CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 353/2005 (C. G. v. Secretary General)

The Administrative Tribunal, composed of:

Mr Kurt HERNDL, Chair,
Mr José da CRUZ RODRIGUES,
Mr Angelo CLARIZIA, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Ms C. G. lodged her appeal on 8 November 2005. The appeal was registered the same day under No. 353/2005.

2. On 9 January 2006, Mr J.-P. Cuny, the appellant's counsel, filed a supplementary memorial.

3. On 1 February 2006, the Secretary General submitted his observations on the appeal.

4. The appellant filed a memorial in reply on 2 March 2006.

Since the Chair had authorised the Staff Committee of the Council of Europe to intervene in the proceedings (Article 10 of the Statute of the Tribunal), the latter filed written observations on 23 March 2006.

5. The public hearing concerning this appeal took place in the Hearing Room of the Administrative Tribunal in Strasbourg on 24 March 2006. The appellant was represented by Mr J.-P. Cuny, and the Secretary General by Mr P. Titiun, Principal Administrative Officer in the Legal Advice Department of Directorate General I - Legal Affairs, assisted by Ms M. Junker-Schreckenberg, an assistant in the same department.

On this occasion the appellant produced the report of the Mediators of the Council of Europe to the Secretary General for 2005, in which the authors set out some considerations on the protection of temporary staff and issue recommendations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. At the time the appellant, who is of French nationality, was a temporary staff member of the Council of Europe. She was employed as Personal Assistant to the Commissioner for Human Rights (the Commissioner). She had also been entrusted with a number of other duties, not least in the financial field.

7. In the autumn of 2003, the Commissioner held an informal meeting of experts in Paris, in which Ms R. participated. The file for claiming reimbursement of the expenses was given to a trainee, who at the end of her traineeship (October 2003) failed to transmit it to the person responsible for dealing with it.

8. In the spring of 2004, Ms R. informed the appellant that she had not yet received the reimbursement. The appellant attempted to solve the matter, but the file was incomplete.

In July 2004, the appellant had a meeting with Ms R. and asked her to complete her file. Some time later, Ms R. transmitted a new account number, but the file nonetheless remained incomplete.

In November 2004, Ms R. again contacted the Office of the Commissioner to obtain the reimbursement of the relevant expenses.

On that occasion, the appellant sent Ms R. a document which, during the proceedings before the Tribunal, she described as a "facsimile of a 'bank transfer notice' in favour of Ms R.". To that end she used a bank transfer notice concerning another transaction in which she changed the addressee's details and indicated an amount corresponding more or less to the reimbursement due.

However, the problem was not solved because the appellant still did not have the documents needed to finalise the processing of the file.

9. On returning from a period of leave, on 8 June 2005, the appellant learned that, during her absence, Ms R. had sent a fax to the Commissioner and that this message and some documents from the file which the appellant had left on her desk had been transmitted to the Finance Directorate of the Council of Europe.

Noting that no payment had been made, this Directorate asked to receive the full file relating to the meeting.

10. Having been asked by the Commissioner to deal with this problem urgently, on 23 June 2005 the appellant sent an e-mail to the Finance Directorate concerning settlement of this matter from the Commissioner's own electronic mailbox.

11. An exchange of e-mails then took place with the Finance Directorate on the same day and the following day.

In the last of these e-mails, sent on Friday 24 June to the Commissioner with a copy to the Director of the Office of the Commissioner, the Finance Directorate indicated that the file would be dealt with at the beginning of the following week.

The same afternoon, the appellant – who was in the Commissioner's office during his absence – saw this e-mail appear on the Commissioner's computer screen and suggested to a colleague present with her in the office (the assistant to the Director of the Office) that she delete the copy of the e-mail from the Director's mailbox (he was also out of the office) since the matter had been settled.

On Monday 27 June, the colleague informed the Director of the e-mail's deletion.

The Director contacted the Internal Audit department the same day and the following day had a meeting with representatives of that department.

12. On 29 June 2005, Internal Audit submitted a report.

13. According to information provided to the Tribunal by the Secretary General, in its conclusions, Internal Audit called into question the appellant's conduct and found that a payment notice had indeed been forged, that evidence had been eliminated (deletion of the e-mail) and, lastly, that two e-mails had been sent using the Commissioner's account and signature.

14. On lodging this appeal, the appellant stated that she had not seen this document and had been informed orally that the auditor recommended that disciplinary proceedings be envisaged against her for the three acts which she was held to have committed and for having failed adequately to perform her duties as Personal Assistant to the Commissioner.

15. On 6 July 2005, the Director of Human Resources invited the appellant to an interview, which was to take place on 11 July 2005. In the letter of invitation, the Director stated:

> "I indeed wish to ask you a number of questions concerning serious incidents noted during procedures for the payment of experts in connection with the activities of the Office of the Commissioner for Human Rights which arose while you were in charge of these matters."

The appellant was informed that she could be accompanied by a staff member of the Council of Europe of her choice. She, however, attended the interview alone.

16. During the interview, the Director gave a summary of the audit report establishing the facts held against the appellant. The appellant acknowledged these facts and described the context in which she performed her duties within the Office of the Commissioner and the circumstances in which she had carried out the reprehensible acts.

The Director of Human Resources informed the appellant that she intended to terminate her employment contract with immediate effect on the ground of serious

misconduct. The appellant then told the Director that she still had a large number of days of leave to take.

17. On 12 July 2005, the appellant was asked to attend another interview by the Director, who gave her a letter notifying her of the termination of her temporary contract as from 20 September 2005. This decision was taken pursuant to Article 6.1.a of Rule No. 821 of 1 December 1992 laying down the conditions of recruitment and employment of temporary staff (paragraph 24 below).

18. On 26 July 2005, the Commissioner – who had in vain sought a meeting with the Secretary General – sent the Secretary General a letter in which he voiced, inter alia, his very serious concerns about the substance of the measure taken regarding the appellant and the conduct of the procedure.

19. On 10 August 2005, the appellant lodged an administrative complaint.

20. On 7 September 2005, the Secretary General received the appellant, who had asked to see him. She was accompanied by the Chair of the Staff Committee. During the discussion, the Secretary General informed the appellant that he considered the acts of which she was accused to constitute serious misconduct justifying the termination of her employment contract and that he would reply to the administrative complaint in the coming days.

21. On 8 September 2005, the appellant sent the Secretary General a letter in which, while stating that she was willing to accept the principle of a sanction, she challenged the existence of serious misconduct and argued that there was an unfair difference in treatment between temporary and permanent staff, since, for the latter, a range of disciplinary measures could be taken.

22. On 9 September 2005, the appellant received a letter, dated 2 September 2005, informing her that her administrative complaint had been rejected.

23. On 19 September 2005, the Secretary General sent the appellant a letter to inform her that he had taken note of the information provided on 9 September and added that he would not reconsider his decision.

II. INTERNAL REGULATIONS

24. The Secretary General's Rule No. 821 was adopted on 1 December 1992. It lays down the conditions of recruitment and employment of temporary staff within the Organisation.

Article 3 specifies the provisions of the Staff Regulations (applying to permanent staff) to be made applicable to temporary staff. This article does not cite the provisions on disciplinary proceedings (Part VI Discipline (Articles 54-58) of the Staff Regulations).

Article 6 is worded as follows:

"6.1 The contracts of temporary members of staff may be terminated:

a. without prior notice, in the event of serious misconduct on their part or if they knowingly made false statements in their application for employment or at the time of their engagement;

b. with the requisite notice and after a written warning, for manifest unsuitability or unsatisfactory work on their part;

c. with the requisite notice, if the contract is not renewed because the corresponding annual budgetary appropriations are unavailable.

6.2 In such cases the decision to terminate a contract, which shall be accompanied by reasons, shall be taken after the temporary member of staff concerned has been heard by the Head of Establishment and given an opportunity to consult his or her file."

THE LAW

25. The appellant requests the annulment of the decision, taken on 12 July 2005, to terminate her temporary employment contract.

She also requests a sum of 5,000 euros in reimbursement of the expenses engendered by these proceedings.

26. The Secretary General asks the Tribunal to find this appeal unfounded and to dismiss it.

27. The appellant submits three arguments: a violation of the general principle of law prohibiting any form of discrimination between staff of an international organisation, a violation of the principle of proportionality and of Article 6, paragraph 1 of Rule No. 821, and, lastly, an absence of reasoning.

28. With regard to the first argument, the appellant notes that the provisions of Part VI (Discipline) of the Staff Regulations have not been extended to temporary staff. This category of staff is concerned by only one measure – that provided for in Article 6 of Rule No. 821, which solely concerns serious misconduct for which it lays down the sanction of termination of the contract. The appellant, who refers to Article 14 of the European Convention on Human Rights prohibiting differences in treatment between persons in comparable situations, considers this to be a clear case of discrimination between permanent and temporary staff of the Organisation. She adds that this deficiency in the regulations also constitutes an encouragement to apply the sanction of dismissal. The appellant contends that she was made subject to disciplinary proceedings without benefiting from the procedural guarantees enjoyed by permanent staff under Appendix X (Regulations on disciplinary proceedings) of the Staff Regulations.

29. The appellant secondly maintains that, in the light of the particular circumstances in which she was led to perform the reprehensible acts, the contested decision seems seriously disproportionate.

30. Lastly, according to the appellant, there is nothing in the case-file that shows the reasons which led the Secretary General to decide to terminate her contract.

31. The Secretary General refers to the case-law of the European Court of Human Rights regarding prohibition of discrimination. He notes that it does not prevent different treatments of different situations. It is in fact clear from the instruments in force that temporary staff are not in the same situation as permanent staff. In this connection, the Secretary General refers to the Tribunal's case-law (appeal No. 256/1999, Grassi v. Secretary General, decision of 7 June 2000).

The Secretary General adds that the appellant, even if she did not undergo disciplinary proceedings, was nonetheless able to submit her arguments and it can consequently be considered that she benefited from the right to an adversarial procedure and that her rights of defence were duly taken into consideration.

32. With regard to the second argument, the Secretary General notes that the appellant's conduct was far from what is expected of any employee and, a fortiori, an international civil servant. He adds that, in view of the appellant's contractual situation, the Organisation was entitled either to decline to renew her contract or to terminate it pursuant to Article 6, paragraph 1 a. of Rule No. 821. This decision falls within the ambit of the Secretary General's unfettered discretion, for which the Tribunal cannot substitute its own assessment.

33. Lastly, the Secretary General notes that, throughout the proceedings, the appellant had the opportunity to acquaint herself with and discuss the charges against her, in particular during the two interviews on 11 and 12 July 2005. She accordingly could not be unaware of the reasons which led the Secretary General to consider that she had committed acts of serious misconduct that must be severely sanctioned.

34. Before examining the merits of the appellant's arguments, the Tribunal deems necessary to turn its attention to a question linked to compliance with the procedural requirements, as applicable to the appellant.

The Tribunal notes that Article 6 of Rule No. 821 establishes a number of procedural guarantees which must be complied with when it is applied. These guarantees are set out in paragraph 2 of this article, which provides "the decision to terminate a contract, which shall be accompanied by reasons, shall be taken after the temporary member of staff concerned has been heard by the Head of Establishment and given an opportunity to consult his or her file".

In the proceedings before the Tribunal, through her third argument, the appellant merely complains of a failure to comply with the first guarantee, i.e. that concerning the obligation to give reasons for the decision. It is moreover not in doubt that the appellant was heard beforehand on 11 July 2005, following an invitation dating back to 6 July 2005.

However, the Tribunal can but wonder whether – in the light of the course of the events – the appellant really benefited from the second guarantee (the right to be heard by the Director of Human Resources) and whether she enjoyed the third guarantee, namely the "opportunity to consult her file". Before the Tribunal the parties moreover raised the issue of the equitable, adversarial nature of the procedure.

35. The Tribunal notes from the outset that the appellant does not deny the facts. She even accepts the principle that they should be sanctioned; however, she gives a different

interpretation of them, above all on account of the difficult professional context in which she alleges she had to work.

In addition, before the interview on 11 July 2005, she was not able to consult the auditor's report, in which she was accused of a number of acts and the possibility of disciplinary proceedings against her was raised.

It is true that, before the interview on 11 July 2005, the appellant did not ask to consult this document, which seems to be of key importance to the dismissal decision. Nonetheless, her failure to do so is mitigated by the fact that the appellant had had no contacts with the auditor and could validly assert that she did not know of the document's existence at the time. In addition and above all, the Tribunal accepts that the appellant was not aware of the nature and purpose of the interview of 11 July, even if she had been informed that she could arrange to be accompanied. She had indeed been invited to attend in order to be asked "a number of question concerning serious incidents noted during procedures for the payment of experts in connection with the activities of the Office of the Commissioner for Human Rights which arose while you were in charge of these matters" (see the letter of invitation, paragraph 15 above). She was not asked to the interview in order to explain her conduct in relation to specific charges that could be brought against her. Furthermore, no discussion took place at the interview held the following day, the sole purpose of which was to hand over to the appellant the letter terminating her contract.

36. The Tribunal would point out that Article 6 of the European Convention on Human Rights lays down a general principle of law, whereby a person who is accused of misconduct has the right to be heard before a decision is taken. This entails that the person concerned should have the possibility of effectively defending himself or herself.

With regard to "disciplinary proceedings" concerning temporary staff, this principle is confirmed by Rule No. 821 of 1 December 1992 itself, which, having provided in paragraph 1 of Article 6 that a temporary member of staff may be dismissed without notice in the event of serious misconduct on his or her part, adds in paragraph 2 that "the decision to terminate a contract, which shall be accompanied by reasons, shall be taken after the temporary member of staff concerned has been heard by the Head of Establishment and given an opportunity to consult his or her file".

These guarantees are moreover upheld in Article 4, paragraph 2 of the new Rule No. 1232 of 15 December 2005 laying down the conditions of recruitment and employment of temporary staff members from 1 January 2006. This paragraph provides that during the interview with the Director of Human Resources the temporary staff member concerned may be assisted by a person of his or her own choice.

37. In the present case, it is clear that the appellant was unable to consult the audit report, the conclusions of which led to the dismissal procedure, and that she still has not seen it, which quite obviously caused her difficulties, and even hindered her, in the organisation of her defence.

38. With regard to the right to be heard beforehand, the Tribunal must, in the light of the circumstances of this case, raise the question of its substance.

In this connection the Tribunal refers to Appendix X to the Staff Regulations governing disciplinary proceedings against permanent staff, Article 2, paragraph 1 of which provides “No warning or reprimand shall be ordered by the Secretary General before hearing the staff member concerned” (these are minor disciplinary measures which may be taken without referring the matter to the Disciplinary Board).

As a rule of procedure, by its very nature, the phrase “No ... shall be ordered ... before hearing” must necessarily be construed as a right intended to enable the staff member concerned to defend himself or herself. Since it is a guarantee given to the staff member, this phrase cannot be interpreted as being confined to mere questioning and to listening to the staff member’s on-the-spot replies.

39. This right is preceded by another, namely the right to be informed in detail of the nature of and the ground for the accusations made against the staff member, and is supplemented by a third, the right of reply, that is to say the right to give one’s reasons for the alleged reprehensible acts, to explain them and to specify the circumstances surrounding them and which led to their commission.

However, an immediate response cannot be required. On the contrary, the staff member must be allowed a reasonable time to prepare it.

In accordance with this interpretation, which is moreover the only one consistent with the letter and the spirit of the general principal established by the European Convention on Human Rights, the Secretary General has a duty to hear the staff member before deciding as to his or her guilt. The pendant to this duty incumbent on the Secretary General is the staff member’s right to be "heard" in accordance with the above procedural requirements.

40. The provisions mentioned (paragraph 24 above) naturally apply only to permanent staff, but, under Article 6, paragraph 2 of Rule No. 821, as the Tribunal has pointed out, termination of contract must be the subject of a decision accompanied by reasons “taken after the temporary member of staff concerned has been heard ... and given an opportunity to consult his or her file”.

It is hence clear that the regulations aim to guarantee temporary staff the possibility of a real defence before a decision is taken concerning them. The Tribunal considers that there can be no guarantee unless this provision of Article 6, paragraph 2 of Rule No. 821 is held to be identical in substance to Article 2, paragraph 1 of the Regulations on disciplinary proceedings (Appendix X to the Staff Regulations).

41. The Tribunal cannot accept that, in the case of proceedings likely to lead to an extremely serious disciplinary measure (termination of the employment contract), temporary staff should be afforded less guarantees than are enjoyed by permanent staff with regard to minor disciplinary measures, such as a written warning or a reprimand, the lightest on the scale appearing in Article 54, paragraph 2 of the Staff Regulations.

42. A temporary staff member’s legal situation, albeit specific, does not justify, in this matter, a treatment different from that dispensed to a permanent member of staff.

43. This consideration is all the more compelling in that the Organisation is having increasing recourse to temporary staff.

44. It follows that, in essence, the appellant was not "heard" beforehand within the meaning of the law. Questions were indeed put to her, which she answered, but she was not really able to give her own explanation of events. The appellant was informed forthwith that her contract was to be terminated, and the letter terminating it was handed to her the following day.

The Secretary General did not challenge this information, supplied by the appellant. Furthermore, the terms of the letters inviting her to the interview and terminating her contract are consistent with this version of events.

The procedure for terminating the employment contract of a temporary member of staff, as provided for by Rule No. 821 and also Rule No. 1232, is of course a summary one applied in cases of urgency. Accordingly, in view of the needs of the situation, which are to be weighed and may be such as to require a rapid decision, it may not necessarily be possible to allow a long period for a response. However, the right to defend oneself requires that the temporary member of staff should be granted a reasonable length of time from the moment when he or she knows exactly what he or she is accused of.

The Tribunal notes that any other interpretation of the relevant expression would reduce to a formality, devoid of any valid substance, the guarantee that must be enjoyed by a member of staff of the Council of Europe, whether temporary or permanent.

45. This was well understood by the Commissioner for Human Rights who, in his letter of 26 July 2005 to the Secretary General, stated "... I am not sure that the manner in which the administrative rules of the Council of Europe have been applied in this case honours this Organisation, which has the ambition of upholding, inter alia, fair and equitable judicial procedures ...".

In addition, the recommendations of the Mediators of the Council of Europe (paragraph 5 above) concerning the guarantees afforded to staff must also be taken into consideration, notably the third, which recommends that "... in the course of the elaboration of this new regulation [on administrative inquiries], fair treatment will be guaranteed equally to both permanent and temporary staff whether or not they will have been recruited after 1 January 2006 …".

46. In conclusion, the contested decision was taken without effective compliance with the essential guarantees established by Article 6, paragraph 2 of Rule No. 821 and must consequently be annulled.

47. Having reached this conclusion, the Tribunal has no need to examine the appellant's arguments, as the procedural guarantee which was disregarded in this case is an essential guarantee and the failure to comply with it cannot be eclipsed by the seriousness of the acts of which the appellant was accused – on the contrary their seriousness calls for greater formal compliance with the procedural guarantees.

48. The appellant, who used the services of counsel, has requested a sum of 5,000 euros for her expenses. The Tribunal deems it reasonable that the Secretary General should reimburse an amount of 4,000 euros (Article 11, paragraph 2 of the Statute of the Tribunal - Appendix XI to the Staff Regulations).

On these grounds, the Administrative Tribunal:

Declares the appeal founded;

Cancels the termination decision of 12 July 2005;

Decides that the Secretary General shall reimburse a sum of 4,000 euros in expenses.

Delivered at Strasbourg on 5 September 2006, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	K. HERNDL