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TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 674/2021
(Paméla MENDEZ CARVALHO v. Secretary General)

The Administrative Tribunal, composed of:

Ms Nina VAJIĆ, Chair,
Ms Lenia SAMUEL,
Mr Thomas LAKER, Judges**,**

assisted by:

Ms Christina OLSEN, Registrar,
Mr Dmytro TRETYAKOV, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Paméla MENDEZ CARVALHO, lodged her appeal on 8 April 2021. The appeal was registered on 13 April 2021 under No. 674/2021.

2. The appellant submitted further pleadings on 17 May 2021.

3. The Secretary General submitted her observations on the appeal on 9 July 2021.

4. The appellant filed submissions in reply on 8 September 2021.

5. As the parties were prepared to waive their right to oral proceedings in this appeal, the Chair decided on 27 September 2021 that it was unnecessary to hold a hearing and allowed the Secretary General to file a rejoinder.

6. The Secretary General filed her rejoinder on 4 October 2021.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. The appellant was recruited on 7 January 2016 on a fixed-term contract (hereinafter "CDD") under a turnover profile at Grade C2 as a production/distribution operator within the Division for Reference Standards and Logistics (hereinafter "DRSL") of the European Directorate for the Quality of Medicines and HealthCare (hereinafter "EDQM"). The total duration of employment under a contract of this type cannot exceed five years (see paragraphs 27 and 28). The appellant's CDD was renewed initially until 31 December 2017 and then a second time until 31 January 2018. The appellant then signed a new CDD for a three-year period ending on 31 January 2021.

8. In November 2017, the appellant informed her managers that she was pregnant.

9. On 16 January 2018, in reply to a question that the appellant had asked with regard to her working time during her pregnancy, the human resources department of the EDQM informed her that according to the relevant provisions, reduced working time for maternity was for persons in full-time work, so it did not apply to her as her working time had already been reduced to 80% (reduced day). The email also informed the appellant that any reduction in her working time should be discussed with her managers "as it [was] not certain that this [was] compatible with the production team's work".

10. The same day, i.e. 16 January 2018, the appellant sent her managers an email in which she asked whether her working time could be reduced to 70% during the period following her return to work after giving birth.

11. On 6 February 2018, the appellant's managers informed her that from that date onwards, her duties would be adjusted so that as far as handling "category D" products was concerned, they would thenceforth be limited to labelling products, excluding the task of filling them, in the "offices area" (non-toxic area – low-risk production). Category D consists of products that pose no risks of carcinogenicity, mutagenicity or reproductive toxicity (CMR). The same day, the appellant sent an email to the Organisation's medical officer asking whether, in the light of the new instructions applicable to pregnant women, she should be concerned about having been exposed to any risks since the beginning of her pregnancy.

12. On 12 February 2018, the appellant had a discussion with the Organisation's medical officer and her managers at the EDQM during which she was informed that she had not been exposed to any risks. Following this discussion, the appellant sent her superiors an email dated 14 February 2018 in which she requested written confirmation of this information.

13. On 13 February 2018, the appellant was placed on sick leave until June 2018, when her maternity leave began.

14. The appellant's request for a reduction in her working time to 70% was refused on 30 August 2018 on the ground that it was not compatible with the needs of the department.

15. In November 2018, the appellant returned to work following her maternity leave and was partially assigned to the General Services Section of the DRSL of the EDQM.

16. Following her return to work, the appellant and her managers once again discussed the question that the appellant had asked in her email of 14 February 2018 (see paragraph 12). By email of 14 January 2019, the appellant was informed that the precautionary measures in place at the beginning of her pregnancy had prevented her from being exposed to any particular risk and that the new instructions for pregnant women which had been applied during her pregnancy had been adopted as an additional precautionary measure.

17. From 2 May 2019, the appellant was assigned solely to the General Services Section of the EDQM as an usher.

18. By letter from the Directorate of Human Resources dated 26 October 2020, the appellant was informed that her CDD would end on 31 January 2021 – the date on which her employment would reach the maximum duration (five years) mentioned in her offer of employment – and that her CDD would not be renewed (see paragraph 7).

19. On 5 January 2021, the appellant had her appraisal interview during which she was told that no vacancy notice would be published in order to fill the post of usher to which she had been assigned since May 2019.

20. On 6 January 2021, the appellant sent the Secretary General a request for protection in her official capacity within the meaning of Article 40 of the Staff Regulations.

21. On 25 February 2021, the appellant's request for protection in her official capacity was refused. The same day, the appellant lodged an administrative complaint against the refusal of her request for protection in her official capacity. The appellant's complaint was dismissed on 6 April 2021.

22. On 8 April 2021, the appellant lodged her appeal against the decision to dismiss her complaint.

II. RELEVANT LAW

23. Article 59, paragraph 2, of the Staff Regulations concerns the complaints procedure and reads as follows:

> "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."

24. Article 59, paragraph 3 b), of the Staff Regulations concerns the time limit for lodging an administrative complaint concerning an individual measure and reads as follows:

> "3. The complaint must be made in writing and lodged via the Director of Human Resources.
>
> (…)
> b. within thirty days of the date of notification of the act to the person concerned, in the case of an individual measure."

25. Article 60, paragraph 1, of the Staff Regulations concerns the appeals procedure and reads as follows:

> "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."

26. The protection of staff members in their official capacity is governed by Article 40 of the Staff Regulations, which reads as follows:

> "1. Staff members may seek the assistance of the Secretary General to protect their material or non-material interests and those of their family where these interests have been harmed without fault or negligence on their part by actions directed against them by reason of their being a staff member of the Council.
>
> 2. Where the Secretary General deems that the conditions set forth in the above paragraph are met, he or she shall decide what form such assistance may take and the amount up to which the Council shall pay the costs incurred in the defence of the interests referred to in paragraph 1, including the costs of any legal action taken. If the Secretary General considers that legal action may harm the interests of the Council, he or she may ask the persons concerned not to take such action; in such cases, if they do not take legal action, the Council shall make good the material damage suffered by the persons concerned, provided that they assign their rights to the Council."

27. The recruitment of staff members under the Junior Professional Programme and profiles with regular turnover is governed by Article 16 of Appendix II (Regulations on appointments) to the Staff Regulations. Paragraph 1 of this article provides that:

> "The Secretary General may determine, by means of a Rule, specific job profiles which shall exclusively be filled in the framework of junior professional programmes or for which it is in the interest of the Organisation that a regular turnover takes place. In such a Rule, the Secretary General shall also set a maximum duration for employment under such profiles. Total employment with the Organisation under such profiles shall not exceed that maximum duration."

28. The rule that determines the specific job profiles that are filled under junior professional programmes or turnover profiles is Rule No. 1268 of 16 October 2014. The duration of employment for staff members recruited under this programme is specified in Article 7 of Rule No. 1368, which is worded as follows:

> "The total duration of employment shall be stipulated in the vacancy notice, however in no case shall the total duration of employment under the Junior Professional Programme or Turnover Profiles exceed five years. Staff members recruited under such profiles shall not be eligible for any subsequent internal competition, promotion or transfer, or for secondment. Staff members or former staff members who are or have been employed in the framework of the Junior Professional Programme or Turnover Profiles will not be eligible again for any of the profiles under these schemes."

THE LAW

29. In her appeal, the appellant asks the Tribunal to annul the Secretary General's decision of 25 February 2021 to refuse to grant her protection in her official capacity and the Secretary General's decision of 6 April 2021 dismissing her administrative complaint. The appellant then asks the Tribunal to order the Secretary General to compensate her for her pecuniary loss consisting of lost earnings from 31 January 2021 – the date on which her contract of employment ended – to the date of the Tribunal's decision, and to pay her €5 000 in non-pecuniary damages. Lastly, she asks the Tribunal to reimburse her costs in the amount of €4 800.

30. The respondent asks the Tribunal to declare the appeal inadmissible and unfounded and to dismiss it.

I. ADMISSIBILITY OF THE APPEAL

A. The Secretary General

31. The Secretary General asserts that both of the grounds put forward by the appellant in her appeal, i.e. the ground of appeal concerning the non-renewal of her CDD on the one hand and the ground of appeal concerning the protection and safety measures in place during her pregnancy on the other hand, are inadmissible because they are out of time.

32. The Secretary General points out that the need for stability in legal situations requires a complaint against an administrative act to be lodged within a reasonable time. Because this time limit is set at 30 days in the Staff Regulations, it is not possible to challenge a final act once this period has ended, according to the principle of legal certainty.

33. With regard to this point, the Secretary General refers to the Tribunal's case law (see ATCE, Appeal No. 312/2003, David Schmidt v. Secretary General, decision of 5 December 2003), according to which:

> "(…) the disputes procedure as set out in Articles 59 and 60 of the Staff Regulations provides that staff members' administrative complaints and appeals against administrative measures adversely affecting them are subject to time-limits. The formalities and procedures laid down in the staff regulations are designed to ensure observance of the principle of legal certainty inherent in the Council of Europe system, in the interests of both the Organisation and its staff. Observance of the principle of legal certainty requires that the time-limit after which the Administrative Tribunal may no longer review an administrative measure be a known date. Failure to meet the time-limit for lodging an administrative complaint renders the complaint inadmissible. (…)"

34. With regard to the appellant's first ground of appeal concerning the non-renewal of her CDD, the Secretary General considers that the final administrative decision is the notice of termination of her contract which was given by the letter of 26 October 2020 (see paragraph 18). Consequently, and in accordance with Article 59, paragraph 3 b), of the Staff Regulations, the appellant had a period of 30 days ending on 25 November 2020 within which to lodge her administrative complaint.

35. The Secretary General refutes the appellant's argument concerning legitimate expectation (see paragraph 43) because this ground of appeal goes to the merits of the appeal and can therefore have no bearing on the procedural time limits. She adds that no such expectation could have continued to exist after notice of the end of the contract was given.

36. Because the appellant lodged her administrative complaint on 25 February 2021, the Secretary General considers that this part of the appeal is inadmissible because it is out of time.

37. With regard to the appellant's second ground of appeal concerning the protection and safety measures put in place at the EDQM when she was pregnant, the Secretary General points out that the appellant was informed by email on 6 February 2018 that she would no longer fill category D products and would merely label products of all kinds (see paragraph 11). According to the Secretary General, this email was the final decision that marked the beginning of the thirty-day period referred to in Article 59, paragraph 3 b), of the Staff Regulations within which an administrative complaint could be lodged.

38. The Secretary General adds that the decision of 25 February 2021 not to grant the appellant protection in her official capacity did not mark the beginning of a new limitation period for lodging an administrative complaint as this decision merely confirmed a previous final decision.

39. Because the appellant lodged her administrative complaint on 25 February 2021, over a year after being notified of the final decision, the Secretary General considers that this second part of the appeal is likewise inadmissible on account of the lapse of time.

40. The Secretary General concludes that the appeal is inadmissible on all grounds.

B. The appellant

41. With regard to the admissibility of her request in relation to the non-renewal of her contract, the appellant states that the subject-matter of the case and the appellant's essential aim must be taken into account when the time limit referred to in Article 59, paragraph 3 b), of the Staff Regulations is applied.

42. The appellant refutes the Secretary General's plea of inadmissibility by stating that the notice of 26 October 2020 informing her of the end of her CDD did not contain any information that had not already been given in her contract and was therefore not an act adversely affecting her that could start the limitation period. In support of this argument, the appellant cites the case law of the Civil Service Tribunal of the European Union (15 September 2011, Bennett e.a./OHMI, case F-102/09, and 26 June 2013, BU / EMA, Joined Cases F- 135/11, F- 51/12 and F- 110/12), according to which a letter that merely reminds a staff member of the date on which his/her contract expires and does not contain any new information is not an act adversely affecting him/her.

43. According to the appellant, the date on which the limitation period began was 5 January 2021 – the date on which her line manager informed her that no notice of a competitive selection process in which she could have participated would be published (see paragraph 19). Despite the notice of the expiry of her contract which she received on 26 October 2020, the appellant asserts that several circumstances prior to that, in particular the fact that she was assigned to a permanent usher's post from May 2019, kept alive her legitimate expectation of being able to sign a new contract. Because this expectation only ended on 5 January 2021 when the effective and final end of her contract was made known to her, this is the date that should be regarded as the start of the thirty-day period.

44. Because the appellant disputed the non-renewal of her contract on 6 January 2021 – the date of her request for protection in her official capacity (see paragraph 20) – she was within the time limit and her request is admissible.

45. With regard to the admissibility of her request in relation to the protection and safety measures put in place at the EDQM when she was pregnant, the appellant points out that Article 40 of the Staff Regulations does not stipulate any time limit for making a request to the Secretary General for protection in an official capacity.

46. According to the appellant, the decision of 25 February 2021 refusing to grant her protection in her official capacity is the one that marks the beginning of the limitation period as it is quite separate from, and does not merely confirm, the decisions of 16 January and 6 February 2018 by way of which the Administration refused to reduce her working time during her pregnancy (see paragraph 14) on the one hand and informed her that she would only label D batches and not fill them (see paragraph 11) on the other hand.

47. Because the appellant's administrative complaint was lodged on the day when notice of the impugned decision was given to her, i.e. 25 February 2021, the time limit allowed by Article 59, paragraph 3 b), of the Staff Regulations was adhered to. For this reason, the request in relation to which the appellant complains that she was not adequately protected by the protection and safety measures for pregnant women working at the EDQM is admissible.

48. The appellant concludes that her appeal is admissible in its entirety.

C. The Tribunal's assessment

49. The Tribunal reiterates the importance of compliance with the prescribed time limits when lodging an administrative complaint in order to ensure observance of the principle of legal security in the interests of both the Organisation and its staff (see ATCE, Appeal No. 416/2008 – Švarca v. Secretary General, decision of 24 June 2009, paragraph 33 with further references).

50. The Tribunal also points out, with reference to the principles laid down by the European Court of Human Rights, that the primary purpose of the thirty-day time limit stipulated in Article 59, paragraph 3 b), of the Staff Regulations (and the sixty-day time limit under Article 60, paragraph 3, of the Staff Regulations) is to maintain legal certainty. It must be ensured that cases raising general points of law or concerning the regulations of an international organisation such as

the Council of Europe are examined within a reasonable time and that the authorities of the Organisation and/or other persons concerned are not kept in a state of uncertainty for a long period of time (see, *mutatis mutandis*, European Court of Human Rights (ECHR), Case of Sabri Güneş v. Turkey [Grand Chamber], Application No. 27396/06, paragraph 39, 29 June 2012). These time limits also enable a potential appellant to consider submitting a complaint and, where applicable, lodging an appeal with the Tribunal.

51. The Tribunal further points out that it can hear a case only once a final internal decision has been adopted by the Organisation. It considers that the dates of final decisions for the purposes of Article 59, paragraph 3, of the Staff Regulations (and, in parallel, of Article 60, paragraph 3, of the Staff Regulations) should be established with due regard being had to the subject-matter of the case and the essential purpose which the appellant wished to achieve (see ATCE, Appeals Nos. 661/2020 and 662/2020, Ulrich Bohner (VII) and Antonella Cagnolati v. Secretary General, decision of 26 April 2021, paragraph 71).

52. With regard to the plea of inadmissibility on the ground that the request in relation to the non-renewal of the appellant's contract was made out of time, the question that arises for the Tribunal is whether, in this case, the letter of 26 October 2020 giving notice of the end of this contract can be regarded as an act adversely affecting her which could start the limitation periods – as the Secretary General asserts – or whether, on the contrary, and as the appellant asserts, this act cannot be regarded as an act adversely affecting her as it does not contain any information that was not already given in the terms of the contract.

53. The Tribunal observes in this regard that after reminding the appellant that she was "currently employed by the Council of Europe on a fixed-term contract ending on 31 January 2021", the letter in question stated that as a result, "[her] fixed-term contract will not be renewed beyond 31 January 2021". Although the information given in relation to the end of the CDD did not contain any details that had not already been given in the terms of the appellant's contract (see paragraph 7 above), the Tribunal considers that the information relating to the fact that her contract was not being renewed was an act that affected her adversely, was distinct from the contract in question and could be complained about and appealed within the prescribed time limits.

54. Furthermore, even if it is assumed that the appellant had a legitimate expectation of signing a new contract (see paragraph 43), the Tribunal considers that the unambiguous wording of the letter of 26 October 2020 removed any possibility that such an expectation could subsist. After this date, the appellant could no longer have had any reasonable hope that her fixed-term contract would be renewed, and she cannot claim to have continued to entertain this hope until 5 January 2021 in order to be exempted from having to adhere to the mandatory time limits for lodging an administrative complaint.

55. It follows from the foregoing that the appellant needed to challenge the act adversely affecting her, i.e. the letter informing her that her contract would not be renewed, within 30 days reckoned from 26 October 2020, i.e. no later than 25 November 2020. Because she only lodged her administrative complaint on 25 February 2021, the appellant was debarred from challenging the non-renewal of her CDD in it and this part of her appeal must be regarded as inadmissible,

which obviates any need for the Tribunal to concern itself with the argument based on a claimed legitimate expectation of obtaining a new contract.

56. With regard to the plea of inadmissibility on the ground that the appellant's request in relation to the protection and security measures put in place at the EDQM when she was pregnant was out of time, the Tribunal notes that the relevant provisions of the Staff Regulations (see paragraph 26) do not lay down any time limit for asking the Secretary General for protection in one's official capacity.

57. Because the appellant made her request for protection in her official capacity on 6 January 2021 and lodged her administrative complaint against the decision to refuse this request on the day when she was notified of the decision, i.e. 25 February 2021, the time limit specified in Article 59, paragraph 3 b), of the Staff Regulations was adhered to and this part of the appeal must be deemed admissible.

58. Consequently, the plea of inadmissibility on the ground of lateness raised by the Secretary General is partly justified in that the Tribunal considers itself to have jurisdiction to examine only the appellant's ground of appeal concerning alleged inadequacy of the protection and safety measures put in place at the EDQM when she was pregnant.

II. MERITS OF THE APPEAL

A. The appellant

59. The appellant considers that she was not protected adequately by the Council of Europe during her pregnancy, and subsequently while she was breastfeeding, in her capacity as a staff member of the Council of Europe and that as such, she was justified in asking the Secretary General for protection in her official capacity.

60. The appellant feels that by not taking account of her legitimate concerns about exposure to toxic medicines and by being slow to reply to her questions and her requests to adjust her working time, the Organisation put her in a particularly worrying position and thereby breached its duties of protection and safety in her workplace, causing her non-pecuniary harm.

61. The appellant maintains that protection in an official capacity under Article 40 of the Staff Regulations was applicable in her case. In this regard, she cites the case law of this Tribunal which states that protection in an official capacity also applies to acts of the Organisation (see ATCE, Renate Zikmund (I) and (II) v. Secretary General, Nos. 414/2008 and 459/2009, decision of 30 October 2009, paragraph 56).

62. Because the appellant made her request for protection in her official capacity on 6 January 2021 when she was still working for the Organisation, she did have capacity to make such a request.

B. The Secretary General

63. The Secretary General firstly notes that a request for protection in an official capacity is not relevant in the appellant's case because according to Article 40 of the Staff Regulations, the

purpose of such protection is to protect a staff member in the course of performing his/her duties from actions of third parties outside the Organisation.

64. The Secretary General then notes that the appellant made her request for protection in her official capacity at the beginning of 2021 – when her employment relationship with the Organisation was about to end – in relation to events dating back to 2018. Therefore, this request did not contain a request to take measures and was instead a repeat of the same questions, several years after the facts at issue, unsupported by any new information.

65. After mentioning the various measures put in place at the EDQM to protect the health and well-being of staff members in the course of their duties, the Secretary General gives a great deal of technical information in order to show that the appellant was not exposed to any risks. She states that the change that was made to the internal instructions during the appellant's pregnancy, which was the cause of her concerns, was intended to prevent any anxiety for pregnant staff members and not to avert any specific risk to the staff members concerned.

66. Insofar as the appellant alleges that her superiors failed to take into account her concerns in relation to her pregnancy, the Secretary General goes back over the history of the discussions between the appellant, her managers and the Organisation's medical officer in order to show that everything possible was done to address her concerns, in accordance with the applicable regulations.

67. The Secretary General concludes that protection in an official capacity under Article 40 of the Staff Regulations is not applicable to the appellant and that in any event, the Organisation showed her kindness and concern and cannot be accused of any failings in this case.

C. The Tribunal's assessment

68. Firstly, the Tribunal notes that in relation to the request for protection in an official capacity that the appellant made on 6 January 2021, shortly before her contract ended on 31 January 2021, the appellant makes reference to events and discussions that took place during her pregnancy and her maternity leave and shortly after she returned to work at the end of this leave, between the beginning of 2018 and the first few months of 2019.

69. The facts mentioned in the request for protection in an official capacity relate primarily to the implementation of new instructions for pregnant women from February 2018 on the one hand, and the appellant's request of 16 January 2018 for a reduction in her working time when she returned from maternity leave on the other hand. In both cases, the appellant could, if she had so wished, have availed herself of the ordinary remedies referred to in Article 59, paragraph 2, of the Staff Regulations in order to challenge, by way of an administrative complaint, the measures that were taken in respect of her at the time when she learned of them.

70. In this case, in a situation which she claims affected her adversely, the appellant – while expressing concerns and asking questions – did not exercise the remedies available under Article 59 of the Staff Regulations at the time of the facts at issue. Instead, she repeated the concerns and questions set out in her request for protection in her official capacity, several months

after she had made it, when her contract of employment was nearing its end. By acting in this manner, i.e. by exercising a remedy – protection in an official capacity – which is not subject to any requirement to adhere to time limits for grievances that could have been raised by way of an administrative complaint, the appellant disregarded the mandatory time limits that apply to the ordinary remedies.

71. The Tribunal cannot endorse such use of the procedure available under Article 40 of the Staff Regulations, which had the effect of diverting protection in an official capacity away from its primary purpose of protecting staff members' material or non-material interests and those of their family where these interests are at risk. In general, the Tribunal underlines that the procedure provided for in Article 40 of the Staff Regulations cannot replace the procedures provided for in Articles 59 and 60 of the aforementioned Regulations and cannot be invoked in order to circumvent the time limits stipulated in these two articles.

72. In these circumstances, the Tribunal considers that the appellant was not in a position to invoke Article 40 of the Staff Regulations and that her request for protection in an official capacity under this article is unfounded.

73. The Tribunal therefore concludes that this part of the appeal is unfounded.

III. CONCLUSION

74. In conclusion, the appeal is partly inadmissible and partly unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares the appeal partly inadmissible and partly unfounded and dismisses it;

Orders that each party shall bear its own costs.

Adopted by the Tribunal by videoconference on 24 January 2022 and delivered in writing pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 27 January 2022, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
Christina OLSEN	Nina VAJIĆ