ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Appeal No. 737/2023

G.T.

v.

Secretary General
of the Council of Europe

***

JUDGMENT

25 January 2024

The Administrative Tribunal, composed of:

Nina VAJIĆ, Chair,
Lenia SAMUEL,
Thomas LAKER, Judges,

assisted by:

Christina OLSEN, Registrar,
Dmytro TRETYAKOV, Deputy Registrar,

has delivered the following judgment after due deliberation.

PROCEEDINGS

1. The appellant, G.T., lodged his appeal on 1 August 2023. It was registered the same day under No. 737/2023.

2. On 14 September 2023, the Secretary General forwarded her observations on the appeal.

3. The public hearing took place in the court room of the Administrative Tribunal in Strasbourg on 6 November 2023. The appellant was represented by Maître Grégory Thuan Dit Dieudonné, member of the Strasbourg Bar. The Secretary General was represented by Jörg Polakiewicz, Director of Legal Advice and Public International Law (Jurisconsult), assisted by Benno Kilian, Head of the Legal Advice and Litigation Department, and Sania Ivedi, Administrative Officer in the same department.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

4. The appellant is a former Council of Europe staff member who was employed at a duty station outside France from 17 July 2017 to 9 December 2022 on a temporary contract, initially on grade B3 and then, from 1 July 2022, grade B4.

5. By email of 3 October 2022, the appellant's superior asked him to make himself available for a meeting, the next day, 4 October 2022, in the presence of the Human Resources Correspondent regarding an urgent human resources matter. The email read as follows:

> "Dear […],
> There is an urgent Human Resources matter that [the Human resources correspondent] and myself would need to discuss with you tomorrow morning.
> Thanks for joining us at the staff meeting room tomorrow at 10 am."

6. At the meeting on 4 October 2022, the appellant was told by his superior that a person outside the Council of Europe whom he had met in connection with his duties had complained about acts that could be considered sexual harassment which they said the appellant had committed towards them. The appellant was invited to respond to several questions regarding the conduct concerned. At the end of the meeting, he was told that the matter would be examined by the Directorate of Human Resources (DHR) at a later date and that he would be contacted again in this connection.

7. On 3 November 2022, the appellant received a letter from DHR notifying him that his temporary contract would terminate early on 4 December 2022 because of his manifest unsuitability for the work he was employed to carry out. The email was worded as follows:

> "Dear […],
> This is to inform you that your temporary contract with the Organisation will terminate as of 4 December 2022, pursuant to Rule No. 1234 laying down the conditions of recruitment and employment of locally recruited temporary staff members working in Council of Europe Duty Stations locations outside of France. The reason for the early termination of your contract is your manifest unsuitability for the work that you were employed to carry out. I refer in this regard to your meeting on 4 October 2022 with your hierarchical superior (…) and (…) the HR Correspondent.
>
> Please be advised that this letter serves as both the written warning and the notice required by the aforementioned Rule. Your salary will be paid until 4 December 2022; however, the Organisation wishes to dispense with your services as of 9 November 2022. You should not therefore come to your place of work after that date. (…)."

8. Following a request for clarification from the appellant, his superior sent him an email dated 3 November 2022. This email explained the procedure which had been followed upon receipt of the report of harassment, given that the person concerned had not wished to file a formal complaint with the Commission against Harassment. The email was worded as follows:

> "(…)
>
> On your question on the procedure, in attachment you can find the information that was shared with the alleged victim.
> Following the report from (…) (who was advised by the CoE DHR colleagues), the report reached me as your supervisor and I initiated the contacts with [the alleged victim].
> Advised by the Anti-Harassment secretaries, I presented [the alleged victim] with the different options once there was no space for non-contentious procedure as [the alleged victim] stated [the wish not to have] any contact with you. I transmitted these two options.
>
> A. Filing a formal complaint to the CoE Anti-Harassment commission
> (…)
>
> Alternatively,
>
> B. If the victim does not feel comfortable to pursue the complaint as described above, I could, as your supervisor, initiate the procedure confronting you with the situation, allowing you to share your version of the facts, and informing you that I am obliged to report officially the case to the CoE Human Resources Department and Anti-Harassment Secretaries for them to assess the case and decide on the actions to be taken.
>
> We followed option B. (…)"

9. On 8 November 2022, a videoconference was held between the appellant and the then Director of Human Resources concerning the termination of the appellant's employment contract.

10. On 22 November 2022, a meeting was held between the appellant and his superior, along with the Human Resources Correspondent, concerning the termination of the appellant's employment contract.

11. On 2 December 2022, the appellant lodged an administrative complaint against the decision to terminate his employment contract early. On that occasion, he sought the opinion of the Advisory Committee on Disputes.

12. On 4 May 2023, the Advisory Committee on Disputes gave its opinion. The conclusions of the opinion read as follows:

> "(…)
>
> 19. The Secretary General terminated the Complainant's contract pursuant to Articles 8 (c) and 9 of Rule No. 1234. The Committee notes that the conduct that formed the basis of the allegations against the Complainant could also have allowed the Secretary General to initiate disciplinary proceedings (as referred to in Article 8 (a) of Rule No. 1234).
>
> 20. Noting that the sanction pronounced against the Complainant was the most severe possible, being the termination of his contract, the Committee considers that disciplinary proceedings would have offered the Complainant stronger guarantees in terms of defence rights and establishment of the facts. Moreover, although the procedure that was followed appears to have complied with the requirements of Articles 8 (c) and 9 of Rule No. 1234, the Committee finds it regrettable that the Complainant did not have an interview with the Director of Human Resources before the decision to terminate his contract was taken; indeed, he had an interview with her on 8 November 2022, whereas he had been notified by the Directorate of Human Resources on 3 November 2022 that his contract was terminated due to his "manifest unsuitability for the work that [he was] employed to carry out".
>
> 21. Nonetheless, the Committee agrees that the conduct of staff members must be beyond reproach, in particular when they represent the Organisation in the context of external events. Allegations of conduct such as the one described by the Secretary General in her submissions (…) undoubtedly call for a swift and serious reaction."

13. On 5 June 2023, the Secretary General dismissed the appellant's administrative complaint.

14. On 1 August 2023, the appellant lodged the present appeal.

II. THE RELEVANT LAW

15. Paragraph 4 of Rule No. 1234 of 15 December 2005 laying down the conditions of recruitment and employment of locally recruited temporary staff members working in Council of Europe Duty Stations located outside of France, as in force at the relevant time, lists the following among the provisions of the Staff Regulations that apply to locally recruited temporary staff:

"(…)

a. Article 2 on hierarchical authority
(…)
e. the provisions of Part III on the duties and obligations of staff
(…)
j. the provisions of Part VI on discipline and Appendix X on Disciplinary Proceedings and
k. Articles 59, 60 and 61 on disputes."

With regard to the termination of the contracts of the staff concerned, the aforementioned Rule No. 1234 provides as follows:

"(…)

7. The employment contracts shall terminate without prior notice on the date stipulated therein.

8. The employment contracts of locally recruited temporary staff members may be terminated by the Secretary General:
   a. without prior notice, where the termination has been imposed as a disciplinary measure in the manner prescribed by the provisions of Part VI of the Staff Regulations and the Regulations on Disciplinary Proceedings (Appendix X to the Staff Regulations);
   b. without prior notice, if they knowingly made false statements in their application for employment or at the time of their engagement;
   c. with one month's notice and after a written warning, for manifest unsuitability or unsatisfactory work on their part;
   d. with three months' prior notice, for a lack of available financing.

9. In the cases referred to in paragraph 8 b. and c. above, the reasoned decision to terminate an employment contract shall be taken after the locally recruited temporary staff member concerned has been heard by his or her hierarchical superior."

16. Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe, as in force at the relevant time, prohibits any form of sexual or psychological harassment in the workplace and/or in connection with work at the Council of Europe. Part II on "Non-contentious procedure" sets out the measures available to persons who consider themselves to be victims of sexual or psychological harassment and who are not staff members if they do not wish to file complaints with the Commission against Harassment:

"(…)

Article 3 - Direct Discussion

Persons who consider themselves victims of sexual or psychological harassment are advised to discuss the matter directly with the other party to ensure that the situation is not the result of a misunderstanding and, should this be the case, to put an end to it. However, there is no obligation upon them to avail themselves of this possibility.
(…)
Article 6 - Confidential Counsellors

1. Any person who considers him/herself to be a victim of sexual or psychological harassment may seek the assistance and advice of a Confidential Counsellor.
(…)

> 4. The role of the Confidential Counsellors shall be to provide support to the persons who seek their assistance and advice, to inform them about the procedures of this Rule and, if necessary, to help them in the steps they take. (...)
> 5. All information given by the alleged victim to a Confidential Counsellor in that capacity shall be considered as confidential and may not be used for any purpose whatsoever without the alleged victim's consent.
> (…)
> Article 7 - Mediation
>
> Persons who consider themselves victims of sexual or psychological harassment may have recourse to one of the Mediators under the conditions of the Rule on Mediation. However, recourse to the Commission against Harassment shall suspend the procedure before the Mediators."

THE LAW

17. In his appeal, the appellant asks the Tribunal to set aside the decision taken by the Secretary General on 3 November 2022 to terminate his temporary contract early because of his manifest unsuitability for his work, and the decision of 5 June 2023 dismissing his administrative complaint against that decision. The appellant also asks the Tribunal to order the payment of compensation for pecuniary damage suffered of €21 880.95, corresponding to the salaries he did not receive up to 31 December 2022 (the date on which his contract was due to expire) and then from January to June 2023 (in respect of his legitimate expectation that his contract would be renewed for a six-month period). The appellant also requests that the Tribunal order the payment of compensation for non-pecuniary damage estimated at €10 000, plus the sum of €5 400 for costs and expenses.

18. For her part, the Secretary General invites the Administrative Tribunal to declare the appeal unfounded and to dismiss it. Stating that the Council of Europe has done nothing illegal to incur its liability towards the appellant, the Secretary General further seeks the dismissal of the appellant's claims for compensation. If the Tribunal were nevertheless to set aside the impugned decision, the Secretary General maintains, as to the pecuniary damage, that compensation should not exceed the amount of the salary which the appellant would have received if his contract had run until its term, namely 31 December 2022, as the appellant had no right to have his temporary contract renewed. As to the non-pecuniary damage, the Secretary General believes that any harm to the appellant's reputation in the field he works in is not the fault of the Organisation, as every care was taken not to cause him harm. The appellant's claim for compensation in this connection should therefore also be dismissed as unfounded and unsubstantiated. As the appeal is unfounded, the appellant's claim for costs should also be dismissed.

I. THE PARTIES' SUBMISSIONS

1. The appellant

19. The appellant begins by submitting that the procedure followed to terminate his contract early failed to comply with the applicable rules and breached the general principles of international civil service law.

20. In this connection, the appellant alleges a breach of Article 8 c) of Rule No. 1234 on the grounds that he did not receive a written warning before Administration took the decision to terminate his contract, whereas the relevant provision specifically requires such a warning to be issued before a contract is terminated. Contrary to the Secretary General's assertions, the email of 3 November 2022 notifying him of the impugned decision cannot be construed as a written warning because, under the aforementioned provision, Administration may terminate contracts for manifest unsuitability only after issuing warnings to the staff members concerned.

21. The appellant notes that in failing to comply with the requirements of Article 8 c) of Rule No. 1234, Administration also breached several general principles of international civil service law. In this connection, he refers to the principle of mutual trust and good faith, Administration's duty of care towards its staff and the corollary thereto, namely the right of the staff member concerned to be heard beforehand concerning the measure envisaged by Administration. In view of these principles, it fell to Administration to make its intentions known and thus give the appellant an opportunity to put forward his point of view and defend his interests effectively. Yet the appellant believes he was denied this opportunity because the preliminary meeting on 4 October 2022 did not deal with Administration's intention to terminate his contract and did not therefore enable him to present his views on the matter.

22. The appellant further submits that the impugned decision was flawed on account of an abuse of procedure. He maintains that under the guise of the ground of manifest unsuitability put forward, Administration actually wanted to discipline him for his allegedly harassing conduct, without initiating disciplinary proceedings. In so doing, the Organisation had violated the appellant's rights of defence, as he had been denied the opportunity to present other evidence or information in his defence and had been unable to argue that Administration had failed to provide proof, beyond all reasonable doubt, of the accusations made against him. The appellant points out here that he was not able to defend himself effectively at the meeting on 4 October 2022 since, on that occasion, he did not have access to any documents and did not have the time or detachment necessary to prepare or substantiate his arguments.

23. In addition to the procedural flaws cited, the appellant alleges that inadequate reasons were given for the impugned decision. In this connection, he notes that the decision in question does not contain any precise reasons, other than a reference to the meeting on 4 October which itself did not provide any reasons of any kind.

24. Lastly, the appellant contests the manifestly disproportionate nature of the measure imposed on him. He maintains that none of the criteria established in international case law on the matter and which must be taken into consideration when imposing relevant measures – whether the nature of the allegations, the number of persons concerned, the duration of the alleged misconduct, its repetitive nature or the consequences for the victim – justifies the termination of his contract. On the contrary, the appellant underlines that his annual appraisals testify to the professionalism and respect he always showed in his work. He also submits a number of certificates to demonstrate that his personality is perfectly respectful of and sensitive to gender issues.

2. The Secretary General

25. The Secretary General begins by referring to the circumstances which led to the decision to terminate the appellant's contract under Rule No. 1234. The Secretary General states that at the meeting on 4 October 2022 the appellant confirmed the facts as reported by the person claiming to be the victim of sexual harassment because of the appellant's conduct. At the end of the meeting, it had therefore been clear that the appellant was manifestly unsuitable for his work, in particular in view of the responsibilities he was entrusted with.

26. Moreover, the Secretary General points out that this was not the first time that incidents of this kind, involving inappropriate conduct by the appellant, had been brought to his superiors' attention. The Secretary General refers to an episode that occurred in 2018, following which the appellant had received an oral warning from his superiors. In her view, the whole range of acts of which the appellant was accused and his inability to recognise that they were potentially problematic demonstrated a clear lack of willingness on his part to correct his attitude in line with the standards expected of him.

27. According to the Secretary General, insofar as the appellant's conduct caused clear harm to the Council of Europe's image and reputation, the Organisation had to react swiftly and take all necessary measures to avoid a repetition of such conduct. In these circumstances, the Organisation had no choice but to terminate the appellant's contract.

28. The Secretary General goes on to state that the impugned decision was taken in full compliance with the relevant regulations because, firstly, it served both as a written warning and as one month's notice, in accordance with Article 8, paragraph c) of Rule No. 1234 and, secondly, it was taken only after the appellant had been heard, at the meeting on 4 October 2022, in accordance with Article 9 of the said rule. Moreover, the appellant was given the opportunity to discuss and obtain further information about the reasons for the decision of 3 November 2022 at two meetings on 8 and 22 November 2022.

29. As to the appellant's argument that disciplinary proceedings ought to have been initiated before his contract could be terminated, the Secretary General comments that, in the light of the general context and insofar as the appellant had confirmed the facts, the most suitable procedure was the one that was actually followed. The Secretary General notes that in its opinion of 4 May 2023, the Advisory Committee on Disputes approved the decision to terminate the appellant's contract insofar as his conduct called for a swift and serious reaction by the Organisation.

30. Lastly, as to the appellant's complaint that insufficient reasons were given for the decision to terminate his contract, the Secretary General maintains that the appellant had been fully informed of the grounds for the decision. It fitted into a context he was familiar with, namely the facts about which he had the opportunity to be heard by his superior at the meeting on 4 October 2022. Moreover, the appellant was informed in detail about the reasons for the decision in the reply to his administrative complaint. That information served to further enlighten the appellant as to the reasons for the impugned decision, and was provided in sufficient time to enable him to make his case in the present appeal.

31. The Secretary General concludes that the impugned decision was justified, legal and taken in accordance with all the relevant principles.

II. THE TRIBUNAL'S ASSESSMENT

32. The subject of the present appeal raises the question as to whether, as the Secretary General maintains, the decision to terminate the appellant's contract by a letter serving both as notice and a written warning was in line with the letter and spirit of the relevant regulations or, as the appellant claims, in proceeding in this manner Administration disregarded those regulations and thereby breached several general legal principles, including the rights of the defence.

33. The Tribunal notes that under the relevant provisions, namely Article 8 c) together with Article 9 of Rule No. 1234, the termination of contracts of locally recruited temporary staff members for manifest unsuitability or unsatisfactory work is subject to several safeguards, including both notice and written warnings (Article 8 c of Rule No. 1234) and also the right to be heard (Article 9 of the said rule).

34. When it comes to determining the scope and interplay of these various safeguards, the Tribunal points out that "it is a basic rule of interpretation that words which are clear and unambiguous are to be given their ordinary and natural meaning and that words must be construed objectively in their context and in keeping with their purport and purpose" (see Administrative Tribunal of the Council of Europe (ATCE), Appeals Nos. 722/2022, 731/2022, 732/2022 and 733/2022, decision of 4 April 2023, *Orekhova and others v. Secretary General,* paragraph 58, and cited case law).

35. As to the wording of the provisions concerned, the Tribunal notes, first of all, that Article 8 c) of Rule No. 1234 differs from Article 8 a) and b). While the latter do not provide for a safeguard in terms of notice let alone a written warning, Article 8 c) provides for a safeguard in terms of notice after a written warning in the event of termination for manifest unsuitability or unsatisfactory work.

36. In view of the above and having regard to the relevant case law (Administrative Tribunal of the International Labour Organisation (ILOAT), Judgment No. 4674, consideration 17; ILOAT, Judgment No. 3911, consideration 11 and cited case law; ILOAT, Judgment No. 1484, consideration 8; ILOAT, Judgment No. 1082, consideration 18), the Tribunal considers that the written warning serves the specific purpose of informing the staff member of the consequences which they face if they fail to remedy shortcomings in conduct, performance or of any other kind which might justify certain measures, such as dismissal, being taken against them. In the context of Article 8 c) of Rule No. 1234, the written warning should therefore enable staff members in situations of manifest unsuitability or unsatisfactory work to understand the criticisms levelled against them and attempt to remedy the shortcomings, in the knowledge that they risk losing their jobs if they fail. This differs from the situations provided for in Article 8 a) and b), where the wrongdoing staff members are accused of is of such a nature and seriousness that granting them the benefit of this "last chance" to improve their conduct is not justified.

37. As to the right to be heard provided for in Article 9 of Rule No. 1234, the Tribunal clarified its scope in paragraphs 38 and 39 of its decision of 5 September 2006 on Appeal No. 353/2005,

C.G. v. Secretary General. In that case, the Tribunal held that a temporary staff member's right to be heard in the event of termination of his employment "must necessarily be construed as a right intended to enable the staff member concerned to defend himself or herself. Since it is a guarantee given to the staff member, this [right] cannot be interpreted as being confined to mere questioning and to listening to the staff member's on-the-spot replies." The Tribunal has also stated that "the exercise of the right of defence, and in particular the right to be heard, also implies that the Administration must give due consideration to the observations thus submitted by the person concerned by examining, with care and impartiality, all the relevant aspects of the case. The right to be heard must thus enable the Administration to investigate the case in such a way as to take a decision in full knowledge of the facts," while pointing out that "the existence of a violation of the right to be heard must be assessed in the light, in particular, of the legal rules governing the matter concerned" (ATCE, Appeal No. 651/2020, decision of 13 July 2021, *B v. Secretary General*, paragraphs 88 and 89).

38. In the particular context of the combined application of Article 8 c) and Article 9 of Rule No. 1234, the Tribunal considers that Administration may not take a decision to terminate a contract on grounds of manifest unsuitability or unsatisfactory work under these provisions without first warning the staff member of its intentions so as to enable them to put forward their arguments in defence.

39. The Tribunal notes that although the appellant was indeed informed at the meeting on 4 October 2022 about the criticisms of his conduct made by a person outside the Organisation, he was never clearly warned about the Organisation's intention to terminate his contract early. The Tribunal therefore holds that the Organisation failed to meet the requirement to issue a written warning when it wrote to the appellant on 3 November 2022 notifying him of the termination of his contract. When the letter was sent, the impugned decision had already been taken without the appellant having been notified beforehand. In other words, while the letter of 3 November satisfied the notice requirement under Article 8 c) of Rule No. 1234, it could not at the same time meet the requirement for a prior written warning.

40. As to the right to be heard provided for in Article 9 of Rule 1234, the circumstances in which the appellant was heard on 4 October 2022 also fail to meet the requirements of that provision, as, for that purpose, the appellant would have had to be informed before the impugned decision of 3 November 2022 not only about the accusations against him but also about what was at stake for him, namely the risk of losing his job. The exchanges held subsequently on 8 and 22 November 2022, between the appellant, his superiors and DHR representatives were not such as to make up for that shortcoming retrospectively.

III. CONCLUSION

41. Having deprived the appellant of his right to receive a written warning and his right to be heard, the impugned decision is flawed on formal grounds and must therefore be set aside. That being the case, there is no need to rule on the appellant's remaining complaints.

IV. CLAIMS FOR DAMAGES AND COSTS

42. The appellant is entitled to compensation for the harm caused to him. His contract was due to expire on 31 December 2022 and conferred no right to renewal. Pecuniary compensation may therefore be set at the amount of salary which the appellant would have received if his contract had run until its term, on 31 December 2022. The appellant must also have sustained some non-pecuniary damage which the mere finding of a violation cannot adequately compensate. He must accordingly be awarded €3 000 in this respect.

43. Lastly, the appellant is seeking the award of costs and expenses for which he submits a detailed supporting document for the amount of €5 400. Taking the nature and the importance of the dispute into account, the Tribunal awards this sum.

For these reasons, the Administrative Tribunal:

Declares the appeal founded and sets aside the impugned decision;

Orders the Secretary General to pay the appellant the sum corresponding to the salary which he should have been paid if his contract had run until its term, on 31 December 2022;

Decides that the Council of Europe shall pay the appellant the sum of €3 000 for non-pecuniary damage and the sum of €5 400 in costs and expenses.

Adopted by the Tribunal, meeting in Strasbourg, on 23 January 2024, and delivered in writing pursuant to Rule 22, paragraph 1, of the Tribunal's Rules of Procedure on 25 January 2024, the French text being authentic.

The Registrar of the
Administrative Tribunal

Christina OLSEN

The Chair of the
Administrative Tribunal

Nina VAJIĆ