

# CONSEIL DE L'EUROPE

# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 605/2019**  
**(X v. Secretary General of the Council of Europe)**

The Administrative Tribunal, composed of:

Ms Nina VAJIĆ, Chair,  
Ms Françoise TULKENS,  
Mr Christos VASILOPOULOS, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,  
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

### **PROCEEDINGS**

1. The appellant, X, lodged an appeal on 7 March 2019. On 11 March 2019, the appeal was registered under No. 605/2019.
2. On 26 March 2019, the Chair granted the applicant's request for anonymity.
3. On 26 April 2019, the then Secretary General submitted his observations on the appellant's appeal. On 31 May 2019, the appellant filed submissions in reply.
4. The public hearing took place in the Tribunal's hearing room in Strasbourg on 13 June 2019. The appellant was represented by Ms Lydia Christie, solicitor in London. The Secretary General was represented by Ms Sania Ivedi, legal officer in the Directorate of Legal Advice and Public International Law (Jurisconsult) assisted by Ms Léa Boucard, junior legal officer in the same Directorate.
5. Having been invited by the Tribunal at the public hearing to submit two confidential documents, the Secretary General disclosed these documents to the Tribunal. The parties were subsequently invited to present their written comments on them. The appellant submitted comments on 15 July 2019 and the Secretary General presented his comments on 2 August 2019.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. On [...] the appellant was recruited by the Council of Europe office in Y as a Local Project Manager of a joint project. X was recruited under a temporary contract governed by Rule No. 1234. A first temporary contract was renewed twice. The third and also last contract was due to expire on the date that the project was expected to come to an end, but it was subsequently extended. The appellant main activities consisted of managing and contributing to the implementation and the assessment of a cooperation programme within the framework of a Council of Europe programme.

7. According to the appellant, early in the employment, X became concerned about the use of the provider Z by the Y Office when asked to use Z for organizing events. Allegedly it was well-known that Z was accorded favourable treatment by the Y Office. The appellant raised the issue with the Head of Office (hereinafter “the HoO”). Moreover, X also raised concerns about the conduct of the Deputy Head of Office with the project coordinators in Strasbourg and explained that the Deputy Head of Office had misrepresented X to the Secretariat and improperly discussed the appellant with beneficiaries.

8. The appellant also became aware of allegations that Z had connections to persons involved in money laundering and organised crime. The appellant voiced suspicions to the HoO, but, allegedly, no further action was taken at that time.

9. On [...] the appellant was allegedly informed that an exclusive contract had been granted to Z for the provision of interpretation equipment and services. The appellant was concerned that the contract entailed a huge increase in fees payable in respect of these services. On the appellant’s calculations, the Y Office would have been paying between EUR 500,000 and 1,000,000 more per year than before. The appellant emailed the Deputy Head of Office in response to his email, copying the message to all team members including the HoO and raising concerns about this additional cost. The HoO responded stating that the contract had been put in place and could not be reversed.

10. On [...] the appellant reported by phone to the Director of Internal Oversight (hereinafter “the DIO”) pursuant to Article 4, paragraph 1, of Rule No. 1327 on awareness and prevention of fraud and corruption, about the award of the exclusive contract, and organised crime. The appellant subsequently faxed and emailed documents to the DIO’s office in support of the claim of a connection between Z and organised crime.

11. According to the Secretary General, a few days later, the DIO met the HoO in Strasbourg and discussed the possibility of carrying out fraud awareness training for office staff but no reference was made to the appellant’s report.

12. According to the appellant, the DIO’s senior investigator called the appellant on two occasions. The appellant informed the senior investigator of previously raised concerns about Z with the HoO. During the second telephone call, the senior investigator notified the appellant that the DIO had found no fraud in relation to the award of the contract to Z. However, X was informed about what action had been taken by the DIO to investigate X’s

report of corruption other than general fraud awareness training provided by the DIO to the staff planned in the near future.

13. According to the appellant, following the report to the DIO, there was a significant change in the working relationship between the appellant and the HoO, which had previously been good; the HoO became extremely critical of the appellant's work. According to the Secretary General, in the course of the appraisal process, the appellant was informed by the DIO, upon the appellant's messages inquiring whether he had spoken to the HoO, that he had not yet informed the HoO of the report received by the DIO. Actually, the DIO and the investigator did not speak to the HoO in Y until a few days after the appraisal had been signed by N+1 and N+2.

14. The appraisal report, signed successively by X's Head of Division and by the HoO, indicated that one of X's objectives had only been "partially achieved"; "improvement was desired" for one of the noted competencies ("professional and technical expertise"); and "improvement was required" for another ("management of teams"). Reference was made to "many important but unnecessary conflicts between the appellant and local consultants but also with X's colleagues". The appraisal report contains, *inter alia*, following comments by the appellant's N+1:

"[X] is committed to ensuring the successful implementation of the project activities [in the host country] in cooperation with the Project Coordinator in Strasbourg ... [X] is conscientious and hardworking. ... [X] should continue to improve however, information sharing with the Project Coordinator concerning exchanges with international experts and meetings with interlocutors. [X] should also increase [X's] efforts to improve ... relationship and communications with beneficiaries and the EUD.

...

[X] should improve the way [X] manages the project team based in [Y]. [X] should manage and delegate more appropriate administrative tasks to the project assistant ... Over the year, there were many important but unnecessary conflict between [X] and local consultants but also with ... colleagues. With respect to local consultants, [X] should establish positive working relations with constructive dialogue and regular exchanges around activities. The same applies to the relations with the EUD and the beneficiaries."

15. On the same day when the appraisal was signed by N+2, the appellant sent an email to the Directorate of Human Resources (hereinafter "the DHR") stating disagreement with certain things noted in it.

16. X submitted extensive comments of 3 and ½ pages. X asked for further discussion with the DHR on the comments and other aspects of the appraisal.

17. A few days before the appraisal was signed, the appellant had reported the change in the HoO's behaviour to the DIO but was advised to contact the Director General of Administration (hereinafter "the DGA"). The DIO further confirmed that the appellant's identity had not been disclosed to the HoO.

18. According to the Secretary General, on the same day the appellant informed the DIO to have been told by the Project coordinator that the project the appellant was working on was to come to an end on the day indicated on the current temporary contract, and that the appellant's employment would therefore be terminated. Moreover, a few days later, the appellant was informed by the DIO that they had not identified tangible elements that could

indicate fraud (compare to paragraph 12 above). Nevertheless, the DIO visited the office in Y to conduct the fraud awareness training and fraud risk assessment. No further information regarding the appellant's report was obtained during this visit.

19. A week later, the appellant's Head of Division of the programme informed the appellant, on the phone, that even if the project was extended, X would not be renewed after the current contract came to an end. This was later confirmed in an email stating, *inter alia*, the following:

"Your way of communicating with your colleagues, with the beneficiaries of the project, with experts and with the EUD does not make it possible to envisage a smooth continuation of the cooperation activities. The Secretariat cannot continue intervening frequently to solve problems of interpersonal relationships rather than focusing on the implementation of the project. Furthermore, it is for us of the utmost importance that the administrative and financial procedures are fully respected, which has not been the case on several occasions, up to very recently.

These difficulties have been raised with you on several occasions, including during your appraisal, both by myself and the colleagues of the Division and by the Head and Deputy Head of the Office. Unfortunately, these repeated warnings have not been taken into account."

20. In an email reply of the same day, the appellant wrote the following:

"... As I noted in my previous email, I have requested from HR further discussion about my appraisal. This will require that I have the opportunity to prove what you note.

What I did as a project manager was to make this project a very successful one. Challenges are on the way, like is known widely among beneficiaries and what they say about me as a project manager and [the project itself].

In conclusion, I would like to have the opportunity to express my objections to what was noted in the appraisal which will be backed up with documents and emails.

Please remain sure that I will continue to work with diligence and motivation and do the best for this project until the end."

21. Still on the same day, the appellant wrote to the DHR:

"Subject: HR procedure in case of non-acceptance to the Appraisal

...

I write regarding the HR procedure in case of non-agreement with the appraisal. What are the steps to be followed? I requested in my comments to the appraisal form that I would like to follow the procedure for submitting my opposition arguments to it."

22. Later on the same day, X wrote to the DGA:

"Following on the email I sent to [the DHR], I also would like to follow this procedure where you should be part of it considering you are the Director of Administration.

I remain hopeful that both of you will take the necessary steps to review my objections to the appraisal and relevant issues that have occurred in the meantime."

23. Immediately, the appellant realised to have written to the wrong person from the DHR and forwarded the mail to the right one (the same person to whom the appellant wrote on the same day when the appraisal had been signed by N+2 (see paragraph 15 above).

24. One month later, the appellant reported to the DGA the retaliatory action, i.e. the refusal to renew the appellant's contract, and requested the DGA to take measures to protect the appellant against retaliatory action. This request was made pursuant to Article 6, paragraph 3, of Rule No. 1327. X stated, *inter alia*:

“...  
2. In short summary, and as set out below, I have been subject to retaliation contrary to Article 6 of Rule No. 1327 by reason of my compliance with the duty imposed upon me by Article 4 of Rule No. 1327 to the Director of Internal Oversight. By this report, I am requesting assistance and advice from the Director General of Administration.  
...  
6. The [project] has a budget of 1.2 million EUR over two years – 20 months in fact ... I worked under significant pressure to spend an enormous budget within a short period of time. Notwithstanding this, my performance was extremely good and it was generally acknowledged within the [Y] office that [this project] was the most successful action in the office, and that other colleagues in the office cannot imagine how I am able to perform at the level that I do taking into account the number of activities performed as well as my discharge of other technical, financial and administrative responsibilities. Even ... the Deputy Head of Office in [Y], told me from time to time that I should work less hard or I would burn out, and acknowledged how much had been achieved ... by comparison with other projects in the [Y] office.  
...  
9. Notwithstanding ... [the] difficulties (connected with extra tasks regarding the project assistants), I was generally regarded as doing an excellent job ... and performed multitude of tasks to a very high level. ...  
...  
10. All of my achievements were reported to HF via bi-monthly reporting by [project managers] and through the Annual Report of the [project] for June 2016 to May 2017. The feedback from experts and beneficiaries about my management ... has been very positive, as is evidenced from the draft reports whose review [the project manager] was involved with. At no time was my performance criticized by [the Deputy Head of Office or, more importantly, by the [HoO] or ... (my first supervisor N-1), who together conducted my appraisal.  
...  
16. I replied to [the Deputy Head of Office]'s email stating my concerns about the impact of the additional cost of the [Z] contract. ...; a simple calculation showed that the [Y] office would be paying [Z] between 500K and 1M EUR a year more than had previously been payable ... I was also concerned because the contract appeared to have been awarded to [Z] without any tendering process having been followed ... In all other tender procedures, we had received an email from the office's executive assistant or been told in weekly team meeting by [the HoO] or [the Deputy Head of Office] about tenders so we could pass the invitation outside the office to people or companies who might be interested. On this occasion the tender was not mentioned in any email to the team or discussed in any team meeting.  
...  
17. [The HoO] responded to my email that the contract was in place and could not be reversed, and that there was nothing to be done: 'end of story'.

”

...

19. My first email to [the DIO] was on .... I then spoke to [the DIO] and faxed [him] documents showing the connection of [Z]'s owner, ..., to one of the most significant organised crime/mafia figures in ... and [the host country] ... on or about ...

...

21. ... I told [the senior investigator] about the favouritism towards [Z] shown within the Y office, and more favourable treatment of employees who favoured [Z] over those who did not. I also told her about a particular case in another project in within a contract about 300 000 EUR for a single event had been awarded to another company, and the company informed, only to have the contract removed and awarded to [Z] a few days later. I understood that this change had been suggested by ... against the wishes of the project manager and approved by [the HoO] and [the Deputy Head of Office].

...

27. [Following my comments in my appraisal report], [t]he HR never responded to my request for discussion of my disagreement with the appraisal, contrary to their obligation. I also sent an email to the Director of Administration but, ... he was not motivated to address my concern because he was the person who signed the exclusive contract with [Z].

...

31. [Three weeks after I had signed the appraisal] I received a phone call from [the Head of Division of the programme] who told me that, even if the [project] was extended, I would not be kept on after [the end of the current contract]. This occurred just after [the HoO]'s second visit to Strasbourg, where [the Head of Division of the programme] is based, for a meeting of all heads of offices. I understand that [the HoO] and [the Head of Division of the programme] had met in Strasbourg during this period and I know that the DIO and [the senior investigator] had met with [the HoO] in person just after the fraud training which they had undertaken in Y [about one week earlier].

...

33. Despite the assertion [in the Head of Division of the programme's] email that '[t]hese difficulties have been raised with you on several occasions ... both by myself and the colleagues of the Division and by the Head and Deputy Head of the Office', and that 'these repeated warnings have not been taken into account', in fact no such issues had been raised with me prior to my appraisal."

25. On the same day, the appellant lodged an administrative complaint which was subsequently referred to the Advisory Committee on Disputes (hereinafter "the ACD") for its independent opinion in accordance with Article 59, paragraph 5, of the Staff Regulations.

26. Three weeks later, the DGA submitted the preliminary assessment report pursuant to Article 6, paragraph 4, of Rule No. 1327, in reply to the report presented by the appellant under Article 6, paragraph 3, of Rule No. 1327. The report was not disclosed to the appellant until the Secretary General submitted his written observations to the present appeal. The report concluded:

"After having established and examined the facts and having made a preliminary assessment of the credibility, verifiability and materiality of the circumstances of the case referred to him, the Director General of Administration concludes that he has no reasonable cause to believe that there has been a retaliatory action against [the appellant]; against the above background, the

Director General of Administration decides not to recommend to the Secretary General that measures be taken to verify the allegations of retaliatory action made by [the appellant].”

27. In a memorandum of the Director of the DGA, the appellant received the following information:

“... I take very seriously all allegations of retaliatory action reported to me, and systematically carry out an assessment of any case referred to me in the light of the screening criteria set out in Article 6, paragraph 4, of Rule No. 1327.

Based on the initial screening of the case you have referred to me, I concluded that there was no tangible and credible information to support your allegations. Therefore, I have no reasonable cause to believe that you have been subjected to retaliatory action.

Consequently, I would like to inform you that I have recommended to the Secretary General that no further action be taken with regard to your allegations.”

28. Subsequently, the Secretary General submitted his observations on the appellant’s administrative complaint to the Advisory Committee of Disputes (hereinafter “the ACD”) concluding as follows:

“On ..., the DGA received a report submitted pursuant to Article 6, paragraph 3, of Rule No. 1327 of 10 January 2011 on awareness and prevention of fraud and corruption by the complainant which requested measures be taken to protect ... against retaliatory action. ...

On ..., the claimant was informed by the Director General of Administration that the Preliminary Assessment report which resulted from the enquiry under Rule No. 1327 had concluded that there was no credible reasons to suspect that there had been retaliatory action against the claimant. The Director General of Administration therefore informed [the complainant] that no further action to verify the allegations would be recommended to the Secretary General.

...

Firstly, as a temporary staff member the complainant’s contract was due to expire on ... with no right or presumption of renewal. Thus, the complainant has suffered no adverse interference with ... rights since [the appellant] does not have a right of renewal of [the] contract. The decision not to renew the complainant’s contract was therefore entirely within the discretion of the decision maker, which was properly exercised by the [HoO] taking into account all relevant considerations.

Secondly, no causal link has been established between the report of suspected fraud and corruption made by the complainant and the subsequent decision not to renew [the] contract. The complainant has entirely failed to prove that the decision maker had the requisite intention for a retaliatory action or otherwise made an error in their appreciation which would vitiate the decision. Furthermore, the complainant has failed to prove that the appraisal on which the decision was partly based is tainted by error.

Finally, [X] was provided with reasonable notice and reasons justifying the non-renewal of [the] contract. For the reasons above, the decision not to renew the complainant’s contract is in conformity with ordinary practice of the organisation, the applicable regulations and general principles of law. It is recalled that the decision maker enjoys a wide discretion to assess the needs of the organisation and the professional abilities of the staff. Nothing in the complaint of the complainant leads to the conclusion that the decision maker has exceeded or otherwise abused their discretionary power, nor have they taken into account irrelevant considerations or committed a manifest error.”

29. In a memorandum issued two months later, the DIO informed the Director of Directorate of Legal advice and Public International Law as follows:

**“Subject: Allegations made by a staff member in the [Y] Office ...**

In response to your question submitted via email on 3<sup>rd</sup> September 2018, I can confirm the following:

On the basis of initial work carried out by the Directorate further to the receipt of allegations in respect of the above-mentioned matter, there were not sufficient reasons to justify the opening of an investigation. No formal report on the matter was prepared.”

30. In a decision adopted another three months later, the ACD stated, *inter alia*:

“19. The complainant acknowledged [to have] no right to have [the] contract renewed but argued that the reasons for it’s no being renewed were improper; namely, that [the complainant] had raised concerns about corruption in [Y] office. [The complainant] contended that the reason for the critical comments in [the] appraisal and the subsequent non-renewal of [the] contract were illegitimate and fell outside the lawful discretion of the Head of [Y] office.

20. Regarding the causal link between the report and the non-renewal of [the] contract, the complainant acknowledged [to have] no direct evidence; nor could [the complainant] have, unless the decision-makers had informed [the complainant] in writing or in front of witnesses that the non-renewal of [the] contract was a retaliatory action. However, [the complainant] contended that prior to making the report to the DIO [the complainant] had enjoyed a very good relationship with the Head of [Y] office, but his attitude towards [the complainant] had changed [after] the report. Moreover, [the complainant’s] performance had always been satisfactory and the criticisms in [the] appraisal were ‘flatly inaccurate’.

...

21. The principal issue for the Committee to address in the present case is whether the decision not to renew the complainant’s temporary contract was made in retaliation for [X] having made a report to the DIO, since such an action would clearly constitute an abuse of power. ... However, for the reasons set above, the Committee does not consider that it is in possession of sufficient information to reach any conclusion on this issue.

...

23. In the present case ... the Committee has serious doubts about the adequacy of either investigation. The information provided to the Committee suggests that ... a senior investigator reviewed the documents faxed to the DIO’s office and subsequently spoke with the complainant ... There does not appear to have been any investigation on site, and there is nothing before the Committee which would suggest that the DIO or his senior investigator contacted anyone in the [Y] Office, sought any documents from that office, or took any other steps to investigate the allegations. ... It may be that further investigative measures did take place; however, there would appear to have been no report drawn up following the DIO’s investigation, setting out the investigative steps ... Alternatively, if any such a report does exist, it clearly has not been disclosed to the complainant ...

24. In this regard, the guidance provided by Article 5 of Rule No. 1327 ... would appear to be wholly inadequate. ... As a consequence, it would not appear to comply with Recommendation CM/Rec(2014)7 ...

25. The Committee considers that similar deficiencies can be found in the DGA’s investigation into the complainant’s allegations of retaliatory action.... Once again, there appears to be no indication of the investigatory steps taken, or the evidence considered, by the DGA in the course of the enquiry. Moreover, no formal report appears to have been drawn up, and the complainant does not appear to have received any reasons for the DGA’s conclusions.



26. In this regard, the Committee also considers the guidance provided by Rule No. 1327 to be lacking in clarity and detail. ... First of all, the Committee considers the terms ‘credibility, verifiability and materiality of the circumstances of the case’ to be so imprecise as to be virtually meaningless. Secondly, despite the concerns raised ... above, and the requirement in Part VII of Recommendation CM/Rec(2014)7 ..., there is no mention in Article 6 of where the burden of proving retaliatory action should lie.

27. Therefore, while the Committee would accept that neither the DOP nor the DGA should be required to conduct a full investigation into every allegation of corruption or retaliatory action, however spurious, it nevertheless considers that the procedure for investigating complaints should be more transparent, and complainants should be informed of the investigatory steps and notified formally of any decision taken and the reasons for it. Moreover, the Committee considers it imperative that any credible allegation of corruption should be investigated fully, preferably on –site, and insofar as possible, bearing in mind the need to protect the identity of the person making the report, that relevant documentation should be reviewed and staff interviewed.

28. In view of the absence of any indication of the investigative measures undertaken or the reasons for the conclusions reached, one cannot assess whether the reports made by the complainant to the DIO and the DGA were with or without merit. Bearing in mind also the complainant’s comparative vulnerability as a temporary agent based outside France, the Committee does not consider itself, ... be able to form an opinion on the merits of [X’s] complaint. Consequently, the Committee finds that, due to the inadequacy of the investigations into the complainant’s allegations of corruption and retaliatory action, it is unable to determine whether the decision not to renew [X’s] contract was motivated by considerations of a nature and type which would question its legality or expediency.”

31. About one month later, the Secretary General dismissed the appellant’s administrative complaint.

32. In a memorandum for the attention of the members of the ACD dated shortly afterwards, the DIO submitted, *inter alia*:

“With respect to the preliminary assessment carried out in accordance with Instruction 65, I would like to clarify that, in ..., [the appellant] brought to the attention of the Directorate of Internal Oversight (DIO) certain concerns regarding a service provider contracted by the CoE. As the communication did not contain clear evidence of fraud, the DIO conducted a preliminary assessment (as required by Instruction 65) in the framework of which it carried out numerous investigative activities and collected additional information. During the preliminary assessment no elements substantiating the allegations were established and the DIO decided not to open a formal investigation. As per the provisions of Instruction 65 the DIO is not required to prepare a report, and such a report was not drafted at the end of the preliminary assessments. In ..., in reply to a request for clarification on ‘one point’ made by the Advisory Committee on Disputes in the following email [addressed to the appellant and ... counsel]:

*‘... the Committee would like clarification of one point: did the Department of Internal Oversight carry out an official investigation into [the appellant]’s allegations and, if so, did he prepare a report setting out his conclusions?’*

*If such a report exists, the Committee would ask that it be provided with a copy ...’*

A memorandum responding to these questions was sent to the Directorate of Legal Advice.

As far as the conclusions of the Committee mentioned in its decision are concerned, I would like to emphasise the following points:

- Preliminary assessments and investigations are conducted by the DIO in compliance with **Rule No. 1327 on awareness and prevention of fraud and corruption and Instruction 65** on investigations ... Therefore, the conclusion that *‘Rule 1327 neither contains nor is*

*accompanied by clear and detailed guidance on the procedures to be followed when reports on corruption or retaliatory action are made' cannot be shared.*

• The Advisory Committee on Disputes **has never requested** from DIO information regarding the activities conducted in the framework of the preliminary assessment. The report containing information about the activities conducted in the framework of a separate preliminary assessment carried out by DGA was in our understanding also not sent to the Committee. Therefore, DIO cannot share the conclusions made by the latter regarding the quality of the assessments referring to their '*deficiencies*' or how '*thorough*' they were. If the committee wished to draw conclusions on the thoroughness of investigations/preliminary assessments or whether they were deficient in any way, the committee should have asked the question what actions were taken to assess the allegations, rather than the specific question about the opening of a formal investigation which under instruction 65 is only done if the '*investigative work*' carried out under a preliminary assessment concludes there are sufficient reasons to open an investigation.

• **Procedures for assessing suspected fraud and corruption** are set out in **Instruction 65 on investigations**; procedures for **inquiring into alleged breaches of the Organisation's internal rules** are set up in **Instruction 51 on inquiries**. As the existence of this legal framework is not mentioned in the above-mentioned decision, it cannot be established whether the Committee took it into consideration when formulating its recommendation to the Administration *to 'revise Rule 1327 so as to provide clear and detailed guidance on the procedure to be followed by both DIO, on receipt of reports of suspected fraud and corruption, and DGA, on receipt of reports of suspected retaliatory action.'*

...”

## II. RELEVANT LAW

33. Rule No. 1327 of 11 January 2011 is aimed to prevent fraud and corruption and to promote the Council of Europe's functioning in an open, transparent and fair manner; to clarify rights and obligations in relation to reporting suspected fraud and corruption; and to enhance the protection of individuals who report reasonable suspicion of fraud and corruption or who co-operate with a duly authorised investigation. It provides, insofar as relevant as follows:

### **“Article 4 – Reporting of Suspected Fraud and Corruption**

1. Secretariat members shall have a duty to report suspicion of misconduct they deem to be fraud or corruption to the Director of Internal Oversight.

...

3. The report shall be made as soon as possible after becoming aware of the suspected fraud or corruption. The report shall be factual and, where possible, be substantiated by reliable information and documentation.

...

### **Article 5 – Examination of Reports**

1. The Director of Internal Oversight shall examine and act upon the reports in accordance with the powers attributed to him/her under the relevant internal regulatory instruments of the Council of Europe.

2. The identity of a person reporting information or cooperating with the investigation shall not be disclosed, unless expressly authorised by him or her.

### **Article 6 – Protection against Retaliatory Action**

1. Everyone to whom this Rule applies has the right to effective protection against retaliatory action, irrespective of the person perpetrating such conduct.

...

3. A person to whom this Rule applies and who believes that s/he has been subjected to retaliatory action (other than sexual and psychological harassment), may report the matter to the Director General of administration for assistance and advice.

4. The Director General of Administration shall make a preliminary assessment of the credibility, verifiability and materiality of the circumstance of the case referred to him or her. If s/he has reasonable cause to believe that there has been a retaliatory action, s/he shall recommend to the Secretary General that measures be taken to verify the allegations of retaliatory action.

5. The Secretary General, if s/he agrees that there is reasonable cause to believe that there has been a retaliatory action, shall order that the allegations of retaliatory action be verified in accordance with the relevant internal regulatory instruments of the Council of Europe.

6. Pending completion of the inquiry the Secretary General may order any provisional measures to protect the alleged victim of retaliatory action. These must be suitable and strictly proportionate.

...

8. A person seeking protection from retaliatory action in accordance with this Rule shall be duly informed of the status and outcome of the review in relation to the alleged retaliatory action.”

34. Rule No. 1234 of 15 December 2005 lays down the conditions of recruitment and employment of locally recruited temporary staff members working in Council of Europe Duty Stations located outside France. Pursuant to article 5, “[t]he employment contracts of locally recruited temporary staff members shall be concluded for specified periods of time. They may be renewed as long as the Duty Station exists, but renewal shall not confer entitlement to further renewal or to conversion into another type of contract”. Article 7 further provides that “[t]he employment contracts shall terminate without prior notice on the date stipulated therein”.

35. Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers of 30 April 2014 provides, so far as relevant as follows:

“VI. Acting on reporting and disclosure

19. Public interest report and disclosures by whistle-blowers should be investigated promptly and, where necessary, the results acted on by the employer and the appropriate public regulatory body, law enforcement agency or supervisory body in an efficient and effective manner.

20. A whistle-blower who makes an internal report should, as a general rule, be informed, by the person to whom the report was made, of the action taken in response to the report.

VII. Protection against retaliation

21. Whistle-blowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion

opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment.

22. Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy.

23. A whistle-blower should be entitled to raise, in appropriate civil, criminal or administrative proceedings, the fact that the report or disclosure was made in accordance with the national framework.

...

25. In legal proceedings relating to a detriment suffered by a whistle-blower, and subject to him or her providing reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, it should be for the employer to establish that the detriment was not so motivated.

26. Interim relief pending the outcome of civil proceedings should be available for persons who have been the victim of retaliation for having made a public interest report or disclosure, particularly in cases of loss of employment.”

## **THE LAW**

### **I. THE PARTIES' SUBMISSIONS**

#### **A. The appellant**

36. The appellant maintains not to claim the right to have the contract renewed. X actually claims that the decision not to renew the contract was taken in retaliation for the whistleblowing and, therefore, was made for an improper purpose. X notes in this respect that the appraisal prior to the whistleblowing had always been positive and the contract was renewed on multiple occasions. X also notes that the relationship with the Head of Office (hereinafter “the HoO”) prior to the whistleblowing had always been positive. Actually, the HoO was in Strasbourg soon after the appellant had made the whistleblowing report and on return the HoO’s behavior was markedly different. According to X, there is no explanation for this other than the HoO had been informed of the report. In addition, the appellant provided evidence that the HoO’s behavior had changed soon after the appellant made the report, following the trip to Strasbourg. The HoO therefore knew of the appellant’s report prior to the appellant’s appraisal.

37. The appellant underlines that the project of which the appellant was the Local Project Manager, had been so successful that an application for its extension was made and granted. Moreover, the Feedback from experts about the appellant to the Y Office was excellent. According to the appellant, the HoO was subsequently involved in the appellant’s appraisal, during which the HoO raised irrelevant and inappropriate historical matters and was uncharacteristically cold and harsh towards X. Moreover, the appraisal was inaccurate and was the only negative appraisal the appellant received; there is no explanation for this other than that the appraisal process was manipulated in order to justify the subsequent refusal to renew the contract. Concerning the email informing X that the contract would not be renewed, the appellant denies to have been repeatedly warned regarding the issue of the appellant’s communication with third persons.

38. The appellant maintains that the dismissal of the administrative complaint by the Secretary General contained a number of errors. X states in this respect that the DIO informed the HoO that a report had been made, before the decision on non-renewal of contract was made. Furthermore, X provided a clear account with specific examples concerning the HoO's change of the attitude towards X, but the DGA did not seek further information and did not ask X if any witnesses existed of his behavior. X made clear this issue in the report to the DGA. Nevertheless, the Secretary General seeks to rely on the DGA's undisclosed report to justify his findings, and further makes no reference to the detailed and particularized examples that the appellant provided in the observations. Nor does the Secretary General respond to the detailed account in the appellant's observations of the inaccuracies in the appraisal report and the strong expressions of support received by the Y Office regarding the appellant's performance.

39. The appellant argues that the Secretary General, when rejecting the administrative complaint, emphasised that the onus was on X to prove that the decision was an act of retaliation. In doing so, he failed to take into account that the complaint was in retaliation to whistleblowing. The appellant refers, in this connection, to Recommendation CM/Rec(2014)7.

40. The Secretary General, in announcing new Rule No. 1327, stated that he would "apply to the Organisation the principles that it recommends itself to State authorities as regards the fight against fraud and corruption". Nevertheless, Rule No. 1327 nowhere makes provision for the burden of proof in legal proceedings relating to a detriment suffered by a whistleblower. The ACD was correct to criticise Rule No. 1327 as lacking clear and detailed guidance on the procedures to be followed when reports of retaliatory action are made. In the absence of express provision to the contrary in Rule No. 1327, the appropriate approach to whistleblowing claims is that set out in the Recommendation. This approach is consistent with the one taken by the Administrative Tribunal of the United Nations in the context of complaints of retaliatory action in response to Staff Association activities (see Robinson UNAT 1952/15).

41. Unless the Secretary General established that the decision not to renew the contract was not motivated by the appellant's whistleblowing activities, improper purpose should be found. According to the applicant, the Secretary General failed to establish that the appellant was not the victim of retaliatory action. He heavily relied on a secret report from the DGA, asserting that adequate investigations had been undertaken and that they supported the conclusion of the DGA that no retaliatory action had been taken. The Secretary General must establish that the decision not to renew the applicant's contract was not retaliatory. He cannot rely on a secret report which has not been disclosed to the appellant in doing so. He has failed to discharge the presumption raised by the appellant about being the victim of retaliatory action and the decision not to renew the contract should be annulled.

42. The appellant further claims that the decision of the Secretary General was tainted by procedural unfairness. It is generally difficult for a complainant to establish that a discretion has been exercised improperly. Given this, it is imperative that due process is followed in the Secretary General's exercise of his discretion as to staffing. Upholding procedural fairness provides a central protection to employees (see Salle WBAT 1983/10, paragraph 50). As part of due process, decision makers must give sufficient reasons for their decisions. The Administrative Tribunal recognised that this is an indispensable requirement for verifying the legality of the act in question and for transparency in staff management

(see ATCE, X v. Secretary General, Appeal No. 248/1998, paragraph 50; Fuchs and Others v. Secretary General, Appeal Nos. 231-238/1997, paragraphs 63-65; Bouillon v. Secretary General, Appeal No. 186/1994, paragraph 35).

43. The Secretary General relies on the DGA's confidential report in justifying his rejection of the appellant's complaint. He asserts that the report meets the ADC's concerns and provides him with sufficient information to make a decision. However, the ADC has not seen this report and so was prevented from giving its independent opinion on the merits of this case, as provided for under Article 59, paragraph 6, of the Staff Regulations. The appellant has not seen this report and is therefore not in a position to understand why the DGA and the Secretary General rejected the complaint. Furthermore, the appellant was unable to participate in the proceedings before the Administrative Tribunal on an equal footing: in refusing to disclose the critical DGA report the Secretary General has prevented effective oversight of the exercise of his discretion.

44. In X's opinion, the ACD rightly expressed "serious doubts" about the adequacy of the DGA investigation. X has been given no information as to the investigatory steps taken, or the evidence considered, by the DGA in the course of its inquiry. The DGA did not make inquiries with the appellant as to possible witnesses that might corroborate the appellant's account. X has been given no reasons for the DGA's outright rejection of the report of retaliatory action. Accordingly, the response to the appellant's complaint of retaliation has been characterised by a lack of transparency and a failure to afford due process. The decision to reject the complaint is tainted by procedural unfairness.

## **B. The Secretary General**

45. The Secretary General considers that it is pertinent to first determine the scope of the appellant's administrative complaint and the present appeal. He notes in this respect that the appellant sought, in the administrative complaint, either the reversal of the decision not to renew the contract or a decision to be redeployed. These are measures which may be taken pursuant to Article 6 of Rule No. 1327 under the rubric of protection against retaliatory action. They may be taken as provisional, and therefore temporary, measures under Article 6, paragraph 6, or may be decided in order to give final effect to the "right to effective protection against retaliatory action" contained in Article 6, paragraph 1, of Rule No. 1327. The appropriate means to determine whether such measures should be taken is the procedure laid down in Article 6 of Rule No. 1327.

46. The preliminary assessment conducted by the DGA concluded that the appellant was not in a situation that required measures of protection against retaliatory action to be taken in the present case. Accordingly, there was no longer a possibility of applying these measures under Rule No. 1327 as the relevant procedure had been exhausted.

47. According to the Secretary General, the question for the administrative complaint therefore concerned only the decision not to renew the appellant's contract, which is the decision the appellant impugns in the present appeal.

48. The Secretary General recalls, referring to Articles 5 and 7 of Rule No. 1234, that the appellant, as a temporary staff member, had no automatic right to the renewal of the contract. Moreover, there are no circumstances which could create a legitimate expectation on the part of the appellant that the contract would be renewed. No promise was made to the appellant

regarding the possibility of continued employment. Also, following the appellant's appraisal, it must have been clear to the appellant that the N+1 and N+2 considered that the appellant had only partly achieved the objectives. The Organisation was under no obligation to renew the contract, since the employment was due to terminate in any case. Accordingly, the appellant cannot claim any right to be given a contract or redeployed after that date.

49. As regards the confidentiality of the preliminary assessment report, the Secretary General notes that it was drawn up for the sole attention of the Secretary General, to inform him in detail of the preliminary assessment carried out by the DGA under Article 6, paragraph 4, of Rule No. 1327 with regard to the allegations made by the appellant.

50. This report contains confidential elements which are not intended to be disseminated, concerning internal processes, in particular information relating to the actions undertaken by the DIO in the context of its preliminary assessment of the fraud report made by the appellant, conducted in accordance with Article 2 of Instruction No. 65 on investigations.

51. The appellant received adequate information from the Director of the DGA on the action taken on allegation that the appellant had been the subject of a retaliatory measure, and on the conclusions reached following the preliminary assessment and the resulting recommendation to the Secretary General. There was no requirement that the appellant receive a copy of the preliminary report.

52. The Secretary General notes that the preliminary assessment into the appellant's report found that there was no reasonable cause to believe that the appellant was the subject of retaliatory action. In other words, the appellant did not demonstrate that the action was "taken against [the appellant] because [of reporting] reasonable suspicion of fraud or corruption or [having] co-operated with an investigation of suspected fraud or corruption" (Article 1 c. of Rule No. 1327). Therefore, on the basis of the preliminary assessment, no full inquiry under Instruction no. 51 on internal inquiries was deemed necessary. The Secretary General recalls in this respect that at the preliminary assessment stage, only a *prima facie* finding of the seriousness of the allegations – through an assessment of their credibility verifiability and materiality – can justify the opening of an inquiry. These elements were, however, not present in this case.

53. In order to demonstrate that the impugned decision was a retaliatory action and should therefore be annulled, the appellant would have to prove the accusation that the decision was motivated by a desire to reprimand for having submitted the report under Rule No. 1327. Accordingly, a sufficient causal link must be established between the fact of the appellant submitting the report to the DIO and the decision of the Head of Division of the programme not to renew the temporary contract. It must have been the actual intention of the decision maker to make the decision as an act of retaliation (see ATILO, judgment No. 3942, V. v. UNESCO, paragraph 6).

54. The Secretary General considers that it is not proven that the Head of Division of the programme was even aware of the report or had reason to believe in its existence at the time that he took the decision not to renew the appellant's contract. It is above all not proven that his intent when taking the decision was motivated by the report made under Rule No. 1327. Moreover, the appellant provided no proof that as soon as reporting concerns to the DIO, the behaviour of the HoO in Y had actually occurred or, if it did occur, that it was related to this report.

55. As to the appellant's appraisal for the reference period, the assessment of the appellant's performance was done by the appellant's superior, who is based in Strasbourg, has no hierarchical link with the HoO and against whom the appellant did not raise any retaliation claims. The appraisal gave a balanced account and recognised the achievements of the appellant. Nevertheless, it identified some negative elements. Accordingly, the reasons for the appellant's unsatisfactory appraisal report are therefore clearly laid out and reasoned and concern primarily the appellant's approach to project management and the communication with colleagues and third-party stakeholders in the project during the reference period. The content of the appraisal report refers solely to matters which occurred prior to the report to the DIO by the appellant.

56. The Secretary General underlines that only on [...] did the Director of the DIO and the investigator have a telephone conversation with the HoO during which they informed the HoO that they had received information suggesting favouritism towards a supplier and suggested links to organised crime. It was explained that the DIO had examined available documentation and had not identified obvious wrongdoing.

57. Moreover, while the HoO had previously been informed by the appellant of the concerns about potential fraud and corruption, there is no evidence to demonstrate that the appellant's superior who drew up the appraisal report, or the HoO who also commented on it, had knowledge of the report at the time when the appraisal was completed. The appraisal report therefore cannot be considered to form part of the alleged retaliatory action.

58. The Secretary General thus finds that the decision not to renew the appellant's temporary contract was clearly motivated by concerns relating to job performance. He refers in this connection to the reasoning put forward by the Head of Division of the programme, which sufficiently justify the decision not to renew the appellant's contract.

59. The Secretary General concludes that the present appeal should be rejected because the appellant had no right to renew the temporary contract or could not presume the renewal, the decision not to renew the contract being within the discretion of the decision maker. Moreover, there was no causal link between the report of suspected fraud and corruption made by the appellant and the decision not to renew the contract, and the appellant did not prove that the appraisal on which the decision was partly based was tainted by error. Finally, the appellant was provided with reasonable notice and reasons justifying the non-renewal of the contract.

60. Accordingly, the Secretary General invites the Tribunal to find that the appellant has failed to prove to have been subject to retaliatory action and, furthermore, that the grounds of appeal against the decision not to renew the temporary contract are unfounded and unsubstantiated.

### III. THE TRIBUNAL'S ASSESSMENT

61. In the present appeal, the appellant seeks to annul the decision not to renew the temporary contract, which, according to the appellant, amounted to a retaliatory action contrary to Article 6, paragraph 1, of Rule No. 1327. In this connection, the appellant put in question the transparency of the procedure of examination by the DGA of the report the appellant submitted.



62. The Tribunal underlines at the outset that the appellant did not and does not claim, contrary to the allegations of the Secretary General, the right to have the contract renewed (see paragraphs 30 and 36 above). It considers that the key issue in the present case is to assess whether the decision not to renew the appellant's temporary contract and the circumstances which preceded this decision constitute retaliatory action for the appellant having made a report to the DIO, or whether it was a consequence of the objective assessment of the appellant's performance during the year in question.

63. The Tribunal recalls that according to its own case-law and according to international administrative case-law the burden of proof lays in principle on a complainant to substantiate any claims of inappropriate behaviour by an employer (see ILOAT, judgment of 6 February 2019, No. 4097, N. (N° 2) v. World Health Organisation, paragraph 14; ATCE Appeal No. 285/2011, André Parienti v. Secretary General, judgment of 16 May 2003, paragraph 54).

64. However, in cases involving sensitive issues like alleged retaliation, harassment or discrimination, the burden of proof can be for a staff member/appellant concerned excessively heavy due to his or her inability to produce unbreakable evidence capable of directly proving that the alleged improper measure or action by the employer has actually taken place in his or her respect. The Tribunal therefore considers that in those cases, to discharge his or her burden of proof, the appellant should at least specify the facts or indications showing a material probability that the improper action or measure actually occurred. In other words, the appellant should indicate the facts showing a sufficient causal link between his or her behaviour and the action or measure by the employer, which is seen as improper.

65. The Tribunal further considers, bearing in mind paragraph 25 of Recommendation CM/Rec(2014) (see paragraph 35 above), that the appellant, who alleges the existence of the improper measure or action against him or her, has to establish *prima facie* that he or she was a victim of such an action or measure. If this burden of proof is satisfied, then it is up to the employer to produce evidence that there was a legitimate and substantiated reason for adoption of a measure which is considered by the appellant as improper.

66. In the present case, the Secretary General argues that there was no causal link between the report of suspected fraud and corruption made by the appellant and the decision not to renew the appellant's contract, and that the appellant did not prove that the appraisal on which the decision was partly based was tainted by error (see paragraph 59 above). The appellant, relying on a number of factual elements occurring or allegedly occurring during the relevant period, claims that the decision not to renew the contract was taken in retaliation for the whistleblowing and, therefore, was made for an improper purpose (see paragraph 36, and also paragraph 30 above).

67. The Tribunal acknowledges the submissions of the Secretary General regarding the confidentiality of certain documents issued in respect of the present case, in particular of the Preliminary report of the DGA and its enclosures (see paragraphs 27, 51-52). It will therefore examine the merits of the case taking into account this remark. Nevertheless, it considers important to point out that it is not convinced by the argument of the Secretary General that the preliminary report "was drawn up for [his] sole attention ..., to inform him in detail of the preliminary assessment carried out by the DGA pursuant to Article 6, paragraph 4,

of Rule No. 1327 with regard to the allegations made by the appellant” (see paragraph 49 above). The Tribunal observes in this respect that the Secretary General did refer to the “preliminary assessment” by the DGA in his written observations to the ACD, but without disclosing at least the summary of the different points raised and preliminarily assessed both to the ACD and the appellant (see paragraphs 28 and 30 above).

68. The Tribunal notes with satisfaction that the Preliminary report of the DGA was disclosed to the appellant as one of the five appendices to the written observations of the Secretary General for the purpose of the procedure before the Tribunal submitted on 26 April 2019 (see paragraph 3 above). The appellant could and did comment on the report although to the limited extent due to the procedural time frame and the confidentiality requirements at the public hearing. The Tribunal further notes that while two annexes to the Preliminary report were not originally released, they were subsequently disclosed, at the request of the Tribunal, after the public hearing on 13 June 2019 and submitted to the parties for comments (see paragraph 5 above). The Tribunal is therefore satisfied that at least at the final stage of the present dispute, the principle of contradictory proceedings has been complied with.

69. Turning to the factual development of the present case, the Tribunal observes that the appellant’s unofficial report to the hierarchy at the Y Office (see paragraphs 8-9 above), the appellant’s subsequent official report to the DIO (see paragraph 10 above), the appellant’s yearly appraisal process (see paragraphs 13-14 above), the decision not to renew the appellant’s temporary contract (see paragraph 19 above), the report submitted by the appellant to the DGA under Article 6, paragraph 3, of Rule No. 1327 (see paragraph 24 above) and, finally, the Preliminary report of the DGA (see paragraph 27 above) constitute chronologically consecutive facts. The Tribunal does not consider, however, that such a chronological chain automatically establishes a sufficient causal link between the first and last events, i.e. between the appellant’s report to the DIO and the decision not to renew the temporary contract which is allegedly a retaliatory act.

70. Concerning the signs of favouritism and/or corruption and/or fraud in connection with Z as suspected by the appellant, the Tribunal observes that X officially reported suspicions to the DIO only after having not received an appropriate reaction from the hierarchy (see paragraphs 7-9 above). After having reported to the DIO on the phone, the appellant faxed and emailed to the DIO documents in support of the phone report (see paragraph 10 above). The senior investigator contacted the appellant on two occasions (see paragraph 12 above), when during the second call, the appellant was informed that the DIO had found no fraud in relation to the award of contract to Z. While it would be more appropriate to inform the appellant in writing on the summary of the manner, content and the results of the preliminary investigation, as Article 20 of Recommendation CM/Rec(2014)7 seems to suggest (see paragraph 35 above), the Tribunal considers that from the content of the present file, including the documents subsequently disclosed by the Secretary General, it does not appear any indication that the DIO did not proceed in accordance with the applicable regulations.

71. The applicant also raises a number of issues also relating to the annual appraisal process concerned, including the involvement of the HoO (see paragraph 37 above). The Tribunal recalls in this respect that the appraisal report constitutes an administrative act which can be challenged by way of Administrative complaint under Article 59 of the Staff Regulations (see ATCE Appeal No. 539/2013, Merita Andrea v. Secretary General, judgment of 30 January 2014). However, the appellant in the present case did not file an administrative

complaint to contest the appraisal report. It is true that the appellant mentioned concerns regarding the annual appraisal in the report to the DGA under Article 6, paragraph 3, of Rule No. 1327 (see paragraph 24 above) but the appellant did not challenge the appraisal report under Article 59 of the Staff Regulations. Accordingly, the Tribunal is not competent to examine the circumstances concerning the annual appraisal process and the appellant's relating arguments.

72. In the light of all these circumstances, the Tribunal considers that the appellant did not sufficiently specify, as indicated above (see paragraph 64 above), the facts or indications showing a material probability that the decision of the Organisation not to renew the temporary contract constitutes an act of retaliation following the appellant's report to the DIO.

73. Accordingly, the Tribunal finds that the present appeal is unfounded.

#### IV. CONCLUSION

74. The appeal is unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares the appeal unfounded and dismisses it;

Decides that each party will bear its own costs and expenses.

Adopted by the Tribunal in Strasbourg on 22 October 2019 and delivered in writing on 31 October 2019 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the English text being authentic.

The Registrar of the  
Administrative Tribunal

S. SANSOTTA

The Chair of the  
Administrative Tribunal

N. VAJIĆ