

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 11 May 2021

In the case of Ilknur YUKSEK (V) v. Secretary General

THE FACTS

1. The complainant, Ms Ilknur Yuksek, is a former staff member whose employment at the Council of Europe ended on 31 March 2021. Prior to this date, the complainant had been regularly employed at the Council of Europe on the basis of temporary and fixed-term contracts (CDD) since 2004.
2. On 12 February 2021, the Tribunal ruled upon the complainant's appeal No. 665/2020 which sought the quashing of the Secretary General's decision of 7 June 2019 not to include her name on the reserve list drawn up at the end of the competitive examination no e17/2018 for MONEYVAL (DG1/Directorate of Information Society and Action against Crime). In her appeal, the complainant invoked that her candidature was not examined by an impartial panel.
3. The Tribunal declared the complainant's appeal No 665/2020 well-founded and set aside the impugned decision.
4. Within the framework of the execution of this decision, the complainant was invited to another interview with a new Appointments Board. The interview took place on 24 March 2021.
5. On 19 April 2021, the Directorate of Human Resources informed the complainant that on the basis of the recommendations made by the Appointments Board further to her interview of 24 March 2021, the Secretary General had decided not to place her on the reserve list.
6. On 26 April 2021, the complainant lodged an administrative complaint under Article 59 of the Staff Regulations. In her complaint, she submits that the Tribunal's decision of 12 February 2021 cannot be regarded as having been executed with due diligence. She mainly refers to the fact that she did not have enough time to prepare for the new interview (only 11 days). She also refers to the fact that her temporary contract ended on 31 March 2021, which put her under extreme pressure before the panel. She requests the Secretary General to annul the decision of 19 April 2021 not to place her on the reserve list and either include her in the latter or "compose a new panel interview which respects the requisite fairness of the procedure in compliance with the *res judicata* of the Tribunal's decision".

7. On 28 April 2021, the complainant applied to the Chair of the Administrative Tribunal for a stay of execution (Article 59 paragraph 9 of the Staff Regulations).

8. On 4 May 2021, the Secretary General submitted her observations on the application for a stay of execution.

9. On 7 May 2021, the complainant submitted her memorial in reply.

THE LAW

10. 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”.

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

11. By her application, the complainant requests the Chair to adopt a decision staying the execution of the decision of the Directorate of Human Resources not to place her on the reserve list of the competition to which she applied, pending the Administration’s response to her administrative complaint.

12. After setting out arguments which relate rather to the merits of the administrative complaint, the complainant maintains that she would suffer irreparable damage if the recruitment procedure continues without her being on the reserve list and/or without having being given equal opportunity of a fair interview as other candidates. She also submits that if the reserve list is established and the service begins to contract the candidates who are on the reserve list, this would deprive her of her chances of obtaining an A1/A2 programme manager position.

13. Consequently, the complainant requests the Chair to adopt a decision staying the execution of “the recruitments from the reserve list until [her] administrative complaint and/or, where applicable, the subsequent appeal before the Tribunal is decided upon”.

14. The Secretary General observes at the outset that the complainant’s request is unsubstantiated since the only observations she puts forth to support the need for a stay of execution are those mentioned *supra* (see paragraph 6).

15. Without prejudice to this observation, the Secretary General notes that the complainant’s request for a stay of execution is in any event belated, and thus unjustified and devoid of purpose.

16. The Secretary General observes in this connection that, had the complainant considered that she would incur a “grave prejudice difficult to redress” for not being included on the reserve list for the recruitment procedure no e17/2018, she should have urgently requested a stay of execution of the earlier decision of 7 June 2019 not to include her name on that list within the

framework of the litigation procedure concerning the decision of 7 June 2019 (see paragraph 2 *supra*). Having failed to do so at that time, the present request lacks the character of urgency required by Article 59, paragraph 9 of the Staff Regulations.

17. The Secretary General adds that another compelling reason against the need for a stay of execution is that an adequate redress would be possible within the framework of the pending litigation procedure, in the form of an invitation for another interview. In her administrative complaint of April 2021, the complainant requests herself redress in this form, in the same way she had done during the previous litigation procedure related to her appeal No 665/2020 against the decision of 7 June 2019.

18. To the extent that the complainant aims at the stay of execution of any recruitments from the reserve list, the Secretary General notes that those recruitments had already started as soon as the recruitment procedure was completed. This circumstance further testifies of the belated nature of the present request.

19. In the light of these elements, the Secretary General requests the Chair to reject the application for a stay of execution as inadmissible and/or unfounded and devoid of purpose.

20. In her memorial in reply, the complainant points to the change in her situation since she is currently unemployed and is no longer a staff member of the Council of the Europe, contrary to her situation at the time of the previous litigation procedure concerning the decision of 7 June 2019. Her current status justifies the urgent and pressing nature of her request.

21. She stresses that her acceptance of a new interview panel as a means of redress cannot be interpreted as an agreement on her part to the procedure, since her administrative complaint aims precisely at contesting its irregularity.

22. In referring to the recruitments of candidates from the reserve list, she reiterates her request to the Chair “to suspend further recruitments from the list because of irreparable damage that [she] would suffer if the service continues to recruit the remaining candidates on the list (...). By the time of a favourable ruling on [her] new appeal, the reserve list might possibility be exhausted and therefore any addition to it would be impossible”.

23. Consequently, the complainant maintains in full the arguments set out in her application for a stay of execution. Given the circumstances of her case, she also asks the Tribunal, if possible, to recommend to the Secretary General, as the most effective remedy to give effect to its decision to end the prejudice by “placing [her] on the reserve list”.

II. THE CHAIR’S ASSESSMENT

24. The Chair notes at the outset that the fact that the Secretary General has already proceeded with the recruitment of candidates from the reserve list at the end of the recruitment procedure cannot constitute grounds for declaring that the present application was lodged belatedly and has become moot. Indeed, the complainant does not challenge the recruitments following the recruitment procedure but rather her exclusion from the reserve list. That list will be valid until 27 May 2023 and candidates on the list can continue to be recruited, which could be to the detriment of the complainant if she is successful in her current litigation. Since, in view of the state of the recruitment procedure at the time the request for a stay was filed, it is clear that by her request for a stay of the procedure, the complainant is essentially aiming to

block, by way of a precautionary measure, any recruitment that may take place, the request cannot be declared devoid of purpose.

25. Accordingly, the Secretary General's request to declare the application for a stay of proceedings inadmissible or devoid of purpose must be rejected.

26. The Chair must therefore examine whether in the present case the complainant pleads a situation that would justify granting the requested stay of execution.

27. 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 or the manner in which the Tribunal's decision of 12 February 2021 was executed. 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*).

28. 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.

29. 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”. Indeed, the fact that the complainant is currently unemployed is not related to her non-inclusion on the reserve list but to the fact that, in any case – whether or not the complainant is included on the list – her contract of employment with the Council of Europe would have in any event expired on 31 March 2021. However, in the past, the Tribunal has not considered difficulties inherent to the end of a contract as a reason to grant a stay.

30. 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).

31. Nevertheless, the Chair notes that, if the Secretary General continues to cover posts that become available by resorting to the reserve list before the end of the present dispute, the complainant's chances of being recruited if she is successful may be reduced and the prejudice may even become difficult to repair if the available posts are all filled.

32. The Chair observes, however, that there is nothing to prevent the Secretary General from following the solution in [appeal No. 455/2008 \(Musialkowski\)](#) in this case, a solution 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. 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 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 Rule 21 of the Rules of Procedure,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL

Decides:

- that Ms Ilknur Yuksek's application for a stay of execution is rejected.

Done and ordered in Zagreb (Croatia) on 11 May 2021.

The Registrar of the
Administrative Tribunal

C. OLSEN

The Chair of the
Administrative Tribunal

N. VAJIĆ