

CONSEIL DE L'EUROPE————

————**COUNCIL OF EUROPE**

**TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL**

**Appeal No. 626/2020
(A v. Central Commission for the Navigation of the Rhine)**

The Administrative Tribunal, composed of:

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

assisted by:

Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant lodged her appeal on 13 December 2019. The appeal reached the Registry of the Tribunal on 2 January 2020 and was registered on the same day under No. 626/2020.
2. On 8 January 2020, the Chair agreed to the appellant's request for anonymity.
3. The Chair gave the appellant until 6 February 2020 to submit further pleadings and the appellant sent an electronic version thereof on 16 January 2020.
4. On 22 January 2020, the Chair gave the respondent organisation until 2020 to lodge written observations.
5. Following requests for an extension, linked in some cases to the drafting of these observations and in others to difficulties connected with the spread of the pandemic in Europe, and also to exchanges between the parties on this subject and the possibility of seeking a friendly settlement between the parties with the assistance of the conciliator, the respondent organisation lodged observations on 18 May 2020.

6. In the meantime, on 29 April 2020, the appellant filed an application with the Tribunal for a stay of execution on appointments (see paragraph 22 below), which the Chair dismissed by Order of 14 May 2020.

7. On 18 May 2020, the Chair set the appellant a deadline of 17 June 2020 to submit observations in reply.

8. On 8 June 2020, the appellant requested an extension of the deadline until 24 June 2020. The Chair rejected this request because, as she had already notified the parties, she was planning to open the oral proceedings on 25 June 2020.

9. On 15 June 2020, the appellant lodged her observations in reply.

10. Because of the pandemic and the precautionary measures to which it has given rise in Europe, the hearing on this appeal was held as planned on 25 June 2020, but by video conference rather than face to face. The appellant was represented by Mr Giovanni Palmieri, legal adviser on international civil service law, assisted by Ms Elizabeth Yacine Pouye, administrative assistant, while the respondent organisation was represented by Mr Emmanuel Andréo, a lawyer practising in Strasbourg, assisted by Ms Bente Braat, legal adviser to the Central Commission for the Navigation of the Rhine (hereinafter “the CCNR”).

THE FACTS

I. CIRCUMSTANCES OF THE CASE

11. The appellant works for the respondent organisation. To preserve anonymity, only the facts needed to arrive at the decision to be made will be referred to herein.

12. According to the appellant, she has had to contend with a toxic climate at work, which has now taken the form of specific acts of harassment of four different types: disdain, ostracism, antagonism and ultimately, planned and announced removal from the CCNR.

13. On 29 May 2019, during its spring 2019 session, the CCNR adopted several resolutions, including the following:

“PROTOCOL 21

Composition of the Secretariat

Renewal of the mandate of the Chief Engineer

Resolution

The Central Commission for the Navigation of the Rhine agrees to extend, for a last time, from 1 August 2019, the engagement of [X] as Chief Engineer of the Central Commission, for a period of eleven months due to expire on 30 June 2020.

PROTOCOL 22

Composition of the Secretariat

Appointment of a new Chief Engineer

Resolution

The Central Commission for the Navigation of the Rhine agrees to appoint [Y] as Chief Engineer of the Central Commission from 1 July 2020, for a period of four years.”

14. In the light of these circumstances, on 13 June 2019, the appellant sent the President of the CCNR an administrative “request” in accordance with Article 38 (c), paragraph 2, of the CCNR staff regulations (see paragraph 29 below). Bearing in mind the delicate nature of the allegations in that they relate to the relationship between [Z] of the CCNR and the appellant, the latter insisted in particular on opening an inquiry enabling the President to gain a precise idea of the responsibilities at stake. The appellant expressed the desire for this inquiry to be assigned to an external investigator.

15. The President refused this request in a decision of 9 August 2019, stating *inter alia* as follows:

“...

1) I refuse to open an external inquiry concerning your psychological harassment.

Reasons:

a. In the aforementioned administrative [request], you:

- submitted that you had been a target of psychological harassment by [Z] ...;

- asked the President of the Central Commission to open an independent external inquiry.

b. In your remarks, you accuse [Z] of failing to meet his obligations. According to Article 33, paragraph 2, of the CCNR staff regulations, opening such an inquiry does not lie however within the authority of the President of the Central Commission.

c. According to the aforementioned article, the Central Commission is responsible for identifying and punishing any failure to comply with obligations where officials covered by Article 10 of the CCNR staff regulations are concerned. This obligation inevitably includes the decision on whether and in what form inquiries must be conducted if there is a suspicion of non-compliance with the obligation.

d. In accordance with Article 33, I will inform the Central Commission at heads of delegation level of the allegations you have made against [Z] so that they can decide promptly what action needs to be taken.

2) I do not agree to suspend the staffing measures relating to the function of chief engineer of the Central Commission.

Reasons:

a. In the aforementioned administrative [request], you asked for the suspension of the application of:

- the extension of the mandate of the current chief engineer of the Central Commission, [X], until 30 June 2020;

- the appointment of [Y] as chief engineer of the Central Commission from 1 July 2020 onwards.

...

b. Under Article 10 of the CCNR staff regulations, the Central Commission appoints the Secretariat’s senior staff ... and in principle each serves for a period of four years; in specific cases it is possible to extend their respective mandates.

c. The Central Commission therefore decides alone on the executive positions of the Secretariat in the context among other things of policy-related considerations and its discretionary power. Neither do applicants have any right to be appointed or for their mandate to be extended after the expiry of the contractual period.
...”

16. On 8 September 2019, the appellant filed an administrative complaint against the decision to refuse her request.

17. On 9 October 2019, the CCNR decided to conduct internal investigations concerning the allegations of psychological harassment by organising a hearing of the appellant and [Z] by a panel made up of the heads of the German and Dutch delegations with a view to deciding what action should be taken on the matter (possibly an external inquiry and disciplinary sanctions on the basis of Article 33 of the Regulations).

18. On 6 November 2019, the President dismissed the appellant’s administrative complaint, stating *inter alia* as follows:

“1. In your administrative complaint ..., you state that you have been the victim of psychological harassment. (...). At the same time, you ask:

- for an independent external inquiry to be opened on this matter, and;
- for the suspension of the application of the extension to the mandate of the chief engineer ad interim of the [CCNR], [X], until 30 June 2020 and the appointment of [Y] as chief engineer from 1 July 2020 onwards.

2. I refused the aforementioned requests by letter of 9 August 2020. As to the reasons for these two decisions, I refer to my considerations in that letter.

Your administrative complaint ... does not contain any information, either from a procedural or a substantive viewpoint, that might lead to a different assessment of your aforementioned requests and hence to any change in my decision. In particular, you do not provide any convincing evidence in this administrative complaint of the alleged link between the allegations of your harassment by [Z] and the staff-related decisions by the [CCNR] which you contest.

3. In accordance with Article 33 et seq. of the CCNR staff regulations, I informed the [CCNR] at the heads of delegation level about the allegations that you made against [Z] for non-compliance with his professional obligations on the ground of psychological harassment. After the initial discussions of 9 October 2019, the [CCNR] intends to hold separate hearings of [Z] and you in person on the subject of these allegations so as to be able to decide what steps to take. The [CCNR] assigned the task of running these hearings to the head of the Dutch delegation, ..., and to me. I will invite [Z] and you to these hearings, which should take place on 3 and 4 December 2019, as soon as possible, by separate letters.
...”

19. On 3 December 2019, the President invited the appellant to a meeting, in the context of the internal inquiry, which was also attended by the head of the Dutch delegation and the German Commissioner to the CCNR, who is also the head of an office of the German Ministry of Transport in the Sub-Directorate run by the CCNR President. The appellant was assisted by her lawyer. According to the appellant she has not, to this day, received the minutes of this meeting. [Z] was heard on 18 December 2019.

20. Not wishing to open a conciliation procedure (which, at the CCNR, is an intermediate phase between the administrative complaint and appealing to the Tribunal), the appellant lodged the current appeal on 19 March 2020.

21. In the minutes of a meeting of the Heads of Delegation of the CCNR held on 29 March 2020, it is stated *inter alia* as follows:

“... The purpose of this closed session of the Central Commission is to be appraised by the panel on their findings regarding the complaint of [psychological] harassment leveled by [the appellant] ... against [Z], raising the possibility of disciplinary proceedings in application of article 33 and seq. of the Staff regulations.

...

The members of the panel underline first that they presented the meetings to both parties not as part of a formal inquiry but as informal hearings to serve as a basis for the Heads of Delegation to decide on further action, possibly in application of Art. 33 of the Staff regulation. They pointed out that art. 38 of the Staff regulation remained the legal framework at present, and this was duly noted in the records of the meetings. They informed the parties that these records would remain confidential.

Following those hearings, they present their findings:

- It is not appropriate to launch an inquiry against [Z] since no sufficient and tangible evidence has been provided to justify it.

- The working climate between the parties is rather bad and the behavior of both parties is questionable and is in fact problematic.

- During both meetings the panel did not find sufficient evidence for [psychological] harassment.

...”

22. On 29 April 2020, the appellant availed herself of the possibility provided for in the last sentence of Article 3, paragraph 3, of the Agreement between the Council of Europe and the CCNR and filed an application with the Tribunal in accordance with Article 59, paragraph 9, of the Staff Regulations of the Council of Europe for a stay of execution of the decision by the President of the CCNR not to suspend the procedures relating to the appointment and taking up of his functions of the official who, according to the appellant, had been appointed to prevent the renewal of her own contract. In an Order of 14 May 2020, the Chair refused to grant the stay of execution requested.

II. RELEVANT LAW

23. The Central Commission for the Navigation of the Rhine (hereinafter “the CCNR”) is an international organisation based in Strasbourg. Appendix 3 of its Rules of Procedure contains the CCNR staff regulations. Chapter VI, entitled “Recruitment, promotion and assessment”, contains Article 10, which reads as follows:

“The Secretary General, the Deputy Secretary General and the Chief Engineer shall be appointed to and dismissed from their functions by the Central Commission.

The aforementioned officials shall be appointed for a period of four years. Their mandate may be renewed twice. A third renewal is possible in exceptional circumstances, particularly if no other candidate is available.

The employment contract of the aforementioned officials shall be negotiated with the Central Commission, as represented by its President. This contract shall set out their working and pay conditions and the arrangements for their social protection.”

24. Chapter XIII of the CCNR staff regulations, entitled “Sanctions”, contains Article 33, which provides as follows:

“Any official who neglects his/her duties within the meaning of these Regulations shall be liable to a disciplinary measure.

The disciplinary measures which may be applied to the officials referred to in Article 10 shall be a written warning, a reprimand or dismissal. These measures shall be ordered by the Central Commission. The disciplinary measures which may be applied to the officials referred to in Article 12 shall be, depending on the seriousness of the misconduct, a written warning, a reprimand, deferment of advancement to a higher step, relegation in step, downgrading or removal from post. These measures shall be ordered by the Secretary General.”

25. Since the CCNR does not have its own tribunal and since, because of the principle of immunity from jurisdiction, disputes between the Organisation and its staff cannot be brought before a national court, on 16 December 2014 the CCNR signed an agreement with the Council of Europe to extend the jurisdiction of the Administrative Tribunal to this dispute.

26. This agreement provides that, following the dismissal of an administrative complaint or a conciliation procedure that was requested but did not result in the resolution of the dispute, the appellant may appeal to the Administrative Tribunal of the Council of Europe.

27. The internal procedures with regard to administrative requests, administrative complaints and conciliation are governed by the provisions set out by the CCNR in its own staff regulations, whereas the procedure before the Tribunal is governed by the Statute of the Tribunal (Appendix XI to the Council of Europe Staff Regulations) and by its rules of procedure.

28. The rules relating more specifically to administrative requests and administrative complaints are set out in Article 38 of the CCNR staff regulations. They are the same in the different scenarios described, the only difference being the authority which is competent to give a ruling. The relevant provision is worded as follows:

“(c) Officials covered by Article 10 [the Secretary General, the Deputy Secretary General and the Chief Engineer]

Any official covered by Article 10 may submit a complaint to the President of the Central Commission requesting that a decision adversely affecting him or her be withdrawn or amended.

Officials may also present the President of the Commission with a written request asking him/her to take a decision or a measure to which they consider themselves to be entitled. Where the President has not replied within sixty days of the official’s request, such silence shall be deemed an implicit decision rejecting the request.

Complaints must be submitted within sixty days of the publication or receipt of the contested decision. The President of the Central Commission shall acknowledge receipt of the complaint.

This procedure shall be open *mutatis mutandis* to the former officials and dependants of the officials and former officials covered by Article 10 in the ninety days following the publication or receipt of the contested decision.

Before taking a decision on the complaint, the President of the Central Commission shall hear the official, who may be assisted by a person of their choice from outside the Secretariat. In such cases, the official shall communicate the name and the capacity of the person who will assist them at least five days before the meeting. The President shall take a decision giving reasons, of which he/she shall inform the official.

Failure to reply within sixty days of receiving the complaint shall be deemed an implicit decision accepting the request.

In principle complaints shall not have suspensive effect. However, the President may decide, at the official's request, to stay the execution of the contested decision if he/she considers it appropriate."

THE LAW

29. The appellant requests that the decision by which the President of the CCNR had refused to open an external inquiry into the allegations of harassment made in her administrative request, and reiterated in her administrative complaint, be set aside, and that the implementation of the high-level appointments decided with the goal and effect of having the appellant removed from the Organisation be suspended.

30. The respondent organisation requests the Tribunal to rule that it has no jurisdiction to examine the appeal to set aside the President's decision of 6 November 2019 dismissing the suspension of the implementation of the high-level appointments decided on in May 2019 for the post of chief engineer; that it has no jurisdiction either to examine the claim for compensation; and that the appeal to set aside the President's decision and the claim for compensation are inadmissible and ill-founded.

31. The appellant also requests payment of 70 000 euros as compensation for non-pecuniary damage, for the CCNR to be ordered to pay her compensation equivalent to thirty-two months' pay if her current contract is not renewed when it expires, and lastly, to be awarded a sum of 8 000 euros in respect of the costs of the present proceedings.

32. The respondent organisation invites the Tribunal to dismiss the appeal to set aside the President's decision and the claim for compensation, and to find that there is no ground to award any sum to the appellant in respect of the costs of the proceedings.

I. ADMISSIBILITY AND MERITS

A. The appellant

33. In support of her claims, the appellant presents two grounds for appeal: the first concerns the examination of a procedural issue relating to her administrative complaint, the second the merits of the decision to dismiss it.

34. In her first ground, the appellant claims that the contested decision was taken by the President of the CCNR in breach of Article 38 (c), paragraph 4, of the CCNR staff regulations as the President did not hear her before taking his decision on her administrative complaint. Consequently, he was responsible for an infringement of essential procedural requirements to the appellant's detriment. According to the latter, the fact that there had been an internal

investigation – which had been conducted by two people including the President – could have been satisfactory if it had found in favour of the applicant. As it had not, the fact that she had not been heard was liable to have had a negative influence on the President’s decision.

35. The appellant points out that under Article 38 (c), paragraph 4, of the CCNR staff regulations, “before taking a decision on the complaint, the President of the Central Commission shall hear the official, who may be assisted by a person of their choice from outside the Secretariat”.

36. In the instant case, the President took a decision on the appellant’s administrative complaint (namely to dismiss it) without inviting her to a meeting. The President’s duty to hear officials before taking decisions on administrative complaints they have filed is clearly an essential procedural requirement, whose infringement gives rise to a procedural defect rendering the decision null and void. The appellant points out in this respect that international case law regards procedures to be essential if the infringement thereof could have influenced the decision taken and, more generally, if they are designed to offer guarantees to citizens. According to this general theory, the infringement by the President of the appellant’s right to be heard undermines the validity of the contested decision. Accordingly, the latter should be condemned by the Tribunal on this ground.

37. According to international case law, the right to be heard stems from the relationship of trust between an Organisation and its staff members. The reason why provision is made for this is to force the administrative authority to make its intentions known to the staff members concerned and to give them the opportunity to put forward their views and defend their interests (see, *mutatis mutandis*, ILOAT, judgment No. 1495, Güsten (1996), considerations 9-11 and the case-law cited therein). While it is true that the obligation for the competent authority to hear a complainant before taking a decision on an administrative complaint is not common in international civil service law, the fact remains that failing to observe this formality when it is explicitly provided for in a written provision with regulatory force invalidates the administrative act concerned, namely the decision to dismiss the administrative complaint.

38. As to the second ground, the appellant points out that by means of her administrative complaint, she drew the President’s attention to serious, detailed allegations of psychological harassment. As the CCNR does not have its own rules on harassment, the general principles of international civil service law apply. According to these principles, as reflected in the case law of international administrative courts, an Organisation called upon to examine an accusation of harassment must “both investigate the matter thoroughly and accord full due process and protection to the person accused” (see, for example, ILOAT, judgment No. 1376, Fargaly (2006), consideration 3).

39. However, in his decision dismissing the administrative complaint, the President refused to open an independent external inquiry.

40. Furthermore, according to the appellant, the harassment to which she was subjected was pursued with the goal and the effect of ultimately removing her from the CCNR. The appellant adds that, to prevent this, she had asked the President of the CCNR to suspend all unlawful acts

to execute the decisions which could cause her removal. In her view, this suspension would have been capable of protecting her rights and interests pending the emergence of the whole truth regarding the allegations of psychological harassment contained in her administrative request and her administrative complaint.

41. In her administrative complaint, the appellant asserted that the President was authorised to examine administrative requests and complaints from the officials referred to in Article 10 of the CCNR staff regulations. He is supposed therefore to assume responsibility for the decisions of the CCNR. The appellant referred, *mutatis mutandis*, to the case law of the Tribunal and in particular to the decision of 31 March 1995 on Appeals Nos. 182-185/1994, Auer and others v. Secretary General of the Council of Europe. The Tribunal states clearly that the Secretary General of the Council of Europe is also responsible for decisions which are not within his power such as decisions on remuneration which are reserved for the Committee of Ministers. According to the Tribunal, the Secretary General's responsibility in administrative proceedings derives from "the fact that, our Organisation's dispute system provides only for appeals against the Secretary General" (see paragraph 54 of the decision).

42. In his decision dismissing the administrative complaint, the President did not reply to the arguments above but expressed his intention to inform "the Central Commission at heads of delegation level" of the allegations of psychological harassment on the basis of Article 33 of the CCNR staff regulations on disciplinary sanctions. However, he refused to entertain the appellant's request for the suspension of the disputed appointments, on the ground of the CCNR's "discretionary power" and the "policy-related" nature of the decisions on appointments.

43. The appellant considers that the contested decision is based on an error of law and can be interpreted as a denial of justice in the true sense. The denial of justice is manifested by the President's desire to exclude the administrative decisions taken by the CCNR at heads of delegation level from any judicial review. These decisions also mean that the appellant loses any chance of her mandate being renewed for a second time, as provided for by Article 10 and the established practice for all renewals of members of the management team. The appellant is confident that the contested decision will be set aside in the light also of these defects.

B. The respondent organisation

44. With regard to the first ground of appeal, the respondent organisation maintains that, following the appellant's administrative complaint of 8 September 2019, the CCNR decided, on 9 October 2019, to conduct internal investigations concerning the allegations of psychological harassment by holding a hearing of the appellant and [Z] by a panel comprising the heads of the German and Dutch delegations with a view to deciding what action should be taken on the matter (possibly an external inquiry and disciplinary sanctions on the basis of Article 33 of the regulations).

45. The respondent organisation maintains that the appellant, assisted by her lawyer, was heard on 3 December 2019 by the heads of these two delegations, who also heard [Z] on 18 December 2019. It mentions, in this connection, that in order to avoid any conflict of interest, the hearing of the parties was conducted by a panel of two delegations of different nationalities

(German and Dutch). The heads of delegation sought to examine the appellant's allegations thoroughly, without excluding the possibility at that stage of a formal inquiry, conducted, if necessary, by an independent external body.

46. Consequently, the appellant did not suffer any substantial harm.

47. As to the second ground of appeal, the respondent organisation begins by raising objections as to the Tribunal's jurisdiction and the admissibility of some complaints and then asks the Tribunal to find the complaints ill-founded and dismiss the appeal.

C. Tribunal's assessment

48. With regard to the first ground of appeal, the Tribunal is bound to note that the President did not hear the appellant before ruling on the administrative complaint (see paragraphs 18 and 19 above). Yet, this hearing is expressly required by Article 38 of the CCNR staff regulations. It is true that before the President took his decision to dismiss the complaint, an internal inquiry was conducted, outside the scope of the complaints procedure, and the appellant was heard at the same time as other persons. However, this is a different type of administrative act, which cannot be deemed to replace the hearing of the appellant required by Article 38 (c), paragraph 6, of the CCNR staff regulations (see paragraph 28 above).

49. Furthermore, the Tribunal notes that the respondent organisation has stated that "the failure to hold a meeting before the decision of 6 November 2019 is not a major defect because [the appellant] was granted the right by the Central Commission to the conduct of internal investigations, which did take place". However, the Tribunal cannot accept this argument for, although the President was one of the persons who took part in the inquiry, the fact remains that this act was separate from the examination of the administrative complaint. Furthermore, and above all, the decision to open an internal inquiry and the subsequent hearing of the appellant took place after the dismissal of the administrative complaint.

50. Accordingly, it is clear that the appellant's statutory right to be heard before the adoption of the response to her administrative complaint was not respected and the appeal is founded in this respect.

51. Having arrived at this conclusion, the Tribunal considers that the contested decision should be set aside and that it is not necessary to rule on the other grounds put forward by the appellant or the objections raised by the respondent organisation.

II. THE CLAIMS FOR COMPENSATION

52. The appellant asks to be awarded compensation for non-pecuniary damage of 70 000 euros, for the CCNR to be ordered to pay her compensation equivalent to thirty-two months' wages if her current contract is not renewed when it expires and to be awarded a sum of 8 000 euros in respect of the costs of the present proceedings.

53. The respondent organisation calls for all these claims to be dismissed.

54. The Tribunal notes that as it cannot rule on the merits of the case because of an irregularity in the complaints procedure, it need not grant the appellant's claim for non-pecuniary damage. The same applies to her claim for compensation for loss of wages. It should therefore also be dismissed.

55. As to the request for reimbursement of procedural costs, the Tribunal finds it reasonable and grants it.

III. CONCLUSION

56. In conclusion, the appeal is founded and the appellant is entitled to the sum of 8 000 euros to cover her procedural costs.

For these reasons,

The Administrative Tribunal:

Declares the appeal founded;

Sets aside the contested decision;

Orders the respondent organisation to pay the appellant a sum of 8 000 euros for procedural costs.

Adopted by the Tribunal by videoconference on 29 October 2020, and delivered in writing pursuant to Rule 35, paragraph 1, of the Rules of Procedure of the Tribunal on 30 November 2020, the French text being authentic.

The Deputy Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

E. HUBALKOVA

N. VAJIĆ