

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER OF 20 June 2018

in the case of Michel BRECHENMACHER v. Secretary General of the Council of Europe

THE FACTS

1. The complainant, Mr Michel Brechenmacher, has been a permanent staff member of the Council of Europe since 1996. Aged 52, his grade is C5 and since 2006, he has been assigned as team leader in the fire safety unit.

2. In his role as team leader, the complainant supervises employees of outside service providers. He acts as a line manager for these outside employees without having the power to assign or reassign them.

3. Following a complaint lodged in July 2015 by a female outside employee assigned to the complainant's team concerning inappropriate conduct by him both at the headquarters of the Organisation and during a dinner with colleagues off the premises, an internal inquiry for sexual harassment was opened pursuant to Instruction No. 51.

4. The internal inquiry report of 13 December 2015 concluded that the complainant had breached the obligations stipulated in Article 1, paragraphs 1 and 2, of the Secretary General's Rule No. 1292 of 3 September 2010 on the protection of human dignity and the duty of loyalty to the Organisation as set out in Article 25, paragraph 1, of the Staff Regulations.

5. The Deputy Secretary General instituted disciplinary proceedings on 23 February 2016 after hearing the complainant (Articles 54-58 of the Staff Regulations and Appendix X to these Regulations).

6. On 20 May 2016, the Disciplinary Board concluded that the alleged misconduct had not constituted a breach of obligations that warranted disciplinary measures.

7. The Deputy Secretary General informed the complainant on 17 June 2016 that, in view of the Disciplinary Board's findings, she had decided not to impose the disciplinary measures set out in Article 54 of the Staff Regulations.

8. After the outside employee went on to lodge a complaint for sexual harassment with the French courts, Strasbourg Criminal Court reclassified the offence as sexual assault on 25 May 2017 and imposed a six months' suspended prison sentence on the complainant and ordered him

to pay 4 000 euros in damages and 1 000 euros for costs. In the absence of an appeal by the complainant, the sentence is final.

9. The complainant states that he informed a colleague and his supervisor of his conviction.

10. On 17 August 2017, the Council of Europe asked the Court for a copy of the judgment, which it was sent on 28 August 2017.

11. The Deputy Secretary General summoned the complainant to an interview, which took place on 9 January 2018.

12. On 16 February 2018, the Deputy Secretary General laid before the Disciplinary Board a report pursuant to Article 2, paragraph 2, of Appendix X (Regulations on disciplinary proceedings) to the Staff Regulations. During the proceedings, the Administration's representative clarified that this did not constitute the re-opening of the initial disciplinary proceedings pursuant to Article 12 of the aforementioned Appendix X.

13. On 27 April 2018, the Disciplinary Board concluded that the complaint's alleged misconduct had not constituted a breach of the obligations set out in the Staff Regulations and other rules requiring a disciplinary measure within the meaning of Article 54 of the Staff Regulations.

14. The complainant was heard by the Secretary General on 24 May 2018.

15. The Secretary General adopted *ad personam* decision No. 7344 on 25 May 2018: he dismissed the complainant with effect from 30 June 2018 (Article 54, paragraph 2 f of the Staff Regulations) for misconduct in breach of Article 25 of the Staff Regulations, Articles 1 and 2 of Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe and Article II.4 of the Charter on Professional Ethics of 15 July 2005.

16. In the letter notifying this decision dated 25 May 2018, the Director of Human Resources informed the complainant that he had been asked to terminate his activities for the Organisation with immediate effect and that he had been relieved of his obligation to work out the rest of his contract.

17. On 6 June 2018, he lodged an administrative complaint with the Secretary General under Article 59, paragraph 2, of the Staff Regulations.

18. He applied to the Chair of the Administrative Tribunal for a stay of execution of the decision complained of (Article 59, paragraph 9, of the Staff Regulations) in an application submitted the same day.

19. On 11 June 2018, the Secretary General submitted his observations on the application for a stay of execution.

20. On 15 June 2018, the complainant submitted his observations in reply.

THE LAW

21. 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 “grave prejudice difficult to redress”.

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.

22. The purpose of the complainant’s application for a stay of execution is to obtain the suspension of the Secretary General’s decision of 25 May 2018 to dismiss him from his duties with immediate effect on disciplinary grounds.

23. The complainant observes that the impugned decision has imposed upon him the most severe disciplinary sanction available and causes him grave prejudice difficult to redress within the meaning of Article 59, paragraph 9, of the Staff Regulations.

24. He stresses that this decision followed disciplinary proceedings that resulted in the Disciplinary Board finding that the acts of which he stood accused had not constituted a breach of his obligations set out in the Staff Regulations and the Council of Europe’s internal regulations and that no sanction should be imposed.

25. The complainant adds that, contrary to the advice of the Board, the Secretary General decided to dismiss him from his duties on 25 May 2018, i.e. almost at the end of the relevant time-limit. The Secretary General had hastily taken up his case, which had been dealt with by the Deputy Secretary General until then. He did not hear the complainant until 24 May 2018, that is to say, the day before he made his decision, thus taking just 24 hours for a decision that would determine the complainant’s future.

26. The complainant expresses the astonishment and shock he felt at being subjected to this decision. With two children and aged 52, he is now unemployed.

27. The complainant maintains that, as he was dismissed on disciplinary grounds, he is not entitled to any indemnity. As an official employed by an international organisation, he has no right to unemployment benefits in France. He can only claim income support in the form of the active solidarity benefit (RSA), which means that his level of remuneration will fall from that of a C5-grade staff member to around 500 euros a month (RSA payment for a person living with a spouse or partner and with one or two children, minus any income from employment that exceeds 500 euros and minus housing benefits).

28. The complainant contends that in the light of his age and family status, it will be exceedingly difficult to find stable employment in his sector. He maintains that he will probably never have an income equivalent to his earnings to date, which means his family’s quality of life will be adversely affected up until he reaches retirement age.

29. This has been compounded by the emotional impact of the decision, which he did not anticipate and for which he was wholly unprepared. The complainant had been under medical supervision for depression for several years prior to this decision.

30. The decision will have a profound and lasting effect on his personal and family circumstances, which is why he is requesting a stay of execution of the decision as a temporary

measure to give him some time to challenge it and allow him to leave the Organisation at which he has worked for many years in a less abrupt manner.

31. For his part, the Secretary General begins by referring to the Tribunal's case-law, according to which "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 Chair's Order of 5 September 1994, *Ernould (II) 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).

32. He adds that were the complaint or any appeal before the Tribunal successful, the complainant would be reinstated in his position with his full rights with retroactive effect, including in terms of remuneration. Any annulment of the impugned decision by the Tribunal would result in continuity of service for the complainant and settlement of back-pay. Furthermore, the Tribunal could order redress for any other damage, particularly non-material, resulting from the annulled decision.

33. The Secretary General further maintains that in the light of the absence of "specific elements", the grounds cited by the complainant do not suffice to demonstrate that the impugned decision will cause him grave prejudice difficult to redress.

34. In fact, again according to the Tribunal's case-law, "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 not provided evidence either to support his claim that he is liable to suffer grave prejudice difficult to redress or the existence of specific elements justifying a departure from the Tribunal's established case-law stemming from the Chair's orders in the aforementioned cases of *Ernould (II)* and *Kling*.

35. According to the Secretary General, the complainant is relying on the grounds put forward in support of his administrative complaint without adding anything specific that might demonstrate the need for the requested stay. These points relate to the merits of the case, which, as indicated below, cannot be addressed at this stage of the proceedings.

36. Regarding lost pay, the Secretary General maintains that this is the logical consequence of a dismissal decision. The complainant has failed to show how his circumstances justify a departure from the Administrative Tribunal's aforementioned established case-law stemming from the Chair's orders in the cases of *Ernould (II)* and *Kling*.

37. The Secretary General contends that if the Tribunal accepted the complainant's argument on the basis of such cursory allegations as the material damage resulting from lost pay, granting a stay of execution would become the norm for all dismissal decisions. Any outcome of that kind would be in flagrant breach of the Tribunal's case-law and the principle that the Chair must exercise great restraint in exercising the exceptional power conferred under Article 59, paragraph 9, of the Staff Regulations.

38. Lastly, the Secretary General points out that there can be no question at this stage of assessing arguments pertaining to the validity of the grievances expressed by the complainant in his administrative complaint, as these issues do not have to be discussed, let alone examined, in the current proceedings, which are concerned only with urgent measures.

39. Given these circumstances and having regard to these considerations, the Secretary General asks the Chair to reject the complainant's application for a stay of execution as ill-founded.

40. In his observations in reply, the complainant argues that the Secretary General cannot reasonably rely on the Chair's Orders in the cases of Ernould and Kling because the facts differed from those of the present application.

41. On the one hand, without dwelling on the developments outlined in his application for a stay of execution, the complainant maintains that both the material and non-material damage have been clearly shown and are based on evidence. The medical certificates attesting his depression provide sufficient grounds to establish the non-material damage he would suffer if the decision complained of is not annulled.

He explains that the significant loss of income, which is easy to calculate, demonstrates the material damage. Lastly, in view of his personal circumstances as a 52-year-old father of two, the complainant claims that it will be extraordinarily difficult to find stable work in his sector, especially considering the damage caused to his reputation by a dismissal based on facts that have not been established.

42. On the other hand, the complainant notes that the Secretary General believes that the grounds put forward for the application for a stay of execution are merely those outlined in the administrative complaint, and do not add any specific elements. In the complainant's view, the Secretary General's requirement of specific elements is not based on any of the regulations governing stays of execution.

Nonetheless, the complainant contends that there are specific elements in his circumstances whereby the dismissal will cause him grave prejudice difficult to redress. Moreover, he considers it appropriate to specify that the regulations refer to prejudice difficult to redress rather than irreparable damage.

However, the complainant adds that although it is unnecessary to dwell on aspects relating to the merits of the complaint, the specific elements need to be established here in accordance with the Tribunal's practice in this matter. The complainant maintains that the case-law of the Tribunal referred to by the Secretary General should not be interpreted in the way it is interpreted by the Secretary General.

43. In his opinion, there is no firm evidence that, by its nature, the material damage resulting from dismissal is easy to redress. Furthermore, with regard to the material damage resulting from the complainant's age, the Tribunal has in no way held that this element can be excluded as a rule. In the Chair's Order in the case of Ernould, the Tribunal only dismissed it in the complainant's case without establishing this as a criterion.

44. Consequently, it is the complainant's view that a stay of execution may be granted, even in cases without material damage, if non-material damage is established and if the implementation of the decision is liable to undermine the principle of fair balance between the Organisation and the staff member, a principle linked to the principle of equality of arms which the European Court of Human Rights has already ruled an integral part of the right to a fair trial.

In his case, the complainant remains convinced that there is equal evidence of material and financial damage, non-material damage and the undermining of the principle of fair balance.

The proper administration of justice also means ensuring that staff members, like all individuals, have access to the means needed to assert their rights. Therefore, the principle of fair balance must be considered intrinsic to the proper administration of justice.

45. Consequently, the complainant reiterates his application for a stay of execution of the decision to dismiss him on disciplinary grounds until the Tribunal has ruled on any appeal that he lodges against the dismissal of his administrative complaint or at least until the time-limit for exercising his right to appeal to the Tribunal has passed.

46. The Chair wishes to begin by highlighting the importance of efforts to combat sexual harassment of any form. These efforts, which must always be conducted in accordance with the relevant rules and regulations, are vital when carried out in the workplace and when aimed at protecting subordinates from sexual harassment, especially if they are in an insecure position.

47. For the purposes of the present application for a stay of execution, however, the Chair is duty-bound to disregard this aspect. In the present case, she is obliged to confine herself to deciding whether the execution of the administrative decision of dismissal during the stage of the administrative complaint and during that of any appeal to the Administrative Tribunal is likely to cause the complainant “grave prejudice difficult to redress” even if he eventually wins his case. Therefore, there can be no question at this stage of assessing arguments pertaining to the merits of the complainant’s administrative complaint, as these issues do not have to be discussed, let alone examined, in the current proceedings, which are concerned only with urgent measures (see Chair’s Order of 3 July 2003, paragraph 10, *Timmermans v. Secretary General*).

Moreover, contrary to the Secretary General’s claims, the arguments that the complainant puts forward to support his application for a stay of execution are not linked to the merits of the case but, rather, to its consequences for him. Even though he repeats passages from the aforementioned administrative complaint in which he mentioned the problems that have arisen from the execution of the decision to dismiss him, the complainant does not submit arguments concerning the legality of the impugned decision.

48. Turning to the merits of the application, the Chair therefore notes, firstly, that it is a necessary condition for a stay of execution order that execution of the act complained of before a final decision on the dispute “is likely to cause ... grave prejudice difficult to redress” (Article 59, paragraph 9, of the Staff Regulations).

49. Accordingly, the Chair agrees with the Secretary General’s observation that according to the Tribunal’s case-law, the removal of the complainant from his post does not in itself, and in the absence of specific elements, constitute grounds for assuming that the complainant would suffer “grave prejudice difficult to redress”. It is thus the Chair’s duty to assess whether the arguments put forward by the complainant in support of his application may constitute specific elements that would justify granting the requested stay of execution. In the light of the Tribunal’s established case-law, it must be acknowledged that specific elements mean facts or circumstances which arise during the proceedings, the existence of which shows that the complainant would suffer prejudice difficult to redress if no stay of execution is granted.

50. As the Secretary General acknowledges, if the complainant wins his case, he could obtain back-payment of wages, continuity of service and redress for any other damage, particularly non-material, resulting from the annulled measure. Consequently, the existence of material or non-material damage cannot be considered a basis for granting a stay of execution, despite the claims made by the complainant, especially in his comments on the Secretary General's observations, seeking to prove there is damage in the present case.

51. It should also be noted that the complainant highlights the financial difficulties arising from the rapid execution of a decision which he did not anticipate and for which he was wholly unprepared. He mentions several circumstances, including his income problems, the difficulty of finding a new job at his age and his health condition. He also underlines the impact which this will have on his personal and family circumstances.

52. However, although these circumstances are not without significance, they do not constitute reasonable grounds for staying the execution of the measure complained of. The complainant fails to substantiate his allegation with evidence which could prove the existence of a grave prejudice difficult to redress if no stay of execution is granted. Furthermore, the complainant does not explain why a failure to grant a stay of execution would undermine the principle of fair balance. In addition, he fails to explain why there would be a breach of the principle of equality of arms and, by extension, the right to a fair trial.

Having regard to the argument based on the complainant's age, this aspect is not sufficient in itself to grant the requested stay of execution because in the present case, age does not constitute an element likely to cause grave prejudice difficult to redress.

53. The Chair points out that the exercise of her exceptional power under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint in its exercise (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). 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 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. As the necessity is not shown 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,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- dismisses the application for a stay of execution submitted by Mr Brechenmacher.

Done and ordered at Zagreb on 20 June 2018.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

N. VAJIĆ