

CONSEIL DE L'EUROPE————— —————**COUNCIL OF EUROPE**

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER of 10 October 2011

**In the case of J. de la P. L.
v. Governor of the Council of Europe Development Bank**

THE FACTS

1. The appellant, Mr J. de la P. L., is a staff member of the Council of Europe Development Bank whose contract ended on 30 September 2011.
2. The appellant has already lodged an initial appeal (No. 485/2011) to contest the last appraisal procedure conducted during his probationary period. This appeal is currently pending before the Tribunal.
3. On 21 June 2011, the appellant received notice of the Governor's decision to terminate his contract on 30 September 2011.
4. On 12 July 2011, the appellant lodged an administrative complaint against the decision of 21 June 2011.
5. This administrative complaint was dismissed on 5 August 2011.
6. On 28 September 2011, the appellant lodged a fresh appeal with the Administrative Tribunal, contesting the decision of 21 June 2011. It was registered the same day under No. 509/2011.
7. On 28 September 2011, the appellant applied to the Chair of the Tribunal for a stay of execution of the decision made by the Governor of the Development Bank to terminate his contract.
8. The Governor submitted his observations on 3 October 2011. These observations were communicated to the appellant the same day.
9. On 5 October 2011, the appellant submitted observations in reply.

THE LAW

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

11. The appellant submits that the conditions for applying for a stay of execution have been met, as the decision complained of would in fact cause him grave prejudice, the appeal which he has lodged is based on serious grounds and is directed against a decision in accordance with Article 59 of the Staff Regulations and, lastly, terminating his contract would have consequences which would be very difficult to redress.

12. As to the first condition, the appellant observes that the disciplinary measure in question would render the appeals currently before the Tribunal (appeals nos. 485/2011 and 509/2011) devoid of purpose. The Governor’s decision means losing his salary, yet earning a salary is essential if he is to be able to remain in Paris, especially given the fact that he is an expat.

13. As regards the serious nature of the grounds for his appeal, the appellant notes that his statutory rights have not been observed (appeal no. 485/2011). In his view, the Governor is also guilty of an abuse of procedure and failed to comply with the Staff Regulations (which afford him additional safeguards if there are doubts about his output and/or competence), and the general legal principle prohibiting the misuse of authority (of which abuse of procedure is part).

14. Lastly, as to the difficulty of redressing the consequences of terminating the contract, the appellant points out that he was elected as a staff representative on the Bank Staff Committee in June 2010. In October, this Committee will be called upon to make some important decisions.

15. The appellant adds that he wishes to apply for the position of Chair of the Staff Committee, the previous Chair having resigned. He contends that what he is going through has implications for all staff members, in particular the ones who placed their trust in him at the time of the election.

16. In his view, the consequences of his dismissal would be irreparable, would be detrimental to his interests in terms of his involvement in the Staff Committee, and would seriously interfere with the smooth running of the main body for defending the rights of Bank staff.

17. The appellant argues that the Governor would no doubt invoke Article 60, paragraph 7, of the Staff Regulations in order to avoid executing any decision setting aside the act complained of. The appellant states, however, that he is not seeking compensation for a disciplinary measure that is unlawful in two respects, firstly because the dismissal was contrary to the Staff Regulations and secondly because the correct procedure was not observed.

18. The appellant adds that there are similarities between his case and the stay of execution granted in connection with Appeal No. 249/1998 (Bouillon IV). However, even though, ultimately, no disciplinary proceedings were instituted against him, he did not want to invoke Article 10.2 of Rule 02/2008 in order to avoid complaining about his main appraiser, who was himself on probation. He contends that his position as a staff representative on the Staff

Committee prevented him from putting his own interests before those of the colleagues who elected him.

19. For these reasons, he asks the Tribunal to order a stay of execution of the Governor's decision to terminate his employment as a staff member of the Council of Europe Development Bank.

20. For his part, the Governor notes that the appellant has alleged two types of prejudice: firstly loss of pay and, by the same token, denial of the possibility of remaining in Paris and secondly, prevention from participating in the activities of the Staff Committee of which he was a member, and indeed from applying for the position of Chair of the Committee.

With regard to the first type of prejudice invoked, after making some observations about the appellant's address during the proceedings, the Governor asserts that, even supposing the appellant were prevented from continuing to live in Paris, firstly he is not homeless since he currently resides in Madrid and he has stated that he intends to reside there for the duration of the proceedings, and secondly, the fact of residing in Madrid rather than Paris during the proceedings does not in itself constitute prejudice sufficiently grave to warrant granting a stay of execution of the decision complained of. There will be nothing to prevent him from returning to Paris if the Tribunal, ruling on the merits, sets aside the contested decision.

21. On the subject of loss of earnings, which, on the face of it, would certainly constitute damage, the Governor observes that the appellant received a leaving allowance and is not, therefore, without sufficient resources to enable him to remain in Paris, should he so wish, for several months.

The Governor further contends, in the alternative, that in any event, the loss of pay incurred during the proceedings on the merits does not amount to prejudice "difficult to redress" within the meaning of Article 59, paragraph 9, of the Staff Regulations. For if the contested decision is set aside by the Tribunal ruling on the merits, it will be deemed to have never occurred; in that case, not only will the Bank be obliged to reinstate the appellant, but it will also have to compensate him for loss of earnings between 30 September 2011 and the date on which he is reinstated (provided, of course, that the appellant refunds the leaving allowance paid on 30 September 2011). Once again, therefore, the prejudice cannot be described as "difficult to redress".

22. As to the second type of prejudice invoked by the appellant, the Governor is of the opinion that this is clearly not of a nature or seriousness such as to justify a stay of execution. To decide otherwise would be tantamount to concluding that the appellant's personal involvement in the Staff Committee is necessary for the proper functioning of the committee, or even of the Bank as a whole, or to accepting the appellant's contention that preserving the possibility for him to apply for the position of Chair of the Staff Committee has the same character of necessity. In the Governor's view, this is patently unreasonable.

23. Lastly, as regards the serious nature of the grounds relied upon by the appellant, the Governor notes that this assessment is exclusively a matter for the Tribunal ruling on the merits. Article 59, paragraph 9, of the Staff Regulations does not make the seriousness of the grounds for challenging an act a condition for granting a stay of execution. The Governor goes on to say, however, that the way in which these grounds are presented by the appellant, despite the

referral to his appeal No. 485/2011, which does not in fact concern the decision of 21 June 2011, is too vague to allow any discussion of the seriousness of these grounds.

24. In conclusion, the Governor asks the Chair to dismiss the appellant's application for a stay of execution of the decision of 21 June 2011.

25. In his observations in reply, the appellant reiterates his request for a stay of execution of the Governor's decision to terminate his contract.

26. He points out that the leaving allowance is intended for purposes other than enabling him to continue living in Paris. In effect, this allowance is designed to enable the recipient to purchase pension rights once he or she finds a job. If the stay of execution is not ordered, therefore, the appellant believes that there would be an issue with equality of arms if he continues to be deprived of adequate means of support. Also, for him, staying in France at this point means having better job opportunities, given his international experience and also the high level of youth unemployment in Spain.

27. The appellant maintains that what is at issue here is his right to fulfil his mandate within the Staff Committee, as conferred on him by the staff of the Council of Europe Development Bank.

28. The appellant points out that the Tribunal has had occasion in the past to emphasise the importance of the Staff Committee's role in social dialogue within both the CEB and the Council of Europe. Failure to suspend the impugned decision, however, would prevent him not only from continuing to discharge his duties within this statutory body but also from becoming its Chair. This unquestionably constitutes "prejudice", for the appellant at any rate. It is also "difficult to redress". This character of prejudice "difficult to redress" has nothing to do with "necessity", contrary to what the Governor seems to believe.

29. In the light of the above, the appellant reiterates his request for a stay of execution of the Governor's decision, to enable him to fulfil his mandate within the Staff Committee.

30. The Chair notes that, according to the relevant case-law, the decision to remove the appellant from his post does not in itself, and in the absence of specific elements, constitute grounds for assuming that the appellant would suffer "grave prejudice difficult to redress" within the meaning of Article 59, paragraph 9, of the Staff Regulations (see ATCE, Chair's Order of 5 September 1994, *Ernould v. Governor of the Council of Europe Social Development Fund*, paragraph 12 and Chair's Order of 27 September 2002, *Kling v. Secretary General*, paragraph 28).

31. The Chair reached similar conclusions in a case involving termination of a contract after the probation period (see the Chair's Order of 3 November 2003, in Appeal No. 318/2003 – *Bendito v. Governor of the Council of Europe Social Development Fund*). These considerations also apply when it comes to the financial consequences of terminating a contract. And the Chair sees no reason, in the arguments put forward by the appellant, to deviate from this case-law.

32. As to the consequences arising from the fact that the appellant had been elected as staff representative, the Chair notes firstly that at no point was it evident that the present dispute stemmed from the appellant's involvement in the activities of the Staff Committee. Secondly, since election to the Staff Committee is a secondary, albeit important, undertaking on the part

of the appellant, this fact cannot be relied upon to argue that terminating the contract is liable to cause the appellant grave prejudice difficult to redress under Article 59, paragraph 9, of the Staff Regulations.

33. The Chair further notes that some of the arguments adduced by the appellant are relevant to the examination of the substance of the case, which it would be inappropriate to prejudge at this stage, as it would be inappropriate to prejudge either the outcome of the disputes procedure or the scope of the enforcement measures which would have to be taken further to any decision which the Tribunal might make (see Bendito Order mentioned above and the case-law cited therein). As to the other arguments, these are not sufficient to prove the existence of “grave prejudice difficult to redress”, which is a prerequisite for ordering a stay of execution of the contested measure. In particular, the Chair notes that the current dispute is different from the one which gave rise to Appeal No. 249/1998 (Bouillon IV v. Secretary General).

34. Lastly, the appellant having mentioned the financial difficulties which he is liable to experience later in the proceedings, the Chair notes that, when considering a disputed measure to determine whether it is lawful, the Tribunal disregards the issue of whether or not the measure has been executed (see Bendito order, mentioned above, paragraph 35). It will be for the Administrative Tribunal, as the body tasked with ensuring that staff’s rights are observed, to satisfy itself that the principles laid down in Article 6 of the European Convention on Human Rights are observed in the present case and that the fair balance between the appellant and the Governor is not disturbed at any future point in the proceedings.

35. The Chair points out that the exercise of his exceptional power under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint (ABCE, 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). Since the purpose of summary procedure is to ensure the full effectiveness of administrative litigation, the application for stay of execution must demonstrate that the requested measure is necessary to avert grave prejudice difficult to redress. Were it otherwise, this would impair not only the proper running of the services but also the management of major sectors of the Organisation.

36. It follows from the foregoing that the application for a stay of execution is not, in this case, well-founded.

For these reasons,

Making a provisional ruling in accordance with Article 59, paragraph 9, of the Staff Regulations, with Article 8 of the Statute of the Administrative Tribunal, and with Article 21 of the Rules of Procedure of the Administrative Tribunal,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- to reject the application for a stay of execution submitted by Mr J. de la P. L.

Done and ordered in Kifissia (Greece), on 10 October 2011.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS