004, the appellant lodged an administrative complaint against the implicit refusal of her claim for reimbursement of fees.

14. On 26 August 2004, the Secretary General, having decided to resume the disciplinary proceedings against the appellant, submitted the report referring the case to the Disciplinary Board. The Board delivered its opinion on 14 December 2004, finding that the charges against the appellant in the referral report had already been the subject of an opinion and that the further referral could not give rise to a further opinion.

15. On 2 September 2004, the appellant's administrative complaint was rejected and she lodged the present appeal with the Administrative Tribunal.

16. On 28 January 2005, by *ad personam* decision (No.2975), the Secretary General imposed a reprimand on the appellant for the matters which had given rise to the disciplinary proceedings against her. The appellant having likewise contested this decision, the case became the subject of a separate appeal (Appeal No.345/2005 – Kling (III) v. Secretary General) on which the Tribunal is today delivering a separate decision.

## II. THE RELEVANT PROVISIONS OF THE STAFF REGULATIONS AND THE APPENDICES TO THEM

17. Article 54 of the Staff Regulations reads:

“1. Any failure by staff members to comply with their obligations ... may lead to ... 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.

3. A single offence shall not give rise to more than one disciplinary measure.”

18. The relevant provisions of the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations) read:

“Article 11

Costs incurred on the initiative of a staff member in the course of disciplinary proceedings, and in particular fees to a person chosen for his or her defence from outside the Council of Europe, shall be borne by the staff member when the disciplinary proceedings result in any of the measures set out under Article 54, paragraph 2.c to f. of the Staff Regulations.”

“Article 12

Where there are new facts supported by relevant evidence, disciplinary proceedings may be re-opened by the Secretary General on his or her own initiative or on application by the staff member concerned.”

## THE LAW

19. The appellant asks the Tribunal to annul the Secretary General’s tacit refusal to reimburse the defence fees which she incurred at the stage preliminary to Appeal No.316/2003. In particular, she claims 3,000 euros in costs incurred before the Disciplinary Board and 2,000 euros in costs incurred before the Advisory Committee on Disputes. Lastly, she claims 4,000 euros in costs occasioned by the present appeal.

20. The Secretary General asks the Tribunal to declare the appeal unfounded and dismiss it.

## I. ARGUMENTS OF THE PARTIES

### A. The appellant

21. The appellant contends that under Article 11 of the Regulations on Disciplinary Proceedings she is entitled to reimbursement of her representation costs before the Disciplinary Board. While accepting that no specific provision deals expressly with the question of reimbursement of costs incurred before the Advisory Committee on Disputes, she also claims reimbursement of them by analogy.

22. In particular, she maintains firstly that the Secretary General’s decision to reopen disciplinary proceedings against her was contrary to two rules, Article 54.3 of the Staff

Regulations and Article 12 of the Regulations on Disciplinary Proceedings. She argues that the former rule translates into internal Council of Europe law the general legal principle of *ne bis in idem*, which has two implications: more than one penalty cannot be imposed for the one offence, and disciplinary proceedings cannot be reopened against a staff member for the same matter.

23. She says that that interpretation of Article 54.3 is upheld by Community case-law (see *mutatis mutandis*, judgment of 3 July 2001, E v. Commission, T-24/98 and T-241/99, RecFP-II.681, rehearsal 82). As regards Article 12 of the Regulations on Disciplinary Proceedings, she submits that it prevents the Secretary General from reopening disciplinary proceedings in the absence of new facts. She therefore takes the view that she has been subjected to illegal treatment unprecedented in the history of the Council of Europe and observes that she has already challenged the decision which the Secretary General took as a result of the proceedings.

24. Recapitulating on the proceedings, the appellant maintains that her situation matches that provided for in Article 11 of Appendix X, entitling her to reimbursement of costs “incurred ... in the course of disciplinary proceedings” in that the conduct and conclusion of the disciplinary proceedings followed all the stages laid down in the relevant provisions. The penalty provided for in Article 54.2f of the Staff Regulations was initially imposed and then set aside by the Tribunal with retroactive effect. In the appellant’s view the Secretary General is attempting to take advantage of illegally instituted fresh disciplinary proceedings which repeat step by step the stages laid down in the Staff Regulations – prior interview of the appellant (18 June 2004) and referral of the matter to the Disciplinary Board by means of a further report (26 August 2004).

25. In her view, the further proceedings are indisputably new and distinct from the 2002 ones. Otherwise, the Secretary General could *ad infinitum* avoid having to reimburse costs by reopening disciplinary proceedings whenever they failed to produce the desired result. At all events, she points out that the disciplinary proceedings were brought to a conclusion by Decision 2957 of 28 January 2005 imposing a reprimand on her and she maintains her claim for reimbursement of the costs. She incidentally expresses surprise at the Secretary General’s omitting to mention that decision in his observations of 10 February 2005 and at his insistence that the disciplinary proceedings are still in progress.

26. With regard to the proceedings before the Advisory Committee on Disputes, the appellant notes that they form part of the disciplinary proceedings in the broad sense in that the optional nature of referral to the Advisory Committee in no way detracts from the importance of the pre-contentious stage for settling a disciplinary issue. In the absence of specific rules, she accordingly maintains that the question of reimbursement of costs incurred before the Advisory Committee must be approached by analogy. She here points out that the analogical approach is based on the principle established by the Latin maxim *ubi eadem legis ratio, ibi eadem legis dispositio*.

27. Under this general legal principle, the requirements for applying an analogical approach are: a. the case must not be covered by any legal provision; b. the case provided for in law and the cases not provided for must be identical in some respect; c. the identical element must have to do with the rule-maker’s reason for laying down the rule governing the case provided for, so constituting its *ratio*. The appellant takes the view that in the present case the three prerequisites are met, given in particular that the *ratio legis* is exactly the same: the rule-maker wanted to avoid a staff member’s incurring expense to defend him- or herself against charges of misconduct in disciplinary proceedings which for one reason or another prove groundless. She argues that there is no objective reason for refusing to reimburse costs incurred before the Advisory Committee to a staff member facing disciplinary proceedings when costs incurred before the Disciplinary Board and the Tribunal are reimbursed.

## **B. The Secretary General**

28. The Secretary General argues that the appellant's claim for costs incurred before the Disciplinary Board is premature as the disciplinary proceedings have not yet reached their natural conclusion, which will be the decision which he himself takes in the light of the Disciplinary Board's opinion of 14 December 2004. That decision, whatever it may be, will mark the end of the disciplinary proceedings against the appellant, and not until that point will it be possible, if appropriate, to make any reimbursement of costs as provided for in Article 11 of the Regulations on Disciplinary Proceedings.

29. The Secretary General comments more specifically that the decision to dismiss the appellant was annulled and that there is thus no legal basis at present for granting any reimbursement of costs. He disputes the appellant's contention that disciplinary proceedings cannot be reopened on account of *ne bis in idem*: the annulment of the penalty which had been imposed on the appellant suspended the disciplinary proceedings, and in particular the penalty which might be imposed on her. In the Secretary General's contention, there is thus no penalty which has been imposed on the appellant, who has had her rights fully restored to her in accordance with the Tribunal's decision.

30. The Secretary General adds that although the appellant disagrees with the word "resumption", what we have here is indeed a resumption of proceedings in progress. The disciplinary proceedings were not reopened but resumed because, as a result of the Tribunal's decision, the proceedings were incomplete. In this connection the Secretary General says that international case-law is clear: annulment by an administrative court, on account of a formal defect, of a decision by a competent authority does not preclude resuming the proceedings. Such a resumption does not constitute a fresh referral (Court of First Instance of the European Communities, judgment of 17 October 1991 in the *de Compte* case; ILOAT, Judgment No.888 of 30 June 1988 in the *Contaifer* case; ILOAT, Judgment No.226 of 6 May 1974 in the *Schawalder-Vrancheva* No.2 case).

31. In addition, with regard to costs incurred before the Advisory Board, the Secretary General maintains that there can be no question of any reimbursement as there is no provision for it in the Staff Regulations. It is therefore not possible to proceed by analogy and apply a rule that exists for disciplinary proceedings to another procedure. If the rule-maker had intended that costs incurred in the examination of an administrative complaint be reimbursed there would have been explicit provision for it.

32. The Secretary General likewise submits that if reimbursement of costs incurred before the Advisory Committee was granted there would be no reason not to also grant reimbursement to persons lodging an administrative complaint or even a mere request. The inevitable result would be an increasing number of improper, unfounded or inadmissible requests and administrative complaints the not inconsiderable cost of which the Council of Europe would be left to meet. In addition, the Secretary General states that referral to the Advisory Committee is an optional procedure for the staff member to use as he or she sees fit, whereas appearance before the Disciplinary Board is a compulsory stage in disciplinary proceedings. Staff members who opt to refer their cases to the Advisory Committee and to be assisted by legal counsel thus know in advance that any expenses incurred will not be reimbursed.

33. The Secretary General submits that in the present case there has not been any infringement of the regulations or a general legal principle. Costs incurred before the Advisory Board are therefore for the appellant to meet. If the Tribunal were to find in favour of the appellant it should reduce the claim by half and set the award at 2 500 euros.

## II. THE TRIBUNAL'S ASSESSMENT

34. The Tribunal firstly points out that in the present case it has unlimited jurisdiction because the dispute is of a pecuniary nature (Article 60.2 of the Staff Regulations).

35. As regards costs incurred for the Disciplinary Board the Tribunal does not consider it necessary for it to decide between the parties' contentions as to the nature and precise significance of the disciplinary proceedings which the Secretary General brought after the decision of 7 May 2004. It notes that the proceedings were completed by Decision No.2957 of 28 January 2005, by which the Secretary General imposed a reprimand on the appellant, the penalty provided for in Article 54.2b of the Staff Regulations (see paragraph 17 above). The appellant, represented by a lawyer from outside the Organisation, is thus entitled to reimbursement of the costs incurred in the disciplinary proceedings, in accordance with Article 11 of Appendix X to the Staff Regulations (see paragraph 18 above).

As regards the costs incurred before the Advisory Committee the Tribunal takes the view that although the proceedings concerning administrative complaints are not strictly speaking part of disciplinary proceedings, the *ratio legis* of Article 11 of Appendix X to the Staff Regulations compels the conclusion that the right to reimbursement applies to all the administrative proceedings, and includes costs incurred before the Advisory Committee in so far as they are justified and necessary in the interests of an effective administrative complaint.

The Tribunal takes the view that the wording of Article 11 of Appendix X is sufficiently broad to take in any costs incurred in administrative-complaint proceedings if the complainant ultimately wins his or her case, given that complaint proceedings are a natural extension of disciplinary proceedings.

The purpose of any assistance which a complainant may seek at the administrative-complaint stage is to provide specialist help which is not only in his or her own interests but also in the interests of the Administration, the object of whose work is legally correct application of the rules governing exercise of the Organisation's disciplinary powers. That was the outcome in the present case, with the appellant finally obtaining annulment of the penalty imposed on 11 September 2002.

It would seem appropriate to proceed by analogy here in that if the appellant were refused the costs in question, she could recover those relating to the first and last stages of her case but not those relating to the second.

Complainants are of course free to opt or not for the assistance of a lawyer but those who do must have their costs reimbursed in so far as they are justified.

The Tribunal accordingly considers it reasonable to grant the appellant 5,000 euros in respect of costs incurred before the Disciplinary Board and the Advisory Committee.

36. The appellant, who had recourse to a lawyer for the present appeal, claims 4,000 euros in costs and expenses. Article 11.2 of the Statute of the Administrative Tribunal states: "In cases where it has allowed an appeal, the Tribunal may decide that the Council shall reimburse at a reasonable rate properly vouched expenses incurred by the appellant, taking the nature and importance of the dispute into account." The Tribunal considers the appellant's claim excessive and that it can reasonably award her 2,000 euros under this head.

For these reasons the Administrative Tribunal:

Declares Appeal No.342/2004 founded;

Orders that the Secretary General reimburse 5,000 (five thousand) euros to the appellant for costs incurred before the Disciplinary Board and Advisory Committee and 2,000 (two thousand) euros costs and expenses in the present appeal;

Rejects the claim in respect of other costs.

Delivered at Strasbourg on 22 December 2005, the French text of the decision being authentic.

The Registrar of the  
Administrative Tribunal

The Deputy Chair of the  
Administrative Tribunal

S. SANSOTTA

P. VAN DIJK