

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR OF 23 December 2021

In the case of D v. Secretary General

THE FACTS

1. The complainant is a staff member employed by the Organisation on a fixed-term contract ("CDD").
2. The complainant was recruited by the Organisation on 1 April 2012 through an external competition in pursuance of Article 25 of Appendix II to the Staff Regulations.
3. The complainant's first contract of five years was renewed until 31 March 2022.
4. On 3 November 2021, the complainant was informed during a meeting with the Secretary General of the latter's intention not to renew the contract beyond the date of 31 March 2022.
5. On 12 November 2021, the complainant received a letter of notice dated 8 November 2021 containing information that the current contract would not be renewed and would thus end on 31 March 2022.
6. On 3 December 2021, the complainant submitted an administrative complaint under Article 59 of the Staff Regulations. The complainant sought the annulment of the decision not to renew the above-mentioned contract.
7. On 10 December 2021, the complainant applied to the Chair of the Administrative Tribunal for a stay of execution of the decision complained of.
8. In the context of the said application, the complainant requested anonymity, which was granted by decision of the Chair dated 14 December 2021. Therefore, the present order is drafted in such a way as to preserve this anonymity as far as possible.
9. On 15 December 2021, the Secretary General's observations on the application for a stay of execution were filed at the Registry.
10. On 20 December 2021, the complainant submitted observations in reply.

THE LAW

11. Under Article 59, paragraph 9, of the Council of Europe Staff Regulations, an application for a stay of execution of an administrative act complained of may be submitted if its execution is likely to cause grave prejudice difficult to redress.

12. According to the 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.

I. THE PARTIES' SUBMISSIONS

13. Acting in pursuance of the above-mentioned provision of the Staff Regulations, the complainant requests the suspension of the execution of the contested decision and that employment on the current post be continued until the Tribunal has ruled on the prospective appeal. The complainant argues that such measures would be necessary to guarantee that the administrative proceedings are fully effective and to avoid creating an irreversible situation before the Administrative Tribunal decides on the appeal.

14. The complainant submits that the request, in addition to being admissible, is justified by the grave prejudice difficult to redress that the complainant would incur should the contested decision be executed.

15. The complainant also adduces considerations aimed at demonstrating that the Organisation infringed *prima facie* several rules of the Council of Europe Staff Regulations by breaching the right to be heard and by committing a manifest error of assessment by taking the decision not to renew the contract, a decision which is a disguised disciplinary sanction. The complainant invokes further a breach of the Organisation's duty of care.

16. As regards admissibility, the complainant submits that the administrative complaint was lodged within the applicable time-limit before seizing the Chair of the Administrative Tribunal, and that there is a direct and existing interest in challenging the non-renewal decision.

17. On the urgency, the complainant argues that the Secretary General's intention to advertise the post for external competition constitutes a grave prejudice difficult to redress which justifies the adoption of urgent measures. The complainant contends that insofar as the decision complained of is a disguised disciplinary sanction taken for acts that are not even yet established and without affording the complainant the chance to be heard, it is obvious that the complainant will suffer a grave prejudice.

18. It is further added that the stay of execution of the non-renewal decision is not only in the interest of the complainant, but also in the interest of the Organisation both on account of the outstanding profile and excellent performances of the complainant and in view of the difficulty which the Organisation would face to reassign the post if, in the meantime, an outside candidate would be selected to replace the complainant.

19. In addition, the complainant argues that the execution of the challenged decision could have a detrimental effect on his/her family, namely by endangering the ability of the complainant's child to pursue studies until the end of the school year in July 2021.

20. According to the Secretary General, it is clear from the documents on file that the complainant was fully aware that the contract was of fixed duration, and also of its date of termination and of the fact that it would not be automatically renewed beyond that date.

21. The Secretary General considers in the first instance that the complainant's request for a stay of execution should be dismissed because its purpose is not to preserve the *status quo*, but to change it. She argues that in contentious proceedings, a fair balance must be maintained between the parties and their respective interests. This balance would be upset if the complainant were to obtain a new contract by means of an urgent procedure, thus modifying the legal situation arising from the automatic expiry of the contract.

22. The Secretary General considers furthermore that, in the application, the complainant does not establish the existence of grave prejudice difficult to redress.

23. Such a prejudice is demonstrated neither by the complainant's submission that the act complained of is a disguised disciplinary sanction, nor by the Secretary General's stated wish to advertise the post for external competition, since as regards the latter circumstance, the complainant's replacement is not imminent, nor has a selection procedure been initiated.

24. The Secretary General adds that she commits herself to keep the post vacant until the Administrative Tribunal will have rendered its decision on the merits in this case, thus eliminating any risk of a grave prejudice difficult to redress in respect of the complainant.

25. The Secretary General notes further that the difficulties inherent to the end of a contract, – such as the moral damage alleged by the complainant and the detrimental effects on the complainant's family –, are not considered as a reason to grant a stay in the Tribunal's case law.

26. The Secretary General concludes by noting that if the Tribunal were to decide in the complainant's favour, any prejudice claimed could be properly remedied through the award of compensation for the damage suffered.

27. Given the impact of this situation on the smooth functioning of the Organisation, the Secretary General invites the complainant, once the deadline for reply to the lodged administrative complaint has expired, to introduce an appeal without further delay and requests the Tribunal to proceed with a fast-track procedure. She considers that a decision to afford the requested stay of execution would create a problematic precedent threatening the functioning of the Organisation.

28. In the observations in reply, the complainant emphasizes that the request for a stay of execution does not aim at changing the contractual situation but at preserving the complainant's rights and interests until the Tribunal rules on the merits of the case. The complainant considers that the commitment to keep the post vacant until such moment (see *supra* paragraph 24) is not a sufficient guarantee to this end and that *a minima*, the post should not be advertised.

29. In response to the Secretary General's observations on the length of the proceedings (see *supra* paragraph 27), the complainant asserts the right to file an appeal within the statutory deadline and indicates that there is no need to accelerate the procedure since fast-track proceedings would not allow resolving her case before the end of March 2022.

30. The complainant reiterates that the likelihood of a grave prejudice difficult to redress has been demonstrated and that the concerns regarding the legality of the decision complained of should be considered when assessing the prejudice. Contrary to the Secretary General's contentions (see *supra* paragraph 26), the complainant observes that financial compensation would not constitute a proper remedy since it should not be regarded as a normal means of executing an annulment decision in pursuance of the terms of Article 60, paragraph 7, of the Staff Regulations.

31. Thus, the complainant stands firmly by the submissions made in the application for a stay of execution.

II. THE CHAIR'S ASSESSMENT

32. From the outset, the Chair specifies that there can be no question at this stage of assessing arguments attaching to the validity of the grievances expressed by the complainant in the administrative complaint: these issues should not be discussed, let alone analysed, in the context of the present procedure, whose sole purpose is the adoption of urgent measures (see ATCE, Chair's order of 3 July 2003, paragraph 10, in the case *Timmermans v. Secretary General*). Thus, there is no need for the Chair to examine the arguments put forth by the complainant regarding the presumption of the merits of the case, as set out in paragraph 15 above.

33. The Chair recalls 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 attaining that objective, the measures sought must be urgent in so far as, in order to avoid grave prejudice difficult to redress, they must be adopted and produce their effects before a decision is reached in the main action (ATCE, Chair's order of 14 August 2002, in *Belyaev v. Secretary*, paragraph 16; [Order of the President of the Court of First Instance of the European Communities 10 September 1999 in Case T- 173/99 R Elkaïm and Mazuel v Commission](#), paragraph 25). Moreover, it is for the party seeking interim measures to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that nature (Order of the President of the Court of First Instance of the European Communities of 19 December 2002 in *Case T- 320/02 R Esch-Leonhardt and Others v ECB*, paragraph 27).

34. The Chair notes further that for the purpose of assessing whether the prejudice incurred would be difficult to redress, it must be determined whether financial compensation would represent an adequate remedy for the damage caused by the illegality complained of. 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 subsequent financial compensation (ATCE, Chair's order of 28 June 2013, *Gündüz and others v. Secretary General*, paragraph 30; Order of the President of the General Court of the EU of 27 April 2010 in [Case T- 103/10 P\(R\) U v Parliament](#), paragraph 35).

35. In the present case, the complainant seeks the suspension of the decision not to renew the above-mentioned employment contract which will end on 31 March 2022. The complainant argues that if the Tribunal overturns the challenged decision but in the meantime the position has already been awarded to an external candidate, the prejudice would be difficult to redress.

36. The Chair takes note that the Secretary General has committed herself to keep the complainant's post vacant until the Administrative Tribunal will have rendered its decision on the merits in this case (see *supra* paragraph 24).

37. In the light of this information, the Chair is of the opinion that, at the present juncture, the Secretary General's commitment to refrain from filling the complainant's post until such time as the Tribunal will have ruled on the merits of the case offers a sufficient guarantee that the complainant's rights and interests will be preserved. Since the post at stake will not be filled before the Tribunal's final decision is rendered, the Chair sees no persisting risk for the complainant of losing the post, and hence no risk of grave prejudice difficult to redress, which would stand in contradiction to the Tribunal's final assessment of the legality of the contested non-renewal. On the contrary, the complainant could return to the post should the Tribunal annul the contested decision. Even with respect to the complainant's complaint about a potential loss of the current employment, the Chair notes that, in the past, the Tribunal has not considered difficulties inherent to the end of a contract as a reason to grant a stay.

38. In the absence of a risk of a prejudice, there is no need for the Chair to assess whether such prejudice would reach the required threshold of grave prejudice difficult to redress, nor whether financial compensation would offer a suitable means of redress in the case the Tribunal finds in the complainant's favour on the merits.

39. Since the condition of urgency is not met, the application for a stay of execution must be dismissed, without the need to examine the other arguments of the complainant or to balance the various interests involved.

40. This finding cannot prejudice the Tribunal's decision on the merits and is without prejudice to the complainant's ability to state during the contentious proceedings the prejudice that he/she might suffer owing to the execution of the contested decision and, if successful, to claim compensation for damage resulting from the act complained of (Article 60 paragraph 2 *in fine* of the Staff Regulations).

41. The Chair reiterates that the exceptional power conferred on her under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint in its exercise (see ATCE, Chair's Order of 31 July 1990, paragraph 12, in the case of Zaegel v. Secretary General; and ATCE, Chair's order of 1 December 1998, paragraph 26, in the case of Schmitt v. Secretary General).

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 Article 21 of its Rules of Procedure,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Having consulted the members of the Tribunal,

Decides that:

- the application for a stay of execution presented by D is rejected.

Done and ordered in Zagreb (Croatia), on 23 December 2021.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

Christina OLSEN

Nina VAJIĆ