

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 10 March 2023

in the case of C (II) v. Governor of the Council of Europe Development Bank

The Chair of the Administrative Tribunal,

Having regard to Appeal No. 728/2022 lodged by the appellant on 23 September 2022;

Having regard to the observations submitted by the Governor on 28 October 2022 and the appellant's memorial in reply of 6 December 2022;

Having regard to Article 5, paragraph 2, of the Statute of the Administrative Tribunal¹ to which Appeal No. 728/2022 is subject in pursuance of Article 3 of Resolution CM/Res(2022)65 adopting the new Statute of the Administrative Tribunal of the Council of Europe;

Having regard to Rule 19 of the Tribunal's Rules of Procedure;²

Considering it appropriate to apply the procedure provided for in the said articles;

Having submitted a reasoned report to the Tribunal judges on 8 March 2023;

Noting that the judges raised no objection but assented to this order;

¹ The Statute of the Tribunal which applies to the present case is set out in Appendix XI to the Staff Regulations adopted by [Resolution Res\(81\)20](#) of the Committee of Ministers of the Council of Europe on 25 September 1981. The 1981 Staff Regulations, amended subsequently on several occasions, were replaced, with effect from 1 January 2023, by the new Staff Regulations adopted by [Resolution CM/Res\(2021\)6](#) of the Committee of Ministers of the Council of Europe on 22 September 2021. All references in the present order to the Staff Regulations are therefore to be understood as references to the 1981 Staff Regulations.

² The Rules of Procedure of the Tribunal which apply to the present case are the [Rules of Procedure adopted by the Tribunal on 1 September 1982](#) and amended on 27 October 1994, 30 January 2002 and 1 January 2014. The 1982 Rules of Procedure were replaced by the Rules of Procedure adopted on 26 January 2023. All references in the present order to the Tribunal's Rules of Procedure are therefore to be understood as references to the 1982 Rules of Procedure.

DECLARES

- Appeal No. 728/2022 inadmissible on the grounds set out in the report appended hereto.

Done and ordered at Zagreb (Croatia), on 10 March 2023, the French text being authentic.

Registrar

Chair

Christina OLSEN

Nina VAJIĆ

REPORT DRAWN UP FOR THE PURPOSES OF THE PROCEDURE PROVIDED FOR IN ARTICLE 5 § 2 OF THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL AND RULE 19 § 2 OF THE TRIBUNAL'S RULES OF PROCEDURE

Appeal No. 728/2022
C (II) v. Governor of the Council of Europe Development Bank

The present report concerns Appeal No. 728/2022 lodged by C. It has been drawn up for the purposes of the procedure provided for in Article 5, paragraph 2, of the Statute of the Administrative Tribunal and Rule 19, paragraph 2, of the Tribunal's Rules of Procedure.

THE PROCEEDINGS

1. The appellant lodged their appeal on 23 September 2022. It was registered the same day under No. 728/2022.
2. On 27 September 2022, the Tribunal agreed to the appellant's request for anonymity.
3. On 28 October 2022, the Governor submitted his observations on the appeal. The appellant lodged observations in reply on 6 December 2022.
4. On 8 March 2023, the Chair of the Administrative Tribunal, after examining the arguments presented by the parties during the written procedure (Rule 19, paragraph 2, of the Tribunal's Rules of Procedure), submitted the present report to the members of the Tribunal.

THE FACTS

5. The present appeal is part of a dispute which originated in the appellant's previous Appeal No. 673/2021 against the Governor. In this last appeal, the appellant challenged the Governor's decision of 17 November 2020 to place them on invalidity without acknowledging that the invalidity was occupational in origin.
6. In its [judgment of 27 January 2022](#), the Tribunal dismissed Appeal No. 673/2021 in its entirety, after declaring it partly inadmissible and, as far as the admissible part was concerned, unfounded.
7. On 14 April 2022, the appellant submitted an administrative request to the Governor concerning, firstly, the damage allegedly suffered as a result of a violation of personal data in connection with Appeal No. 673/2021 and, secondly, the uprating of their pension, rectification of their leave balance and compensation for various losses, pecuniary and non-pecuniary.
8. On 31 May 2022, in a letter from the Director of Corporate Services, the Bank rejected the appellant's administrative request on the ground that it was based on the Governor's decision of 17 November 2020, the subject of Appeal No. 673/2021, and was res judicata.
9. The appellant then filed an administrative complaint on 27 June 2022 maintaining the claims concerning the alleged violation of personal data, compensation for the non-pecuniary damage allegedly suffered, leave calculation, and reimbursement of legal costs. In the complaint, the

appellant also contested the competence of the Director of Corporate Services to respond to the administrative request, in the absence of a delegation from the Governor empowering him.

10. In a letter dated 26 July 2022, after referring to the power of signature that the Governor had delegated to the Director of Corporate Services in matters of litigation, the Bank stated that the appellant's administrative complaint was *res judicata* and accordingly rejected it as manifestly inadmissible.

11. On 23 September 2022, the appellant lodged the present appeal.

APPLICABLE LAW

12. Article 5, paragraph 2, of the Administrative Tribunal's Statute deals with the admissibility of appeals and reads as follows:

"If the Chair states, in a reasoned report to the judges of the Tribunal, that he or she considers the appeal to be manifestly inadmissible, and if the judges raise no objections within two months, the appellant shall be informed without delay that his or her appeal has been declared inadmissible for the reasons stated in the report, a copy of which shall be communicated to him or her."

13. Rule 19, paragraph 2, of the Tribunal's Rules of Procedure reads:

"If, during the written procedure, the Chairman considers the appeal to be manifestly inadmissible, Article 5, paragraph 2 of the Statute shall apply. Any decision of rejection is given by an Order of the Chairman."

14. Article 12, paragraph 2, of the Administrative Tribunal's Statute establishes the principle that decisions handed down by the Tribunal are final, stating that:

"No appeal lies from decisions".

THE LAW

15. The appellant brought an appeal before the Tribunal asking it to find that the decision of 26 July 2022 was unlawful firstly because the author of the decision was incompetent and secondly because the decision ran counter to the principle of good administration and the duty of care. The appellant also asked the Tribunal to order the respondent to make good the non-pecuniary damage suffered on account of those illegalities.

16. The Governor, for his part, contends that the appeal is inadmissible on two grounds. First and foremost, the appeal is inadmissible because of the *res judicata* effect and final nature of the judgment handed down by the Tribunal in Appeal No. 673/2021. The Governor points out that not only does the present appeal not allege any new facts but also it involves the same parties and has the same purpose – namely compensation for paid leave and for non-pecuniary damage – and the same cause of action since, in both appeals, the appellant seeks to establish that their leave balance has been calculated in a manner inconsistent with the rules. Secondly, the Governor contends that the appeal is inadmissible *ratione temporis* because it was for the appellant to challenge the decision concerning the leave balance in appeal No. 673/2021. As to the merits of the appeal, the Governor considers that it is unfounded.

17. In the observations in reply, the appellant reiterates the contention that the appeal is admissible and well founded. As regards admissibility, the appellant states that the present appeal differs from Appeal No. 673/2021 in terms of the purpose and cause of action. Whereas Appeal No. 673/2021 related to the Bank's decision not to recognise the occupational origin of their invalidity, this one concerns the Bank's decisions refusing to provide details of their leave balance and the information requested concerning the competence of the author of those decisions. The claim for compensation which the appellant makes in the present appeal concerns the non-pecuniary damage arising from this alleged lack of transparency. In the view of the appellant, therefore, the present appeal does not infringe the principle of *res judicata*.

18. The Chair points out that the principle of *res judicata* precludes a further ruling on claims identical in substance to claims on which the Tribunal has already passed judgment ([Judgment No. 574](#) of the ILO Administrative Tribunal of 20 December 1983). This principle is also intended to prevent the parties, once judgment has been handed down, from endlessly bringing proceedings before the same court or another court in order to finally obtain a decision in their favour ([Judgment No. 467](#) of the ILO Administrative Tribunal of 28 January 1982).

19. In the present proceedings, the Chair notes that the central issue raised on the merits by the appellant concerns the amount of leave left at the date when their contract of employment with the Bank ended.

20. The claim relating to the leave calculation is in fact the only one that the appellant has maintained in Appeal No. 728/2022 in relation to the various claims made at the preliminary stages of the present dispute.

21. The Chair observes that the appellant has made a claim relating to leave calculation before, in Appeal No. 673/2021. This claim was taken into account by the Tribunal in its judgment of 27 January 2022. Paragraph 43 of this judgment sets out the exact terms of that claim: "The appellant asks the Tribunal to (...) order the Governor to pay the sum of EUR 26 346.07 in respect of 54.5 days of unpaid leave". This claim was rejected by the Tribunal, however, along with the claims for annulment and the claims for damages made by the appellant in Appeal No. 673/2021 (see in this regard paragraphs 100 to 102 of the judgment). It is therefore incorrect to claim, as the appellant does, that the Tribunal has not ruled on this matter.

22. Since the Tribunal's judgment of 27 January 2022 addresses the question of the appellant's leave calculation, it needs to be considered whether the principle of *res judicata* precludes the possibility of resubmitting, in the present appeal, a claim which would have been settled in the earlier case.

23. The Chair points out that, according to well-established case law of international administrative courts, the principle of *res judicata* applies only where the parties, the purpose of the suit and the cause of action are the same as in the earlier case ([Judgment No. 4501](#) of the ILO Administrative Tribunal of 6 July 2022, consideration 3).

24. The first of these conditions requires no comment, as the fact that the parties are the same is not in dispute.

25. As regards the condition relating to identity of purpose, in this case the appellant is asking the Tribunal to set aside the decision "refusing to provide (...) details of their leave calculation". In their previous appeal, the appellant had sought, *inter alia*, "correction of the errors made in calculating their entitlements", including leave entitlements. In both cases, irrespective of the different wording used, it is clear that the appellant's intention is to dispute the Bank's finding that

they had 33 days of leave left, rather than the 54.5 days they claim. The appellant did in fact obtain a detailed breakdown of their leave from the Bank in the first appeal, and in this case has merely re-submitted the same calculation as that relied on in the first appeal as a basis for their claim. In these circumstances and having regard to the relevant case law ([Judgment No. 1263](#) of the ILO Administrative Tribunal of 14 July 1993, consideration 4), the Chair concludes that, as regards the calculation of the appellant's leave, the purpose of this appeal is the same as that of the appeal decided earlier.

26. As to the cause of action, the Chair observes that in this appeal as in the previous one, Appeal No. 673/2021, the appellant has based the claim concerning the leave calculation on the various applicable arrangements (annual leave balance, annual leave accrued during sick leave and administrative leave, leave accumulated in the leave savings account) which, the appellant submits, produce a total number of days different from that for which the appellant was paid by the Bank (see section II.3 of the appellant's administrative request of 14 April 2022). It is clear therefore that the appellant's claim relating to the leave calculation has the same foundation in law as their previous appeal. The appellant's position is therefore contrary to *res judicata* in that it is based on considerations that have been discussed and considered by the Tribunal before, in Appeal No. 673/2021. Regardless of the new grounds now advanced by the appellant, namely the lack of competence of the author of the impugned decision and non-compliance with the principle of good administration and the duty of care ([Judgment No. 1216](#) of the ILO Administrative Tribunal of 10 February 1993, consideration 4), the underlying cause of action is the same in both cases: in both instances, the appellant takes issue with the decision concerning their leave balance, contending that it is incorrect.

27. In conclusion, the three conditions for *res judicata* have been met in the instant case. The *res judicata* plea is well founded therefore.

28. The Chair further observes that if, as they maintain in this appeal, the appellant believed that the information provided by the Bank in order to deny the leave claimed was insufficient and/or incomplete, it was incumbent on them to make those points in the first appeal. The Tribunal has already had occasion to point out that a party to a dispute cannot call into question the authority of *res judicata* and bring the same issue before the Tribunal again by relying on rights the exercise of which is not subject to any particular requirement to adhere to time limits (see, *mutatis mutandis*, [decision of the ATCE](#) of 27 January 2022, Appeal No. 674/2021 – Mendez-Carvalho v. Secretary General, paragraphs 68 to 73).

29. In conclusion, the appeal must be declared manifestly inadmissible and the special procedure provided for this purpose must be applied.

CONCLUSIONS

32. This report is submitted to the judges of the Tribunal so that they may exercise the supervision provided for in Article 5, paragraph 2, of the Statute of the Tribunal.

The Chair

Nina VAJIĆ