

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER of 10 June 2021

in the case of Ourania BOTSI v. Secretary General

THE FACTS

1. The complainant, Ms Ourania Botsi, is a staff member who has been regularly employed at the Council of Europe, at the Secretariat of the Co-operation Group to combat drug abuse and illicit trafficking in drugs (Pompidou Group), on the basis of temporary contracts since September 2016. She currently works for the above Secretariat of the Pompidou Group.

2. Following the publication of vacancy notice no e46/2020, the complainant applied for the external competition for the recruitment of Senior Project Officers (grade B5).

3. On 12 May 2021, the Directorate of Human Resources (hereinafter the "DHR") informed the complainant that after careful examination of her application together with those of 873 other candidates, her application was not considered among the best matched to the eligibility criteria. She was therefore not invited to the next stage of the selection procedure consisting of online assessments scheduled for 31 May 2021.

4. At the complainant's request, she was given feedback on the reasons why her application had not been shortlisted on 20 May 2021. She was informed that she did not fulfil one of the essential requirements set out in the vacancy notice, namely to "*have a minimum of 3 years' of relevant project management experience in at least one of the areas mentioned in the vacancy notice*".

5. On 25 May 2021, the complainant submitted to the DRH a request for a review of the decision, setting out the reasons why she considered that she met the professional experience criterion.

6. On 27 May 2021, the DHR replied to the complainant that after a careful review of her file and additional information provided by her management, it was confirmed that her application did not meet the professional experience criterion set out in the vacancy notice and that the decision not to invite her to the next stage of the selection procedure was maintained.

7. On the same day, the complainant lodged an administrative complaint asking to be admitted to the competitive examination on the grounds that she fulfilled the professional experience criterion. In her complaint, the complainant submits that it is discriminatory in the

context of an external competition to consider appraisal reports of temporary staff as a qualification criterion, when such a criterion cannot be applied to external candidates whose current or past employment appraisal(s) cannot be retrieved or otherwise evaluated at the pre-selection stage. She adds that vacancy notice no. e46/2020 did not require from candidates to submit any proof at that stage. She considers therefore that the practice applied in assessing her application was discriminatory and against the framework set by the vacancy notice.

8. On 27 May 2021, the complainant applied to the Chair of the Administrative Tribunal for a stay of execution (Article 59 paragraph 9 of the Staff Regulations).

9. On 31 May 2021, under provisional measures granted by the Secretary General, the complainant took part in the online assessments within the recruitment procedure in question.

10. On 2 June 2021, the Secretary General submitted her observations on the application for a stay of execution.

11. On 6 June 2021, the complainant submitted her memorial in reply.

THE LAW

12. Under Article 59 paragraph 9 of the Staff Regulations, an application for a stay of execution of an act of the Administration may be lodged if its execution is likely to cause “grave prejudice difficult to redress”.

13. According to the same provision, the Secretary General must, save for duly justified reasons, stay the execution of the act until the Chair of the Administrative Tribunal has ruled on the application in accordance with the Tribunal’s Statute.

I. THE PARTIES’ SUBMISSIONS

14. By her application, the complainant requests the Chair to adopt a decision for a stay of execution of the decision of the DHR not to invite her to the written exams of the competitive examination e46/2020 by imposing a duty on the Secretary General to decide on whether her application for the Vacancy Notice e46/2020 renders her eligible for invitation to the written exams, and if so, invite her to the written exams on 31 May or on a later date.

15. After setting out her arguments which relate rather to the merits of her administrative complaint, the complainant maintains that she would suffer irreparable damage if the recruitment procedure continues without her being able to sit the written exams.

16. The complainant further submits that not being shortlisted signifies to her a loss of opportunity to pass the competition concerned and therefore to potentially be offered regular employment within the Organisation. She considers that this constitutes grave prejudice, especially in view of her complaint on the merits that she was refused a place in the competition based on discriminatory grounds.

17. The complainant adds that the present case also puts her at risk of potentially losing her current employment. Within the framework of the upcoming reform of the regulatory framework for staff management, the complainant observes that she may no longer be eligible

to work for the Organisation if she does not pass an open competition giving her access to a fixed-term/open-end contract. She takes the view that her current employment and the fact that she has been employed on the basis of temporary contracts since 2016 are circumstances that should be given appropriate weight in the Tribunal's deliberations in her case.

18. As to the solution proposed by the Secretary General (see paragraph 24 below), the complainant emphasizes that even if her name were to be – subsequently – included on the reserve list, she will have significantly less chance of being recruited if other successful candidates will have the opportunity to be recruited before her.

19. The complainant also asserts that her application for a stay of execution should in the particular circumstances of her case be reviewed, *inter alia*, on the probability of success in the main proceedings. She adds that, given what is at stake for her in the event of not granting her the stay of execution, on the one hand, and what efforts and costs are to be incurred by the Secretary General in the event of granting her stay of execution, on the other hand, she would suffer hugely disproportionate damage to that arising for the Secretary General from the stay of execution.

20. Following the Secretary General's decision to grant her request provisionally and to invite her to participate in the online assessment that took place on 31 May 2021, the complainant reformulated her request for a stay of execution, proposing its implementation "by imposing a duty on the Secretary General to maintain her provisional decision to invite the complainant to take the online written examination of Vacancy Notice e46/2020, and to provisionally grant the complainant a place in the competition concerned, pending the final decision of the Administrative Tribunal, thus allowing for her paper submitted on 31 May 2021 to be marked and the competition to continue without posing any obstacles to its timeline".

21. The Secretary General observes at the outset that, at this stage, there can be no question of any assessment of the arguments related to the merits of the case, as the present proceedings concern only urgent measures.

22. The Secretary General submits that it is for the complainant, who applies for a stay, to establish the existence of a "grave prejudice difficult to redress".

23. According to the Secretary General, the complainant's arguments relate to the merits of the complaint and her application for a stay of execution is unsubstantiated.

24. The Secretary General adds that the normal conduct of this competition and future recruitments are in no way likely to cause any harm to the complainant, since, in the unlikely event that the Tribunal were to rule in her favour in a possible appeal, the Secretary General could follow the solution applied in the past to execute the decision rendered by the Tribunal. In this respect, she recalls that in the context of Appeal No. 455/2008, *Musialkowski v. Secretary General*, the execution of the Tribunal's decision consisted of organising new written tests for all candidates concerned. In this competition, written exams and interviews had already taken place, a reserve list had already been established and some successful candidates had already been recruited. Following the new written exams and interviews which took place in execution of the Tribunal's decision, a new reserve list was drawn up and integrated into the initial reserve list. The candidates on the second reserve list were thus not prejudiced and could be recruited in the normal way.

25. The Secretary General further presents her arguments as to the negative consequences for the Organisation if the recruitment procedure of senior project officers is suspended.

26. She concludes by stating that the prejudice invoked by the complainant, if any, would not be of such a nature as to justify the stay of execution and requests the Chair to declare the present application unfounded.

II. THE CHAIR'S ASSESSMENT

27. The Chair is called to examine whether, in the present case, the complainant pleads a situation that would justify granting the requested stay of execution.

28. Concerning the merits of the request, the Chair recalls that there can be no question at this stage of any assessment of the arguments relating to the merits. These matters are not for discussion, let alone examination, in the current proceedings, which are only concerned with urgent measures (see Order of the Chair of 3 July 2003, paragraph 10, *Timmermans v. Secretary General*).

29. The Chair notes that the Tribunal has already ruled on other requests for a stay in which the complainants asked, as the case may be, to stay the procedure or to stay all recruitments, and this second request was granted on the grounds of the prejudice that a complainant may suffer if he or she is interviewed after other candidates previously summoned by the Appointments Board have been recruited. This problem arises not only where there is a competition for one or more posts to be filled in advance, but also where a list of eligible candidates is drawn up and recruitments are made before the disputed case is settled.

30. The Chair further observes that the arguments put forward by the complainant – which relate rather to the merits of the case – are not such as to prove that she would suffer serious harm difficult to repair if the stay were not granted. The Chair recalls, however, that the burden of proof is on the person bringing the application for a stay. In the present case, the complainant has not established the existence of a “grave prejudice difficult to redress”. Even with respect to the complainant’s complaint about a potential loss of her current employment, the Chair notes that, in the past, the Tribunal has not considered difficulties inherent to the end of a contract as a reason to grant a stay.

31. This finding is without prejudice to the complainant’s ability to state during the contentious proceedings the prejudice that she might suffer owing to the execution of the contested decision and, if she is successful, to claim compensation for damage resulting from the act complained of (Article 60 paragraph 2 in fine of the Staff Regulations).

32. The Chair takes note of the Secretary General’s proposal of following in this case the solution in appeal No. 455/2008 (*Musialkowski*), which consisted of integrating the candidates on a new reserve list (drawn up following the dispute) into the initial reserve list and recruiting them in the normal way. The Chair considers that such a solution should be implemented in such a way as to avoid putting the complainant in a less favourable position in relation to the candidates who will have the opportunity to take the exam within the regular timeline, for example by extending the period of validity of the reserve list. Therefore, it is not necessary to

apply Article 8, paragraph 2, of the Statute of the Tribunal, which gives the Chair the possibility to attach certain conditions to the decision taken on the application for a stay of execution.

33. The Chair further adds that the exercise of her exceptional power under Article 59, paragraph 9 of the Staff Regulations calls for some self-restraint (ATCE, paragraph 12 of the Chair's Order of 31 July 1990 in the case of Zaegel v. Secretary General; ATCE, paragraph 26 of the Chair's Order of 1 December 1998 in the case of Schmitt v. Secretary General; and paragraph 16 of the Chair's Order of 14 August 2002). The purpose of the urgent procedure is to ensure that the administrative proceedings are fully effective so any application for a stay of execution must show that the requested measure is necessary to avoid grave prejudice that is difficult to redress. Otherwise, it would jeopardise not only the smooth running of the Council departments but also the management of significant sectors of the Organisation. Since that is not so in the present case, it is not appropriate to grant the stay of execution sought.

For these reasons,

Ruling on the urgent application under Article 59, paragraph 9 of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Article 21 of its Rules of Procedure,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decides that

- the application for a stay of execution presented by Ms Ourania Botsi is rejected.

Done and ordered in Zagreb (Croatia), on 10 June 2021.

The Deputy Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

Dmytro TRETYAKOV

Nina VAJIĆ