

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR OF 21 October 2009

In the case of Jean-Marc LIBS v. Secretary General

THE FACTS

1. The appellant, Mr Jean-Marc Libs, works for the Council of Europe as a fixed-term permanent staff member. He holds a contract running from 1 September 2006 to 31 December 2009, and currently occupies a B4 post within the Organisation.
2. On 8 September 2009, the appellant applied, within the context of an “internal competition open solely to permanent staff”, for the post of Web 2.0 and multimedia support assistant (Grade B3), advertised in Vacancy Notice No. 67/2009.
3. On 10 September 2009, the Directorate of Human Resources informed him that his application had been rejected, since the Regulations on Appointments did not provide for the possibility of a staff member’s filling a post carrying a grade lower than his present one. The Head of the Recruitment and Appointments Division wrote to him as follows:

“I regret to inform you that, coming from a B4 staff member, your application cannot be accepted, since the Regulations on Appointments do not envisage a staff member’s applying for a post at a lower grade than his present one, which would amount to downgrading. The applicable texts, firstly, provide for downgrading only as a disciplinary measure, and, secondly, restrict the appointment and competition procedures to recruitment, transfer, promotion and secondment (Article 2 of the Regulations on Appointments).”
4. On 6 October 2009, the appellant lodged an administrative complaint under Article 59, paragraph 1 of the Staff Regulations. He requested the Secretary General to set aside the decision to reject his application.
5. On the same day, he applied to the Chair of the Administrative Tribunal for a stay of execution (Article 59, paragraph 9 of the Staff Regulations).
6. On 9 October 2009, the Secretary general submitted his observations concerning the application for a stay of execution.
7. On 12 October 2009, the appellant submitted his observations in reply.

THE LAW

8. Under Article 59, paragraph 9 of the Staff Regulations, application may be made for a stay of execution of an act decided by the Administration, if execution is likely to cause “grave prejudice difficult to redress”.

Under that same provision, “the Secretary General shall, 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.”

9. In his application, the appellant asks the Chair to order suspension of the decision of 10 September 2009, in which the Directorate of Human Resources rejected his application under Vacancy Notice No. 67/2009.

10. He starts by adducing a series of arguments to show that there are serious legal reasons why the decision of 10 September 2009 should be set aside.

11. He then argues that the consequences of the decision to reject his application would be difficult to redress if that decision were not suspended. He states that the Appointments Board will be meeting on 13 October 2009 and that, given the nearness of the date, he would, if the stay of execution were not granted, be finally excluded from the competition, even though his administrative complaint was lodged in due time, and the contested decision was taken in total violation of the applicable regulations.

12. The Secretary General first notes that the appellant has no direct and existing interest, of the kind required by Article 59, paragraph 1 of the Staff Regulations, in proceeding before the Tribunal, since he cannot show that his legal situation has been adversely affected. He bases his argument on the wording of Articles 1, paragraph 2, and 2 of the Regulations on Appointments (Appendix II to the Staff Regulations). In his view, the appellant cannot, as a B4 staff member, claim the right to apply for a B3 post, since the Regulations on Appointments make no provision for this.

13. The Secretary General adds that the Directorate of Human Resources, in informing the appellant that his application could not be accepted, was merely complying with the statutory provisions and regulations applying to him as a staff member of the Organisation – which means that he cannot claim that this decision has been prejudicial to him. In the Secretary General’s view, the appellant has, in view of his grade, no legally protected interest in applying, via internal competition, for a post carrying a grade lower than his present one. The complaint, and the application for a stay of execution which accompanies it, are thus inadmissible because he has no interest in proceeding.

14. The Secretary General then points out that, since the purpose of the urgent procedure is to ensure that the administrative proceedings are fully effective, 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. For the reasons already given, the Secretary General argues that the appellant cannot claim that he has suffered grave prejudice that is difficult to redress.

15. The Secretary General also argues that, if the appellant believed that rejection of his application had caused him such prejudice, he should have reacted at once, as soon as he learned of this decision, by applying for suspension of the procedure, to ensure that the purpose of his complaint could, if the latter was admitted, be realised. However, he waited nearly a month to lodge his complaint, just a few days before the Appointments Board’s meeting.

16. Finally, the Secretary General points out that there can be no question, at this stage, of examining the appellant's arguments in support of his complaint, which is not to be discussed, let alone examined, in these proceedings, which are concerned solely with the adoption of urgent measures.

17. In these circumstances, and in view of the points he has made, the Secretary General asks the Chair to dismiss the application for a stay of execution as inadmissible and/or ill-founded.

18. In his observations in reply, the appellant again states that he has an interest in defending the opportunity offered him by Vacancy Notice No. 67/2009 - namely, the possibility of obtaining a post carrying an indefinite contract, instead of his present fixed-term contract, which will expire on 31 December 2009, and so extending his professional career at the Council of Europe.

19. The appellant also repeats that failure to suspend the decision complained of will cause him grave prejudice that is difficult to redress and abides by his earlier arguments.

20. The Chair must first consider the Secretary General's objection that the application for a stay of execution is inadmissible.

21. He notes that the arguments put to him are concerned more with the merits of the case than with the admissibility of the application for a stay of execution and contain nothing to indicate that the application is indeed inadmissible.

22. It follows that the Secretary General's objection on grounds of inadmissibility must be dismissed.

23. Concerning the validity of the application for a stay of execution, the Chair points out that there can be no question of examining, at this stage, the admissibility and/or validity of the appellant's complaint in his appeal, since these questions are not to be discussed, let alone examined, in the present proceedings, which are solely concerned with the adoption of urgent measures (cf. paragraph 10 of the Chair's Order of 3 July 2003 in the case of *Timmermans v. Secretary General*).

24. The Chair notes that the complainant can reasonably claim that he risks suffering grave prejudice that is difficult to redress, if the advertised post is filled under the contested procedure before the Tribunal decides whether or not he was entitled to compete for it. On this point, the Chair refers, *mutatis mutandis*, to the arguments used in other cases where the issue was also restrictions on the scope of a decision granting a stay of execution when appointment-making had already begun under a recruitment procedure contested before the Tribunal (cf. the Order of 28 January 1992 in the *Muller-Rappard* case) and restrictions on the scope of a decision when an appointment has been decided during the contentious proceedings (ATCE, paragraph 25 of the Chair's Order of 26 February 2009, in Appeal No. 456/2008 – *Golubok v. Secretary General*). The fact that the present proceedings concern an internal competition, and not a recruitment procedure, is immaterial.

25. The Chair further notes that nothing the Secretary General has said allows him to conclude that the appellant would suffer no grave prejudice that is difficult to redress, if the procedure continued. In fact, the Secretary General merely criticises the appellant for waiting until 6 October 2009 to lodge his application for a stay of execution to suspend the procedure. However, that argument does not serve to show that he would suffer no grave prejudice, if the procedure continued. His purpose in applying for a stay of execution is to secure suspension of measures, as yet untaken, under the internal competition procedure, to fill the advertised post. Moreover, the Chair notes that, according to information supplied by the appellant and published on the Council's intranet

site, the Appointments Board will not be meeting on 13 October 2009 (paragraph 11 above), but on a later date.

26. The Chair points out that the exercise of his exceptional power under Article 59, paragraph 7 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). 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 it is necessary in this case, the stay of execution requested should be granted.

27. The Chair also notes that the appellant has requested that his exclusion from the internal competition procedure be suspended. However, this must involve, not so much his provisional admission, pending conclusion of the contentious proceedings, as suspension of the competition procedure, pending settlement of the dispute.

28. The Secretary General is obviously entitled, at any stage in the proceedings, to provide guarantees, which have not so far been given, that there will be no grave prejudice that is difficult to redress, and request that the stay of execution granted today by the Chair be lifted (cf. ATCE, paragraph 29 of the Chair's Order of 26 February 2009, in Appeal No. 456/2008 – Golubok v. Secretary General).

For these reasons,

Making an interim order in accordance with Article 59, paragraph 7 of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal, and Article 21 of the Rules of Procedure,

In view of the matter's urgency,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- grant the stay of execution applied for, insofar as it concerns continuation of the procedure for appointment to the post at issue in the contentious proceedings (Vacancy Notice No. 67/2009).

- decide that the stay of execution will expire, at latest, on the day on which the Administrative Tribunal gives its decision.

Done and ordered at Oberwil (Switzerland) on 21 October 2009.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

L. WILDHABER