

CONSEIL DE 'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER of 13 September 2013

In the case of Giovanni PALMIERI v. Secretary General of the Council of Europe

THE FACTS

1. The complainant, Mr Giovanni Palmieri, is an Italian national, who works for the Council of Europe as a permanent staff member. He is currently on secondment with the Staff Committee. In his capacity as the Council of Europe's delegate on the Committee of Staff Representatives of the Co-ordinated Organisations, the complainant is also Chairperson of that committee.

2. In December 2013, the complainant will reach the age at which staff members are required to retire unless, under rules recently introduced at the Council of Europe, it is decided to retain them in service beyond the age limit.

3. The matter is governed by Articles 24 and 24 *bis* of the Staff Regulations. In its resolution CM/Res(2012)47 of 12 December 2012, the Committee of Ministers of the Council of Europe amended Article 24 and introduced Article 24 *bis*. The provisions now state that, under certain conditions, the Secretary General may retain staff members in service up to the age of 67 years.

In the version applicable to this case, the provisions read as follows:

Article 24 – Age limit

“1. A staff member shall retire on reaching the age of 65 years.

2. By way of exception, the Secretary General may, on a case-by-case basis and in the sole interests of the Organisation, ask a staff member to remain in service beyond the age of 65 years, under the conditions laid down in Article 24 *bis*.”

Article 24 *bis* – Service beyond the age limit

“1. Staff members who meet the physical requirements of the employment may exceptionally be retained in service up to the age of 67 years at most.

2. Regarding the conditions of employment and remuneration, such staff members shall be treated as if they had not reached the age limit for retirement. In particular, the staff members concerned shall continue to be entitled to step advancements, indemnities and allowances under the same conditions as if they had not reached the age limit. They shall also benefit from leave entitlement and part-time work arrangements

under the same conditions. They shall nonetheless not be entitled to benefit from unpaid leave nor can they apply for transfer or promotion.

3. Staff retained in service beyond the age limit shall acquire no additional pension rights after reaching that age. No contribution to the Organisation's pension schemes shall be levied. The Organisation shall moreover pay no contributions to any other pension scheme for the benefit of the staff members concerned. Pension benefits shall be payable only after termination of service. The calculations of pension benefits – retirement pension, reversion or orphan's pension or leaving allowance – and family allowances to which a recipient of a pension is entitled shall be made by reference to the staff member's employment situation, for example his/her grade, step and length of service, at the date when the staff member reached the age limit, and his/her family situation at the date of departure.

4. Health insurance cover shall be maintained.

5. An absence for health reasons lasting more than 90 days shall constitute a ground for terminating the contract without notice and shall entail the immediate award of the pension benefits.

6. Staff retained in service beyond the age limit shall not be eligible for an invalidity pension, an indemnity for loss of job or measures for termination of service.

7. The procedure shall be determined by the Secretary General in a rule.”

4. On 7 June 2013, Council of Europe staff elected their new Staff Committee. The complainant, who was Chairperson of the outgoing Committee and therefore on secondment with the Staff Committee, was re-elected after winning the most votes.

5. On 21 June 2013, the complainant was elected Chairperson by the new Staff Committee, after winning 20 votes out of 29. The complainant observes that this is the first time in the last thirty years that an outgoing Chairperson has been re-elected for a second consecutive term.

6. The complainant states that on 24 June 2013, he met with the Deputy Secretary General to inform her of his intention to ask the Secretary General to extend his contract as a staff member beyond the age of 65 under Article 24 *bis*, paragraph 2, mentioned above.

7. On 25 June 2013, the complainant sent a request to the Secretary General, asking him to extend his secondment with the Staff Committee until 30 June 2015. The complainant pointed out that this memorandum implicitly raised the question of extending his contract beyond the age of 65.

8. The complainant states that on 11 July 2013, he had a second meeting with the Deputy Secretary General who told him that the Secretary General was leaning towards denying his request for reasons other than budgetary ones. The Deputy Secretary General said the complainant should expect to receive a written memorandum towards the end of August.

9. On 12 July 2013, the Secretary General wrote to the complainant to confirm that he would be on secondment with the Staff Committee until 31 December 2013, when he would retire from the Organisation. He added the following:

“As regards your request that your employment be continued beyond your current retirement date, I have carefully considered this request. Having regard to the fact that the Staff Committee may appoint another chairperson from among its members, all of whom have been given a mandate to serve as staff representatives during the recent elections – as indeed the Staff Committee has done in previous cases where a Chair or Vice-Chair has not been in a position to continue in these roles for various reason – I do not consider that the circumstances in hand warrant an exceptional decision on my part to prolong

your contract beyond the usual retirement age. I nonetheless thank you for your willingness to continue to serve the Organization in this way”.

10. On 10 August 2013, the complainant lodged an administrative complaint under Article 59, paragraph 9, of the Staff Regulations. He asked the Secretary General to kindly reconsider the decision not to extend his contract beyond 31 December 2013.

11. On 29 August 2013, the complainant applied to the Chair of the Administrative Tribunal for a stay of execution under Article 59, paragraph 9, of the Staff Regulations. He asked the Chair to grant a stay of execution in respect of the administrative decision of 12 July 2013.

12. On 3 September 2013, the Secretary General submitted his observations on the application for a stay of execution.

13. On 6 September 2013, the complainant submitted observations in reply.

RELEVANT LAW

14. 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”.

According to this 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.

15. The complainant lodged his application for a stay of execution in order that the Chair might order the suspension of the administrative decision of 12 July 2013.

16. The reason given by the complainant for his application is that executing the impugned decision is likely to cause him “grave prejudice difficult to redress”.

17. He submits that such execution would render *restitutio in integrum* permanently unfeasible. Termination of service would mean that, from 1 January 2014, he would no longer be able to sit on the Staff Committee and would, *ipso facto*, be deprived of his position as Chairperson. He points out that Article 3, paragraph 3, of the Regulations on the composition and election of the Staff Committee stipulate that “The term of office of a Committee member shall end (...) on termination of service”.

The complainant adds that since he would no longer be a member of the Staff Committee, he could no longer serve as the Council of Europe’s delegate on the Committee of Staff Representatives of the Co-ordinated Organisations and, under its rules of procedure, would be stripped of his chairmanship of that committee as well, a position he has held continuously since 1994.

In his view, the foregoing serves to demonstrate that the requested stay of execution is necessary in order to avert serious and irreparable harm. In effect, should the disputed act be executed, “the administrative complaint would be rendered ineffective” (see Chair’s Order of

8 January 1992 in *Cannizzaro v. Secretary General*, paragraph 10) and *restitutio in integrum* would be legally impossible.

The complainant refrains from making any submissions on the merits of his administrative complaint, being aware that an application for a stay of execution in no way requires the Chair of the Tribunal to assess arguments attaching to the validity of the grievances expressed by the complainant.

18. For his part, the Secretary General contends that the application for a stay of execution is unfounded.

He begins by noting that the Secretary General's power to retain a staff member in service beyond the statutory age limit is defined in Article 24 of the Staff Regulations. This provision makes it clear, however, that any decision to extend a staff member's appointment beyond the age of 65 years is at the discretion of the Secretary General. Such decisions may be taken only in exceptional circumstances, and in the sole interests of the Organisation.

As to the merits of the request for a stay of execution, the Secretary General notes that the complainant has not established the existence of any "grave prejudice difficult to redress". As is clear from the case law of the Administrative Tribunal, "it is for the person applying for the stay of execution to show that he or she is likely to suffer prejudice difficult to redress if the stay of execution is not granted, and not for the Secretary General to provide evidence to the contrary". In the Secretary General's view, however, the complainant has provided no evidence to support his claim that he is liable to suffer harm.

The Secretary General further maintains that, on the contrary, the complainant is not entitled to claim grave prejudice difficult to redress as he has always been aware that the statutory age limit is 65 years. The complainant's retirement date, namely 31 December 2013, follows from the usual age limit stipulated in the Staff Regulations and this is in no way likely to adversely affect his interests.

In asking for his appointment to be extended beyond 31 December 2013, the complainant was aware that his request would be granted only if, in the Secretary General's view, the situation demanded that an exception be made, in the sole interests of the Organisation. The discretionary and exceptional nature of such a decision cannot be used, therefore, as a justification for suspending it.

The complainant refers to his inability to obtain *restitutio in integrum* in the unlikely event that the Tribunal should find in his favour following a possible appeal. It is important to point out, however, that *restitutio in integrum* is merely one of various possible means of redress, the most common of which is compensation.

The Secretary General submits that, in the instant case, any prejudice which the complainant might invoke cannot be such that it is incapable of being remedied through compensation for the damage sustained.

In the Secretary General's view, it is clear from the foregoing that the complainant's situation does not present any of the elements that could be considered to result in a "grave prejudice difficult to redress", a condition which is required for the granting of a stay of execution. The fact is that the prejudice invoked by the complainant, if any, would not be

such as to justify granting a stay of execution in the context of proceedings to challenge the decision taken by the Secretary General, at his discretion, not to extend the complainant's appointment beyond his normal retirement date.

The Secretary General notes that since the purpose of summary procedure is to ensure the full effectiveness of administrative litigation, the application for a 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. The Secretary General considers that, for the reasons which he has outlined, the complainant cannot plead grave prejudice difficult to redress.

Lastly, the Secretary General also wishes to point out that there can be no question at this stage of assessing arguments attaching to the validity of the grievances expressed by the complainant in his administrative complaint, as these issues need not be discussed, much less examined, in the context of this procedure, which concerns only the adoption of urgent measures.

Under these circumstances and in view of these considerations, the Secretary General asks the Chair of the Administrative Tribunal to reject the application for a stay of execution submitted by the complainant as ill-founded.

19. In his observations in reply, the complainant makes three points: the possibility of a discretionary act being suspended, the likelihood of him suffering prejudice and, lastly, the grave nature of the prejudice and the difficulty of redressing it.

20. Firstly, he refutes the Secretary General's assertion that the Chair does not have the power to order the suspension of a discretionary act. The relevant texts and the Tribunal's case law, he maintains, indicate otherwise. Article 59, paragraph 9, of the Staff Regulations, for example, merely refers to "the act complained of", which may be discretionary or non-discretionary. A close look at the Tribunal's earlier decisions, furthermore, provides no support for the Secretary General's contention. By way of example, the complainant cites the Chair's Order of 26 November 1984 in the Koenig case where the act whose execution was ordered by the Chair was a discretionary one (granting of leave for personal reasons).

21. As to the existence of prejudice, the complainant notes that he asked to be granted the benefit of Article 24 *bis* of the Staff Regulations and that the denial of his request is unquestionably prejudicial to his interests. As he sees it, the prejudice is assessed in law by reference to the legal situation as it obtains at the time of the impugned act and not by reference to a pre-existing legal situation, as the Secretary General's argument implies. In his view, the likelihood of him suffering prejudice has thus been established since at the time when the Secretary General took the impugned decision, he had the power to extend the contract beyond the age of 65. The fact that prior to 31 December 2012, the Secretary General did not possess such power is, in itself, irrelevant.

22. As regards the grave nature of the prejudice and the difficulty of redressing it, the complainant notes that the Secretary General has implicitly acknowledged that it would be impossible for him to obtain *restitutio in integrum* if the Tribunal were to rule in his favour following any appeal which he might bring. He notes, however, that this practical and legal impossibility (on 1 January 2014, the appellant will allegedly lose forever his right to serve on

the Staff Committee and, by extension, as Chairperson of the Staff Committee and the Committee of Staff Representatives) is of no importance in the eyes of the Secretary General, who maintains that any prejudice which the complainant might rely on could be remedied by means of compensation for the damage suffered. The Secretary General further submits that compensation is the most common form of redress.

In the complainant's view, however, due account must be taken of the specific circumstances of the present case together with international case law in general and the Tribunal's case law in particular.

According to the complainant, these circumstances include the non-material nature of the injury due to the negative consequences that would arise, on 1 January 2014, from the execution of the impugned act, namely his loss of two chairmanships: one of the Staff Committee of the Council of Europe and the other of the Committee of Staff Representatives of the Co-ordinated Organisations.

As to international case law, the complainant notes that the setting aside of the impugned decision is, in the vast majority of cases which come before international courts, sufficient to restore the factual and legal situation which obtained before the decision was adopted. Compensation plays merely a complementary or secondary role, in that it erases certain negative effects of the decision. Further, the fact that the prejudice complained of is non-material in nature is of paramount importance in this context.

The complainant then refers to the Tribunal's case law. The existence of effects that cannot be easily reversed has been held by the Tribunal to constitute evidence of "prejudice difficult to redress" within the meaning of Article 59 § [9] of the Staff Regulations (see Deputy Chair's Order of 26 October 1993 in the Ferriozzi-Klejsen case, §15).

Furthermore, if the Secretary General's argument had been accepted by the Tribunal's Chairs in the past, they would never have granted any stays of execution: for in every single case, pecuniary compensation was available as a measure of last resort. This proves, if proof were needed, the spurious nature of the Secretary General's argument.

The complainant also refers to the letter and spirit of Article 60, paragraph 7, of the Staff Regulations under which only the Tribunal is entitled to decide, upon a reasoned proposal from the Secretary General, whether the execution of an annulment decision should be replaced by compensation, with the sum to be paid being determined by the Tribunal. This provision – which is clearly not applicable as such in the present case – does nevertheless show that, in the eyes of the legislator, *restitutio in integrum* and the payment of compensation are not interchangeable. Yet this is what the Secretary General surreptitiously seeks to allege in his observations. The appellant demurs, arguing that the fact that the impugned act will produce irreversible consequences is clear proof that he is likely to suffer grave prejudice difficult to redress.

23. The complainant stands firmly by the submissions made in his application.

24. The Chair notes that, as the parties have pointed out, there can be no question at this stage of assessing arguments attaching to the validity of the grievances expressed by the complainant in his complaint as these issues need not be discussed, much less examined, in the context of this procedure, which concerns only the adoption of urgent measures

(see paragraph 10 of the Chair's Order of 3 July 2003, in the case *Timmermans v. Secretary General*).

25. With regard to the merits of the application, the Chair notes that the act complained of is the Secretary General's decision not to accept the complainant's request to be allowed to stay on beyond the age of 65. Contrary to what the Secretary General alleges in his observations, the "discretionary and exceptional" nature of a decision to retain a staff member in service cannot be considered a reason not to order the suspension of a decision to refuse such request provided, of course, the conditions laid down in Article 59, paragraph 9, of the Staff Regulations, have been met.

26. As regards the existence of these conditions, and more specifically the existence of prejudice, the Chair agrees with the complainant that he can claim to suffer prejudice from the time he asked – albeit implicitly – to be retained in service beyond the age of 65 years.

27. As to the grave nature of the prejudice and the difficulty of redressing it, the Chair notes the following.

28. The complainant mentions the negative consequences to which the decision will give rise from 1 January 2014 and also the non-material nature of the injury.

29. On the subject of the negative consequences, he refers to the fact that he will no longer be able to serve on the Staff Committee (and hence as its Chairperson) under Article 3, paragraph 3, of the Regulations on the composition and election of the Staff Committee and will lose his position as the Council of Europe's delegate on the Committee of Staff Representatives of the Co-ordinated Organisations (and hence his position as Chairperson of that committee as well).

30. With regard to this second negative consequence, the Chair notes firstly that there is no mention of any automatic disqualification of this kind in the texts submitted to the Tribunal. Article 2 of the Articles of Association of the Committee of Staff Representatives of the Co-ordinated Organisations states that this Committee is "composed of delegates designated by the statutory bodies representing the staff" of the Co-ordinated Organisations, while Article 3 merely states that the statutory bodies representing the staff of the Co-ordinated Organisations shall each designate a delegate who may be assisted by deputies or advisors of their choosing, without stipulating that all these individuals must be members of a staff committee or staff members of an Organisation.

31. As to the two negative consequences as a whole, the Chair notes that it is for the two staff representation bodies to consider the unusual situation – which is certainly not covered by the rules governing their operation – in which the appellant will find himself from 1 January 2014 if the dispute between the complainant and his employer has still not been resolved by then. As far as the Chair is aware, however, no decision has been taken by either of these staff representation bodies as to whether any termination of the complainant's membership would be permanent.

32. In conclusion, the consequences in question cannot be considered permanent and nor can they be described as irreversible. To the Chair's knowledge, moreover, the Staff Committee has not taken any steps to request, under Article 24, paragraph 2, of the Staff

Regulations, that its Chairperson be retained in service until his term of office expires or at least until this dispute is over.

33. As things stand, therefore, it cannot be concluded that the complainant is liable to suffer prejudice difficult to redress on that ground.

34. Lastly, the Chair notes that the time-limit within which the Secretary General is required to rule on the administrative complaint has just expired and if the complainant fails to win his case, he has the option of promptly lodging an appeal which, if fast-tracked, could be settled by 1 January 2014. Under Article 60, paragraph 5, of the Staff Regulations, moreover, “While an appeal is pending, the Secretary General shall avoid taking any further measure in respect of the appellant which, in the event of the appeal being upheld, would render unfeasible the redress sought”.

35. As regards the non-material nature of the prejudice, the Chair notes that while, in an earlier dispute over termination of service, due account was taken of this aspect in the Tribunal’s decision to order a stay of execution, in that case, termination was a disciplinary measure which allowed the Chair to conclude that specific evidence had been presented which required that the stay of execution requested be granted (see Chair’s Order of 27 August 1998, paragraph 17, appeal No. 249/2008 in Bouillon (IV)). In this instance, the Chair does not believe that there is specific evidence which would justify considering non-material harm when deciding whether to grant the requested stay of execution.

36. The Chair notes that, at present, the different arguments put forward by the complainant are not sufficient to show that execution of the impugned decision is likely to cause him grave prejudice difficult to redress.

37. 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 a stay of execution must demonstrate that the requested measure is necessary to avert grave prejudice difficult to redress. As this is not so in the instant case, there is no reason to grant the requested stay of execution.

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 Rule 21 of the Rules of Procedure,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- that the application for a stay of execution submitted by Mr Palmieri is dismissed.

Done and ordered at Kifissia (Greece), on 13 September 2013.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS