

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 617/2019
(Barbara UBOWSKA (I) v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

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

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Barbara Ubowska, lodged her appeal on 14 June 2019. On 20 June 2019, the appeal was registered under No. 617/2019.
2. On 10 July 2019, the then Secretary General submitted his observations on the appellant's appeal. The latter filed submissions in reply on 9 August 2019.
3. As the parties had agreed to waive oral proceedings, the Tribunal decided on 22 October 2019 that there was no need to hold a hearing. The appellant conducted her own defence. The Secretary General was represented by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law (Jurisconsult).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The appellant is a former staff member who worked at the Registry of the European Court of Human Rights as an assistant lawyer under a fixed-term contract, which ended on 30 April 2019.

5. In anticipation of her departure from the Organisation, the appellant requested clarification from the Directorate of Human Resources (hereinafter “the DHR”), in an email dated 14 March 2019, on the granting of special leave to change her place of residence. She wrote the following:

“... ”

I am leaving the Court on 30 April. I talked to my colleagues and, apparently, the leave for change or place of residence is not applicable to persons moving out at the end of their contract. However, I looked into Rule 1343 and it provides only: ‘Change of the staff member’s place of residence (removal) – up to 2 days per annum’. No exclusions. Is the information I received correct and, if yes, are there any legal grounds for the leave being non-applicable in cases of moving out of Strasbourg?”

6. On 15 March 2019, the appellant received the following reply from the DHR:

“Special leave for removal is not foreseen when Staff members leave the Organisation: although Rule 1343 on leave does not mention specifically this situation, it has been a consistent administrative practice to allow special leave only when staff members take up their duties, are transferred or when exercising their duties.”

7. On 1 April 2019, the appellant formally requested special leave for the afternoon of 11 April 2019 and the morning of 12 April 2019 to organise her change of residence. On 4 April 2019, she was informed that her request had been denied, and thus that the information already provided to her on 15 March 2019 was confirmed.

8. On 5 April 2019, the appellant introduced an administrative complaint against the refusal to grant her one day’s leave to change her place of residence. On 9 May 2019, her administrative complaint was rejected in the following terms:

“... ”

First of all, in accordance with [Article 13, paragraph 1, of Rule No. 1343 of 15 December 2011 on leave], special leave for change of residence is granted to ‘staff members’, i.e. those who remain in service after having changed residence ..., and not when the leave requested is actually linked to the termination of the staff member status. In fact, the above-mentioned provision allows for taking time off during the moving process, as otherwise for staff members bound by working hours it could be difficult to find the time to get everything arranged for the move. The end date of your employment under the junior professional scheme was known to you and should have permitted you to organise the removal in a way that it takes place after the end of your employment.

It must be noted that the impugned decision is consistent with the Council of Europe’s constant practice in this matter. ...

The international administrative case-law clearly recognises that a consistent practice can bind both the Organisation and its staff and therefore provide a legal basis for a decision such as the one taken in your regard. ...

Furthermore, the administrative practice in question is fully in line with the terms of Article 13 of Rule No. 1343 on leave. Indeed, it is necessary to point out that these terms only provide a possibility for the Director of Human Resources to grant special leave ... Consequently, the Director of Human Resources is under no obligation to grant such leave and may decide on a discretionary basis which situations justify the granting of special leave. This discretionary power is consistently admitted by the international administrative case-law. ...

Therefore, in accordance with both the terms of Rule No. 1343 and the principle drawn from the relevant case-law, the Director of Human Resources, who has discretionary power when deciding on a request for special leave, has only and rightfully exercised her power in your case, in order to comply with the administrative practice in place. Noting that your contract was coming to an end and that you

were therefore leaving the Organisation, she decided, within the limits of her powers, to refuse your request for special leave for change of residence.

Finally, concerning your allegation that this practice would result in discriminatory treatment between staff members on fixed-term or indefinite-term contracts, it must be stressed that the said practice is uniformly applied to all staff members, regardless of their type of contract. ...

It follows from all these elements that the decision to refuse you special leave for removal is based on objective elements and is not vitiated by any legal defect. ...”

9. On 14 June 2019, the appellant lodged the present appeal.

II. RELEVANT LAW

10. Rule No. 1343 of 16 December 2011 lays down the conditions for different types of leave for staff members of the Council of Europe. Article 13, paragraph 1 provides that “[o]n receipt of documentary evidence, the Director of Human Resources may authorise periods of absence for the motives specified as follows ... Change of the staff member’s place of residence (removal) up to 2 days.”

11. Pursuant to the first sentence of paragraph 2 of Article 13 entitled “Grounds for authorisation of short periods of absence”, “[i]n the case of leave of absence to move house, to marry or to conclude a PACS or equivalent or for a death in the family, the days of leave authorised may be split.”

THE LAW

12. The appellant asks the Tribunal to set aside the refusal to grant her one day’s leave to change her place of residence at the end of her fixed-term contract.

13. The Secretary General invites the Tribunal to find the present appeal unfounded and to dismiss it.

I. THE PARTIES’ SUBMISSIONS

A. The appellant

14. The appellant maintains that the administrative practice applied in her case and in similar cases by the DHR is unjust and discriminatory. According to her, the automatic refusal to grant leave to move house without looking into individual circumstances is not a solution a good employer should apply.

15. The appellant acknowledges that Article 13 of Rule No. 1343 affords discretionary power to the Director of Human Resources to authorise periods of absence but asserts that the fact that the decision is discretionary cannot lead to it being arbitrary.

16. The appellant argues that when she requested leave to move house, she had exceeded her numerical objectives by over 200% and that a short absence would not have negatively affected her work. She was returning to Poland a week earlier than she had originally planned to have a series of medical examinations which she had postponed for several months to spend more time at work.

17. The appellant considers that the administrative practice in question is discriminatory to staff members on a CDD contract, especially to those recruited for a specified period of time only. As they have to leave when their contract ends, and in most cases move to another country, they need those two days of leave to move house more than anyone else. The statement that employees with a CDI contract would be treated in the same manner is not plausible in the appellant's view, because during her time at the Court she has never seen an employee with such a contract leave the Organisation other than for retirement. Moreover, due to obvious differences in the type of contract, persons on a CDD contract will leave much more often than those on a CDI contract and therefore the practice of not granting leave to move house to those whose contract is expiring targets them more than CDI employees, and this would not be the first practice to limit their rights within the Organisation.

18. In short, the appellant considers that the automatic refusal to grant special leave to move house only because a staff member is about to leave the Organisation, without any consideration of their circumstances and, in particular, without assessing whether the leave might negatively affect their work, amounts to an arbitrary decision and, as such, cannot be considered to be fair and within discretionary boundaries.

19. The appellant adds that the decision not to grant her leave to move house was arbitrary, because it was based on unfair grounds and led to discrimination against employees in a certain situation with regard for no other factor than the fact that they were leaving the Organisation. The appellant does not seek "special treatment" but "fair treatment". She does not see any justification for refusing leave to move house to a person leaving the Organisation who has reached or is close to reaching their objectives. Indeed, knowing that she or he would have time to prepare their move, that person could calmly continue working on other days.

B. The Secretary General

20. The Secretary General, relying on Article 13, paragraph 1, of Rule No. 1343, maintains that special leave for change of place of residence is granted to "staff members", in other words to those who remain in service having changed residence, not when the requested leave is actually linked to the termination of the person's status as a staff member. The fact that the appellant still enjoyed the status of staff member over the two half-days of leave she had requested does not alter the fact that her change of residence took place as a result of the end of her contract. The appellant was not going to remain a staff member after her change of place of residence. Therefore, she could not benefit from this type of leave.

21. According to the Secretary General, Article 13 of Rule No. 1343 enables staff to take time off during the moving process, as otherwise, for staff members bound by working hours, it could be difficult to find the time to get everything arranged for the move. This however is no longer a concern for a person whose employment has ended. The appellant, who was employed under the Registry's Assistant Lawyers' scheme, knew the date of termination of her employment and this allowed her to organise her move so that it would take place after the end of her employment.

22. The Secretary General notes that Rule No. 1343 gives the Director of Human Resources some discretion to decide which situations justify the granting or not of special

leave. Indeed, Article 13 of Rule No. 1343 only provides for the possibility for the Director of Human Resources to grant special leave, as evidenced by the use of the term “may”. Consequently, the Director of Human Resources is under no obligation to grant such leave and may decide on a discretionary basis which situations justify the granting of special leave. This discretionary power is consistently recognised by international administrative case law (see, for example, *K. (Nos. 1 and 2) v. International Organisation of Labour (ILO)*, ILOAT, [judgment No. 4101 of 6 February 2019](#), consideration 8).

23. The Secretary General points out that the Director of Human Resources’ decision reflected the Organisation’s consistent practice with regard to all staff members, who are aware thereof, as evidenced by the correspondence attached to the appellant’s complaint. In this respect, the Secretary General notes that international administrative case law clearly recognises that a consistent practice can bind both the Organisation and its staff, and therefore provides a legal basis for a decision such as that taken with regard to the present appellant (see, for example, *Lehman-Schurter v. Intergovernmental Organisation for International Carriage by Rail (OTIF)*, ILOAT, [judgment No. 1125 of 3 July 1991](#), consideration 8).

24. The Secretary General stresses that the decision in question cannot be qualified as arbitrary having been taken in accordance with the strict terms of a rule, within the framework of the power attributed to the entity responsible for it, and in accordance with the practice relating to that rule and applied to all. The fact that the appellant was performing her tasks and had reached her numerical objectives has no bearing on whether this type of special leave should be granted. Similarly, the fact that she chose on her own initiative to undergo medical examinations during her annual leave rather than take authorised days of absence for medical reasons is no justification for an exception to the rule and to the practice to be applied to her.

25. Finally, concerning the appellant’s allegation that this practice results in discriminatory treatment between staff members on fixed-term contracts and those on indefinite-term contracts, the Secretary General stresses that the relevant practice is uniformly applied to all staff members, regardless of their type of contract. The appellant’s argument that she has never, during her time with the Organisation, seen a staff member on an indefinite-term contract leave the Organisation is irrelevant. Indeed, the fact that she is not aware of it does not mean that this specific situation never occurs. In any case, special leave to change place of residence is not granted to retiring staff members either, on the basis of the exact same practice. In other words, as all staff members leaving the Organisation are treated in the same way, there is no discrimination whatsoever in the present case.

26. For the above-mentioned reasons, the Secretary General concludes that the present appeal is without merit and must be dismissed as unfounded.

II. THE TRIBUNAL’S ASSESSMENT

27. The appellant contends that the refusal to grant her one day’s special leave to move from her place of residence in connection with the end of her fixed-term contract has no legal basis and results in discriminatory treatment.

28. The Secretary General maintains that the refusal to grant special leave to change their place of residence to staff members who leave the Organisation at the end of their

employment lies within the discretionary powers of the Director of Human Resources, and is based on consistent administrative practice of which staff members of the Organisation are aware (see paragraphs 8 and 22-23 above).

29. The Tribunal points out in this connection that it is well established in international administrative case law that a practice cannot become legally binding if it contravenes a written rule that is already in force (see, *A. v. World Health Organisation (WHO)*, ILOAT [judgment No. 4029](#) of 15 May 2018, consideration 19). Accordingly, such a practice could be legally binding if it does not break valid written rules.

30. In the present case, the fact that Article 13, paragraph 1, of Rule No. 1343 using the words “may authorise” gives the Director of Human Resources full discretion to decide whether or not to grant any type of leave described in this provision. In other words, there is no right to which staff members who leave the Organisation could lay claim.

31. By consistently applying Article 13 of Rule No. 1343 in refusing to grant special leave to move to a new place of residence to a particular group of persons, the Director of Human Resources merely interpreted this provision in a particular way within the scope of the discretion afforded her, thus establishing consistent administrative practice. The Tribunal notes that this practice did not modify or otherwise affect the content of Article 13 of Rule No. 1343. The Tribunal therefore concludes that the practice was legally binding.

32. The appellant argues that the refusal to grant special leave to move house to staff members who are shortly to leave the Organisation is automatically applied without any consideration of the employees’ circumstances, and, in particular, without assessing whether the leave might adversely affect their work. The Tribunal notes, in this respect and in addition to what it has said in the previous paragraph, that the aim of an administrative practice is to establish certain guidelines which a legal entity (the Organisation) has decided to follow in the administration and implementation of its internal rules (the Staff Regulations) either generally or with respect to specific types of situations. Accordingly, the legally binding administrative practice is applied automatically. In short, the decision made in the present case was based on the legally binding administrative practice which was rightly applied to the person (appellant) belonging to a particular group of persons in a specific situation (persons leaving the Organisation following the end of their contract).

33. The appellant also considers that the administrative practice in question is discriminatory towards staff members on CDD contracts, especially to those recruited for a specified period of time only, compared to those retiring after a CDI contract.

34. The Tribunal notes that the principle of equality requires that persons in the same position in fact and in law be treated equally. Failure to do so would constitute unequal or even discriminatory treatment. In the present context, this implies that the administrative practice in question should be applied consistently to all staff members leaving the Organisation regardless of the type of contract under which they have been employed.

35. In this respect, the Tribunal points out that discrimination cannot be established unless it is proved that staff members in identical situations were treated differently (see, *K. (Nos. 1 and 2) v. ILO*, above-quoted judgment, consideration 9 with further references). In the present case, the Tribunal notes that the appellant based her allegations only on her own experience and did not back this up with other evidence (see paragraph 17

above). It thus finds reliable the statement provided by the Secretary General that the administrative practice of not granting special leave to move house was applied to all staff members leaving the Organisation (see paragraph 25 above).

36. Admittedly, the appellant could have submitted evidence that the administrative practice in question was applied only to staff members who worked on CDD contracts. This stems, however, merely from the fact that these staff members have to leave the Organisation after the expiry of their contract. Logically, they leave more often than staff members employed on CDI contracts who are retiring or have resigned. Accordingly, the appellant's allegation regarding discriminatory treatment compared to staff members on CDI contracts is not substantiated.

37. In the light of these considerations, the Tribunal finds that the present appeal is in all points unfounded and must be dismissed.

III. CONCLUSION

38. In conclusion, the appeal is unfounded and must be dismissed.

For these reasons,

the Administrative Tribunal:

Declares appeal No. 617/2019 unfounded and dismisses it;

Decides that each party shall bear its own costs.

Adopted by the Tribunal in Strasbourg on 10 December 2019 and delivered in writing on 17 December 2019 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the English text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

N. VAJIĆ