

CONSEIL DE L'EUROPE— —COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 13 JULY 2023

In the case of L. C. v. Secretary General

THE FACTS

1. The requesting party, L. C., was recruited on 1 July 2022 on a two-year fixed-term contract, at grade C2, in the European Directorate for the Quality of Medicines and HealthCare (EDQM). The requesting party's post was a turnover profile with a maximum five-year duration and was subject to the completion of a two-year probationary period.
2. By email dated 15 June 2023, the requesting party was informed by his department that, on account of his unsatisfactory performance during the probationary period, his employment contract would be terminated with effect from 14 July 2023.
3. The notice of termination of employment was served on the requesting party the same day, in a memorandum from the Directorate of Human Resources (DHR).
4. On 10 July 2023, the requesting party requested a management review of the decision, in accordance with Article 14.3 of the Staff Regulations.
5. On the same day, the requesting party filed a request to the Tribunal for a stay of execution of the contested decision, in accordance with Article 14.8 of the Staff Regulations. With this request, he sought the suspension of the decision to terminate his fixed-term contract with effect from 14 July 2023.
6. On 11 July 2023, the Secretary General submitted his observations on the request for a stay of execution.
7. On 12 July 2023, the requesting party submitted his observations in reply .

THE LAW

8. In accordance with Article 14.3 of the Staff Regulations, staff members who consider that an administrative decision is prejudicial to their interest and conflicts with their terms and conditions of appointment, or with any pertinent provisions of the Staff Regulations, Rules, Instructions or Policies, may initiate the process of management review, allowing for the correction of an improper decision or, where a decision was properly taken, its confirmation along with a reasoned explanation.

9. In accordance with the terms of Article 14.8 of the Staff Regulations, requesting a management review does not suspend the contested administrative decision. However, the staff member may file a request with the Administrative Tribunal to suspend the implementation of a contested administrative decision in cases of particular urgency where the implementation of the administrative decision would cause serious and irreparable damage to the staff member.

10. Under Article 12.1 of the Tribunal's Statute, when a request for a stay of execution is filed, the Secretary General shall, unless there are duly justified reasons, suspend the execution of the contested decision until the Tribunal has ruled on the request.

11. Under Article 12.2 of the Tribunal's Statute, the Chair, on behalf of the Tribunal, must rule within 15 days on requests for a stay of execution, by giving a reasoned decision, which may be subject to certain conditions. The decision must not rule on the merits of the appeal or the complaint. Decisions on a stay of execution shall not be subject to appeal.

12. In accordance with Article 14.2 of its Statute, the Tribunal has unlimited jurisdiction in disputes of a pecuniary nature. In all other disputes, it may annul the contested administrative decision. Where appropriate, it may also order the payment of compensation for damage resulting from the contested administrative decision.

13. With regard to the execution of the Tribunal's judgments, Article 16.2 of its Statute provides that the Secretary General decides what measures shall be taken in order to execute judgments. Where a judgment annuls a decision by the Secretary General, the latter may decide that it would not be in the interests of the Organisation to take the measures that the judgment would entail and that compensation shall be paid to the appellant in lieu of such measures being taken. The amount of such compensation, which is fixed by the Tribunal, must not exceed the equivalent of two years of the appellant's remuneration. The Tribunal may, however, in exceptional circumstances and when it considers it justified, order the payment of a higher amount of compensation. The Tribunal must state its reasons for such an order.

I. THE PARTIES' SUBMISSIONS

14. With his request, the requesting party asks the Chair to suspend the execution of the contested decision to terminate his employment contract with effect from 14 July 2023.

15. To justify his request for a stay of execution, the requesting party refers to the grounds set out in his request for a management review. He maintains that the one-month notice of termination applied to him was not applicable to his situation insofar as, at the time of his recruitment, the notice period applicable during his probationary period was set at two months, as indicated in his contract signed on 24 May 2022. Moreover, he alleges that the rules applicable to evaluation of performance during the probationary period were not complied with in his case.

16. With regard to the particular urgency, the requesting party maintains that the execution of the contested decision would *de facto* validate the termination period which he is challenging and prevent him from completing the procedure for evaluating his performance. With regard to the damage, the requesting party states that by terminating his employment with the Council of Europe, execution of the decision in question would cause him serious economic harm.

17. For her part, the Secretary General firstly holds that the request for a stay of execution should be rejected in view of the Tribunal's case law on requests for stays of execution of decisions concerning the termination of staff members' employment, whether they be decisions not to renew fixed-term contracts or disciplinary dismissal decisions.

18. In this connection, the Secretary General points out that in contentious proceedings, a fair balance must be maintained between the parties and their respective interests. In the instant case, this balance would be destroyed if the requesting party succeeded in having the termination of his contract suspended, thereby requiring the Organisation to continue his employment contract although his inadequate performance was undermining the proper functioning of the department concerned and was incompatible with him being maintained in post, and that the applicable regulations allowed the termination of the contract during the probationary period.

19. Secondly, the Secretary General points out that, according to the case law of the Tribunal, it is for the person applying for the stay of execution to show the harm they are likely to suffer if the stay of execution is not granted, and not for the Secretary General to provide evidence to the contrary. In her view, however, in the instant case, the requesting party has not shown the existence of such harm insofar as he does not provide detailed and specific evidence in support of his request.

20. The Secretary General notes that the requesting party cannot claim to have suffered serious and irreparable harm, as he was informed, at the start of his employment, that his contract could be terminated during the probationary period by either party subject to notice being given. Moreover, his management had regularly warned him that his performance was unsatisfactory and he had received support in this connection.

21. The Secretary General adds that if the Tribunal were to rule in favour of the requesting party, any harm suffered could be made up for by way of the payment of compensation pursuant to Article 14.2 of the Tribunal's Statute. In support of the position that the harm which the requesting party might suffer is capable of redress, the Secretary General points out that, in connection with his request for a management review, the notice period will be corrected and will correspond to two months, in accordance with the terms of the requesting party's employment contract, and a sum equivalent to one month's salary will be paid to him in this respect.

22. Lastly, the Secretary General observes that there can be no question, at this stage, of analysing the arguments made by the requesting party in his request for a management review that relate to the merits of the case, which it is inappropriate to discuss, still less examine, in the current proceedings, which concern only the taking of urgent action.

23. Under these circumstances and in view of these considerations, the Secretary General asks the Chair to dismiss the request for a stay of execution as ill-founded.

24. In his observations in reply, the requesting party firstly raises a procedural issue. He challenges the fact that the Secretary General has disregarded her obligation under Article 12.1 of the Tribunal's Statute (see paragraph 10 above) to suspend the contested decision for a limited period, without giving any reasons. The requesting party maintains that the failure to apply the suspension provided for in that article reduced the usual period for the examination of his request for a stay of execution by the Tribunal, as provided for in Article 12.2 of the

Tribunal's Statute (see paragraph 11 above) and, by extension, shortened the period granted to him to submit his observations in reply to the Secretary General's observations. In this connection, he refers to the period of one day which he was given, whereas in the practice of the Tribunal the time limit is usually three days and follows the time limit of five days which the Secretary General is in principle granted to reply to a request for a stay of execution. On this point, the requesting party concludes, primarily, by requesting that the aforementioned time limits be applied and that he be given a period running up to 20 July to submit his observations in reply.

25. In the alternative, the requesting party maintains all the submissions made in his request for a stay of execution concerning the serious and irreparable harm he would suffer as a result of the execution of the decision to terminate his employment contract. As he has not paid unemployment insurance contributions and does not have any other source of income or assets, he states that he would be deprived of all resources. He also stresses that by terminating his contract at such short notice, the Organisation did not enable him to prepare for the consequences, for instance by seeking other employment.

26. Insofar as he had a legitimate expectation of being able to benefit, throughout his entire fixed-term contract, from the probationary period so as to acquire the skills needed for his job, the requesting party refutes the analogy drawn by the Secretary General between his situation and cases of non-renewal of fixed-term contracts or disciplinary dismissal (see paragraph 17 above). The proportionality of the harm caused to him could not, in his view, be assessed in the light of the criteria that applied in such cases. Moreover, the serious harm in question in his case would not only be economic but also non-pecuniary because execution of the contested decision would deny him the right to continue his probationary period and improve his performance.

27. As to the irreparable nature of the harm, the requesting party acknowledges that the loss of income could be made good by payment of compensation or the conclusion of a new employment contract. However, the loss of any chance of improving his skills during a longer probationary period and having his contract renewed at the end of the probationary period would amount to irreparable harm.

II. THE CHAIR'S ASSESSMENT

28. Firstly, regarding the procedural issue raised by the requesting party, the Chair observes that the procedural time limits applied in the case of requests for stays of execution are not based on any binding rules, apart from the 15-day limit provided for in the Tribunal's Statute for ruling on requests. The intermediate procedural time limits are set by the Chair according to the needs of the proceedings, on the basis of the powers assigned to the Chair pursuant to the relevant regulations, in particular the Tribunal's Rules of Procedure.

29. The Chair notes that, in the instant case, the requesting party received notification of the termination of his employment contract on 15 June 2023 and filed his request for a stay of execution on 10 July, i.e. a few days before the contested termination decision was to take effect on 14 July 2023. Under these circumstances, the Chair was free to determine the procedural time limits in such a way as to be able to rule usefully on the request for a stay, before the contested decision took effect. In so doing, the Chair took account of the parties' interest in obtaining a ruling from the Tribunal on the requested stay of execution as soon as possible, while ensuring that the principle of adversarial proceedings was complied with.

30. The Chair notes in this connection that, as a rule, compliance with that principle requires the party applying to the Tribunal for a stay of execution, upon filing the request, to provide the necessary grounds in fact and law on which it is based so as to enable the respondent to prepare their submissions. In fact, the requesting party formulated his request very concisely. The Secretary General nevertheless replied to it within the short time limit given by the Chair. The Chair further notes that in his observations in reply to the Secretary General's observations, the requesting party repeats and reiterates the arguments which he had already submitted in his request and elaborates on them, without giving any reason to illustrate the need to have more time to complete his defence, for instance to obtain supporting documents that would corroborate his claims.

31. In the light of the above, the Chair believes that there is nothing in the file to support the conclusion that the procedural time limits adversely affected the requesting party's ability to present his case before the Tribunal.

32. Consequently, the requesting party's request for a further period, expiring on 20 July 2023, to file information supplementing his observations in reply must be dismissed.

33. As to the merits of the request for a stay of execution, the Chair points out that, at this stage, there can be no question of analysing arguments concerning the validity of the grievances expressed by the requesting party in his request for a management review, which it is inappropriate to discuss, still less examine, in the present proceedings, which concern only the taking of urgent action (ATCE, Chair's Order of 3 July 2003, in the case *Timmermans v. Secretary General*, paragraph 10). It is not therefore necessary for the Chair to examine the requesting party's submissions concerning the merits of the case, as set out in paragraph 14 above.

34. The Chair also points out that the exercise of her exceptional power under Article 14.8 of the Staff Regulations calls for some self-restraint (ABCE, Chair's Order of 31 July 1990 in the case of *Zaegel v. Secretary General*, paragraph 12; ATCE, Chair's Order of 1 December 1998 in the case of *Schmitt v. Secretary General*, paragraph 26).

35. The Chair also points out that according to settled case law, the purpose of the urgent procedure is to ensure that the administrative disputes procedure is wholly effective and that the judgment on the substance of the case takes full effect. For the purpose of achieving that objective, the measures sought must be urgent insofar as, in order to avoid serious and irreparable harm, they must be adopted and produce their effects before a decision is reached in the main action (ATCE, [Chair's Order of 23 December 2021](#), in the case of *D. v. Secretary General*, paragraph 33, and case law cited). Were it otherwise, this would impair not only the proper running of departments but also the management of the Organisation.

36. The Chair further notes that for the purpose of assessing whether the harm incurred would be irreparable, it must be determined whether financial compensation would represent an adequate remedy for the damage caused. In that regard, it must be borne in mind that purely financial damage cannot, save in exceptional circumstances, be regarded as being difficult to redress, since, as a general rule, it can be the subject of financial compensation in a subsequent appeal (ATCE, [Chair's Order of 23 December 2021](#), in the case of *D. v. Secretary General*, paragraph 34, and case law cited).

37. The Chair does acknowledge that, even in the event of purely financial harm, the suspension of the contested decision might be justified in certain circumstances (Order of the President of the Civil Service Tribunal of the European Union of 27 April 2010 in case [T- 103/10 P\(R\) U v. European Parliament](#), paragraphs 35 and 36). However, to be able to assess whether such circumstances justify suspending, on an exceptional basis, the execution of the contested decision, the judge must always be provided with concrete and precise indications, supported by detailed evidence making it possible to assess the consequences likely to result from the absence of the measure requested. In any case, it is for the party requesting the suspension of the contested decision to show that they cannot wait until the outcome of the proceedings without suffering harm of a kind that would justify the requested suspension.

38. It is in the light of the above that the present request seeking the suspension of the decision to terminate the requesting party's employment contract following an unsatisfactory probationary period must be examined.

39. As to the seriousness of the alleged harm, the Chair notes that the request in question is based on general claims focusing essentially on the fact that the salary paid by the Council of Europe is the requesting party's only source of income. The Chair nevertheless notes that the requesting party does not make any submissions enabling his overall financial position to be assessed, in particular regarding benefits or allowances to which he might be entitled from the relevant national authorities. In any case, the requesting party's arguments concerning his assets and financial situation remain unsubstantiated and do not suffice to demonstrate, for instance, that execution of the contested decision would jeopardise his financial viability and his ability to meet his vital needs.

40. The Chair further notes that when his fixed-term contract was signed on 1 July 2022, the requesting party was informed of the possibility that his contract could be terminated at any time during the probationary period, subject to notice being given. The requesting party states perfunctorily that he had a legitimate expectation of having an employment contract for the entire duration of his probationary period. Nevertheless, while acknowledging that his performance was unsatisfactory, he focuses more on the fact that a longer probationary period would have enabled him to achieve the required level of performance. He is therefore wrong to claim that it was not until the notification of termination was given that he could have prepared for the consequences of losing his job, in particular for the purpose of securing alternative sources of income or building up adequate savings.

41. Apart from the financial loss, the requesting party refers to the non-pecuniary damage resulting from having been unfairly denied a longer probationary period. Without prejudice to any examination by the Tribunal as to the merits of the complaints made in this connection in his request for review, the Chair notes that the requesting party had a probationary period of a full year, during which he had been alerted several times to issues concerning his performance and his conduct. The requesting party does not deny these circumstances, nor does he contest the fact that during this period he received managerial support designed to improve his performance. These aspects must be taken into account when assessing the seriousness of the alleged harm, as they need to be weighed against the department's interest in retaining only staff with adequate prospects in terms of performance.

42. In the light of the above, the Chair concludes that the requesting party has provided no proof of the seriousness of the harm inherent in the execution of the contested decision.

43. With regard to the irreparable nature of the harm in question, the Chair underlines that the harm in question in the instant case is linked, firstly, to the length of the notice period, which the requesting party maintains ought to have been two months rather than just one month, and, secondly, the length of his probationary period, which usually could have been two years rather than just one year. In this connection, the Chair notes the information provided by the respondent that an additional month's salary will be paid to the requesting party in respect of the notice period in connection with his request for a management review.

44. Considering the rule laid down in Article 16.2 of the Tribunal's Statute (see paragraph 13 above), the Chair concludes that in the event of the requesting party being successful before the Tribunal and any appeal he lodges being considered well-founded, the harm caused by the execution of the decision to terminate his contract with effect from 14 July 2023 could be remedied by payment of compensation, the amount of which could be determined on the basis of the period of employment of which the requesting party had been unfairly deprived.

45. In the light of the above, the Chair concludes that the requesting party has also provided no proof of the irreparable nature of the harm inherent in the execution of the contested decision.

46. This conclusion is without prejudice to the Tribunal's decision on the merits of the case or to the requesting party's ability to refer during the contentious proceedings to any harm he might suffer as a result of execution of the contested decision and, if successful, to seek compensation for the damage resulting from the act complained of.

For these reasons,

Ruling in accordance with Article 14.8 of the Staff Regulations, Article 12 of the Statute of the Administrative Tribunal and Article 20 of the Rules of Procedure,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- Rejects the application for a stay of execution.

Done and ordered in Milna (Croatia), on 13 July 2023, the French text being authentic.

The Registrar of the
Administrative Tribunal

Christina Olsen

The Chair of the
Administrative Tribunal

Nina Vajić