

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 618/2019
(Barbara UBOWSKA (II) 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 26 June 2019, after an exchange of mails between the registrar and the appellant about the admissibility of the appeal, the appeal was registered under No. 618/2019.
2. On 2 September 2019, the then Secretary General submitted his observations on the appellant's appeal. The appellant filed submissions in reply on 3 October 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 of the Council of Europe. She was recruited on 1 May 2016 and worked until 30 April 2019 at the Registry of the European Court of Human Rights as an assistant lawyer.

5. Before leaving the Organisation, between 4 and 12 February 2019, the appellant asked the Directorate of Human Resources (hereinafter “the DHR”) for information about the number of days of leave she was entitled to for 2019.

6. On 12 February 2019, the DHR informed the appellant that she had the right to aggregate leave of 12.5 days for annual leave, home leave and travelling time for home leave.

7. The appellant disagreed with the DHR’s calculation of travelling time for home leave, and on 27 February 2019, she sent a letter to the Secretary General through the Director of Human Resources. The relevant part of the letter reads as follows:

“After exhausting the possibility of settlement of my problem with the Department of Human Resources, I hereby lodge a complaint concerning the manner in which my leave for the year 2019 was calculated.

...

I therefore request that the calculation method of leave used by the DHR be revised. It has a potential to negatively and in a discriminatory manner affect not only the Organisation’s employees who, like me, arrive or leave in the middle of the year, but also those working part-time. I also request that my leave for the year 2019 be established at 14.5 day, as per the following calculation:

...”

8. In a memorandum of 4 March 2019, the Director of Human Resources issued an acknowledgment of receipt, which read as follows:

“Subject: Your administrative request of 27 February 2019

Dear Ms [appellant]

The Secretary General of the Council of Europe has directed me to acknowledge receipt of your administrative request of 27 February 2019, which arrived at the Directorate of Human Resources on 1 March 2019...”

9. On the same day, the appellant confirmed receipt of this message.

10. On 18 April 2019, the Director of Human Resources sent the appellant a reply to her letter, which read as follows:

“Subject: Your administrative request of 27 February 2019

Dear Madam,

The Secretary General of the Council of Europe has asked me to reply on his behalf to your administrative request made under Article 59 § 1 of The Staff Regulations, dated 27 February 2019, which was received by the Directorate of Human Resources (DHR) on 1 March 2019.

...

I trust that the above elements constitute a satisfactory reply to your administrative request.”

11. On the same day, the appellant confirmed that she had received the email containing the decision of 18 April 2019.

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

II. RELEVANT LAW

13. The procedure regarding disputes is governed by Part VII of the Staff Regulations. Article 59 (Complaints procedure) provides as follows:

“1. Staff members may submit to the Secretary General a request inviting him or her to take a decision or measure which s/he is required to take relating to them. If the Secretary General has not replied within sixty days to the staff member’s request, such silence shall be deemed an implicit decision rejecting the request. The request must be made in writing and lodged via the Director of Human Resources. The sixty-day period shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.

2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression “administrative act” shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.

3. The complaint must be made in writing and lodged via the Director of Human Resources:

- a. within thirty days from the date of publication of the act concerned, in the case of a general measure; or
- b. within thirty days of the date of notification of the act to the person concerned, in the case of an individual measure; or
- c. if the act has been neither published nor notified, within thirty days from the date on which the complainant learned thereof; or
- d. within thirty days from the date of the implicit decision rejecting the request referred to in paragraph 1.

The Director of Human Resources shall acknowledge receipt of the complaint.

In exceptional cases and for duly justified reasons, the Secretary General may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.

4. The Secretary General shall give a reasoned decision on the complaint as soon as possible and not later than thirty days from the date of its receipt and shall notify it to the complainant. If, despite this obligation, the Secretary General fails to reply to the complainant within that period, he or she shall be deemed to have given an implicit decision rejecting the complaint.

...”

14. Article 60 (Appeals procedure) provides as follows:

“Article 60 – Appeals procedure

1. In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers.

...

3. An appeal shall be lodged in writing within sixty days from the date of notification of the Secretary General's decision on the complaint or from the expiry of the time-limit referred to in Article 59, paragraph 4. Nevertheless, in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods.

...”

THE LAW

15. The appellant disputes the way in which travelling time was calculated for the year 2019. She requests that the Tribunal set aside the DHR's administrative act and, if the Tribunal finds it fair, to compensate her in an amount equivalent to the travelling time from which she was unable to profit.

16. The Secretary General invites the Tribunal to declare the present appeal inadmissible or, alternatively, unfounded, and to dismiss it in its entirety, including the appellant's claim for payment of compensation.

I. AS TO THE ADMISSIBILITY

A. The parties' submissions

1. The Secretary General

17. The Secretary General maintains that the appellant failed to exhaust internal remedies and that the appeal she submitted to the Tribunal was out of time. He notes in this respect that the question of whether the appeal meets admissibility requirements must be examined in the light of Articles 59 and 60 of the Staff Regulations (paragraphs 13-14 above).

18. As to the exhaustion of internal remedies, the Secretary General observes that the administrative request procedure described in Article 59, paragraph 1, allows staff members to submit a request to the Secretary General inviting him/her to take a decision or measure relating to them in order to obtain a ruling – either explicit or implicit – which they may then challenge through the contentious procedure described in Articles 59, paragraph 2 et seq. and 60, if they consider that it affects them adversely.

19. The Secretary General submits that the appellant's letter dated 27 February 2019 (see paragraph 7 above) was regarded as an administrative request in accordance with Article 59, paragraph 1, of the Staff Regulations. In this letter, the appellant sought a revision of the calculation of her leave entitlement, as she disagreed with the method explained to her by the DHR and presented the arguments for a different way of calculating her leave entitlement.

20. The Secretary General considers that, contrary to what the appellant claims in her communication with the Tribunal when the appeal was filed (paragraph 1 above) and during the written procedure, it was legitimate to treat her letter as an administrative request and not as an administrative complaint given its content and the very nature of her requests.

21. The Secretary General argues that the appellant had not previously received a “final reply” from the DHR on the issue she had raised, which is clearly demonstrated by the correspondence between the appellant and the DHR, from which two observations must be drawn.

On the one hand, there was no “final reply” from the DHR that would have constituted a final decision against which the appellant could have complained since the last message came from the appellant herself and no conclusions were drawn from the exchange.

On the other hand, while all the exchanges between the appellant and the DHR related to the method of calculating leave entitlement, the DHR never formally refused to recalculate the appellant’s leave but simply explained to her, in response to her questions, how her leave entitlement had been calculated and, in view of her doubts, why this calculation was correct in the light of the relevant regulations.

22. The Secretary General adds that, in any case, the appellant knew that her letter of 27 February 2019 was being treated as an administrative request from the moment she received the acknowledgment of receipt of her letter by the Director of Human Resources on 4 March 2019, in which reference was made to her “administrative request” (see paragraph 8 above). She did not dispute this when she acknowledged receipt of the document (see paragraph 9 above). Moreover, the reply by the DHR on 18 April 2019 clearly indicated that her letter had been dealt with as an administrative request under Article 59, paragraph 1, of the Staff Regulations (see paragraph 10 above).

23. The Secretary General argues that, regardless of her intention when sending the letter on 27 February 2019, the appellant was fully informed on 4 March 2019, and at the latest upon receipt of the DHR’s reply of 18 April 2019, that her letter had been regarded and dealt with as an administrative request under Article 59, paragraph 1, of the Staff Regulations and not as an administrative complaint under Article 59, paragraph 2.

24. The Secretary General considers that, once she had been informed of the decision on her administrative request, the appellant should have lodged an administrative complaint in accordance with Article 59, paragraph 2, of the Staff Regulations. Pursuant to Article 59, paragraph 3 b), the appellant had 30 days from the date of the reply to her administrative request to file such a complaint. In the present case, the deadline expired on 20 May 2019. Instead, she directly brought an appeal before the Tribunal on 14 June 2019 (see paragraph 12 above).

25. Pursuant to Article 60 of the Staff Regulations, a staff member may appeal to the Administrative Tribunal only in the event of either an explicit or an implicit rejection of an administrative complaint made under Article 59, paragraph 2, of the Staff Regulations.

26. The Secretary General argues that, in the present case, however, the appeal is directed against the reply to an administrative request and not to a complaint since the appellant failed to submit one. The Secretary General recalls that the international administrative case-law is clear and consistent about the necessity to exhaust internal remedies before filing an appeal (see ATCE, Appeal No. 586/2017 - Manuel Paolillo v. Secretary General, judgment of 14 May 2018, paragraph 70). It follows that the appellant has not exhausted internal remedies.

27. The Secretary General concludes that the present appeal is therefore inadmissible on this ground.

28. As far as the second objection is concerned, the Secretary General notes that, even assuming that the appellant's letter of 27 February 2019 should have been regarded and dealt with as an administrative complaint, not as an administrative request, the appellant would not then have complied with the statutory deadlines for bringing her action before the Tribunal (Article 60, paragraph 3, of the Staff Regulations).

29. Indeed, if the letter of 27 February 2019 had been regarded as an administrative complaint, the Secretary General would have had a period of thirty days from the date of its receipt, expiring on 1 April 2019, to reply to it. Article 59, paragraph 4, of the Staff Regulations provides that if no reply is received within the prescribed time-limit, the Secretary General is deemed to have given an implicit decision rejecting the complaint.

30. Since the Secretary General had not replied by 1 April 2019, and hence had implicitly rejected her complaint, the appellant had sixty days, until 31 May 2019, to bring her appeal before the Tribunal, as provided for in Article 60, paragraph 3, of the Staff Regulations. Yet, the Secretary General notes that the present appeal was only registered on 26 June 2019.

31. Consequently, even if the appellant's letter of 27 February 2019 had been regarded as an administrative complaint instead of an administrative request, the appellant would not have complied with the prescribed deadlines. The present appeal would therefore be inadmissible on the ground that it was out of time.

32. The need to guarantee the stability of legal situations requires that an administrative act must be disputed within a reasonable time. Beyond the time-limit set in the Staff Regulations, it is no longer possible, in accordance with the principle of legal certainty, to challenge a final decision. The case law of the Administrative Tribunal of the Council of Europe is clear and consistent in this matter (see ATCE, Appeal No 312/2003, David Schmidt v. Secretary General, decision of 5 December 2003).

33. Furthermore, the Secretary General refers to the consistent international administrative case law (see ILOAT judgment No. 1106 of 3 July 1991, No. 955 of 27 June 1989, No. 752 of 12 June 1986 and No. 612 of 5 June 1983). He also refers to the case-law of the European Court of Human Rights, which systematically declares inadmissible applications submitted more than six months after the final internal decision. He points out that the same applies to European Union case law (see the judgment of the Court of First Instance of the European Communities of 7 June 1991, Georges Weyrich v. Commission of the European Communities).

34. In the Secretary General's view, all these decisions clearly demonstrate that regulatory deadlines are binding, and necessary to ensure the stability of legal situations, and cannot be challenged, even on grounds of equity.

35. In view of the above, the present appeal is inadmissible for failure to exhaust internal remedies or, in the alternative, for having been lodged out of time.

2. *The appellant*

36. In her memorial in reply, the appellant disputes the Secretary General's assertion that he gave no "final reply". In her view, the question is: how many times does a person have to hear "no" if there is no procedure set in stone. She points out that she sent the first e-mail to the DHR on 4 February 2019 and the exchange of e-mails ended on 12 February. Therefore, the appellant had a right to assume that the DHR's answer was a "no" and that it was "final" for the purpose of administrative proceedings, since the employees of the DHR, who work under the supervision of the Director of Human Resources and are clearly authorised to manage leave allowances on her behalf, refused to apply the method she had presented in the first e-mail and claimed their method was correct.

37. The appellant states that on 27 February 2019 she lodged a complaint with the Secretary General, which was received on 1 March 2019. The reply reached her on 18 April 2019. However, the letter did not contain instructions on any further steps to be taken. The appellant adds that this contrasted with the answer of 9 May 2019, which she received in the other dispute she had with the Organisation (see ATCE, appeal No. 617/2019 – Ubowska (I) v. Secretary General, decision of 17 December 2019, paragraph 8). She therefore submitted the complaint to the Administrative Tribunal on 14 June 2019.

38. Thus, the appellant argues that her administrative complaint was lodged within the time limits set down by the rules. Had the letter contained information that her next step should be to lodge an administrative complaint, she would have complied. Instead, due to the general lack of instruction from the DHR's staff at any point in the proceedings, the appellant was convinced that she had received a reply against which she should appeal directly to the Tribunal, since her letter to the Secretary General was an administrative complaint.

39. The appellant invites the Tribunal to declare her appeal admissible because of the administration's failure to instruct her of the steps to be taken in its letter of 18 April 2019.

B. The Tribunal's assessment

40. The Tribunal considers that the key issue regarding the admissibility of the present appeal is whether the submission that the appellant addressed to the Secretary General on 27 February 2019 was a "request/*demande*", which is governed by paragraph 1 of Article 59 of the Staff Regulations or a "complaint/*réclamation*" (usually called an "administrative complaint/*réclamation administrative*"), which is governed by paragraph 2 of the same Article.

41. The Tribunal notes that the title of Article 59 is "Complaints procedure" but points out that the purpose of its two paragraphs is different. In point of fact, paragraph 1 makes it clear that staff members who are not subject to an administrative act adversely affecting them within the meaning of paragraph 2 of Article 59 must be subject to such an administrative act before they can challenge it by filing a complaint. As has already been stated by the Tribunal, a request under paragraph 1 of Article 59 cannot replace or alter an administrative complaint under paragraph 2 of Article 59, whose purpose is to enable staff members who are already subject to an administrative act adversely affecting them to challenge this administrative act by way of an administrative complaint.

42. With regard to the case at hand, the Tribunal notes that the appellant called her letter a “complaint”, and this seems to match the term “complaint” used in paragraph 2 rather than the term “request” in paragraph 1, despite the appellant’s failure to state on what provision her submission was based. Moreover, the term “complaint” matches the wording used in paragraph 3 of Article 59, which refers to paragraph 2 of the same provision. However, the Tribunal cannot take account only of the term used by the appellant. The Tribunal points out that in the past it has stressed the need for a full description of the nature of documents falling within the scope of litigation.

43. Having assessed the content of the document in question, the Tribunal finds that it was indeed formulated as a complaint within the meaning of paragraph 2, for the following reasons.

44. Firstly, it is clear, contrary to what the Secretary General asserts, that the DHR had taken a decision which affected the appellant, despite what she said in her last e-mail. Moreover, the Secretary General implicitly admits this fact by saying that the appellant could ask the DHR to recalculate her leave (see paragraph 21 above). However, it was up to the appellant to decide whether to pursue the administrative route (at the risk of allowing the thirty-day period provided for in Article 59, paragraph 3, of the Staff Regulations to expire) or to start a dispute.

45. Second, in her letter of 27 February 2019, the appellant asked again for the DHR to revise its calculations, not for a decision to be adopted.

46. Moreover, the same kind of letter, written in the context of appeal No. 617/2019, was considered by the Organisation to be a complaint with the meaning of Article 59, paragraph 2 (see ATCE, No. 617/2019, Ubowska (I) v. Secretary General, decision of 17 December 2019, paragraph 8).

47. Lastly, if the Organisation had doubts as to the nature of the act because it was not clearly described, it should have invited the appellant to clarify her intentions. The fact that the Director of Human Resources sent an acknowledgement referring to an “administrative request” (see paragraph 8 above) cannot be considered sufficient, since no reference was made to the relevant legal provisions on which the definition of the nature of the act had been based.

48. Accordingly, the Tribunal concludes that the letter of 27 February 2019 constituted a complaint within the meaning of paragraph 2 of Article 59 and therefore the Secretary General’s objection regarding the non-exhaustion of internal remedies must be rejected.

49. In reply to the Secretary General’s objection that the appeal was lodged outside the sixty-day period running from the expiry of the thirty-day time limit, as the Secretary General had to take a decision on the complaint because the appellant was facing a situation of implicit dismissal, the Tribunal notes the following.

50. The Tribunal points out that, according to the appellant’s statements, her intention from the beginning was to introduce a complaint within the meaning of Article 59, paragraph 2, of the Staff Regulations and that it has accepted that the letter of 27 February 2019 constituted such a complaint (see paragraph 48 above).

51. However, once it was her intention to submit a complaint, she had to do so within the statutory time-limit. Under Article 59, paragraph 4, and Article 61 of the Staff Regulations, the Secretary General's time-limit to adopt a reasoned decision on the complaint submitted on 1 March 2019 ended on 1 April 2019. Consequently, it was for the appellant to respect the sixty-day period under Article 60, paragraph 3, of the Staff Regulations which expired on 31 May 2019.

52. Accordingly, as it was lodged on 14 June 2019, the present appeal was out of time. In addition, the Tribunal considers that there is no good reason to apply the exceptional admissibility clause provided for in the last sentence of paragraph 3 of Article 60 of the Staff Regulations.

53. In the light of these considerations, the Secretary General's objection regarding the belatedness of the present appeal is well-founded and must be accepted.

II. CONCLUSION

54. In conclusion, the appeal is inadmissible and must be rejected.

For these reasons,

the Administrative Tribunal:

Declares appeal No. 618/2019 inadmissible and rejects 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