

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR ORDER of 23 January 2009

in the case of Petra WINTER v. Secretary General

THE FACTS

1. The appellant, Ms Petra Winter, is an Austrian national already employed by the Organisation as a temporary staff member. She holds a grade B5 post.
2. The appellant applied to sit the external competitive examination for the recruitment of administrative officers (grade A1/A2) advertised in vacancy notice e84/2007.
3. On 15 September 2008, the appellant learned that she had not achieved the requisite average mark in the first (eliminary) stage of the competitive examination and that, consequently, her other tests had not been marked and she was not being called for the next stage of the procedure.
4. On 15 September 2008, the appellant lodged an administrative complaint under Article 59 of the Staff Regulations.
5. On 4 November 2008, the Secretary General rejected her administrative complaint as partially inadmissible and/or ill-founded. The appellant says she was notified of this on 12 November.
6. On 8 January 2009, the appellant lodged an appeal before the Tribunal under Article 60 of the Staff Regulations. The appeal was registered as Case No. 458/2009.
7. In her form of appeal, the appellant also applied to the Chair of the Administrative Tribunal for a stay of execution of the decision barring her from taking any further part in the recruitment procedure.
8. On 12 January 2009, the Secretary General forwarded his observations on the request for a stay of execution.
9. On 14 January 2009, the appellant indicated that she did not wish to file observations in reply.

THE LAW

10. Under Article 59, paragraph 7 of the Staff Regulations a complainant may apply for a stay of execution of an administrative act “if its execution is likely to cause him or her grave prejudice difficult to redress”.

The appellant has applied for a stay of execution of the “further selection procedure”.

11. In support of her application the appellant contends that she would be “disadvantaged if called for interview at a later stage than the successful candidates”.

12. The Secretary General argues firstly that the application for a stay of execution is inadmissible.

13. Under Article 59, paragraphs 7 and 4 of the Staff Regulations, he says, applications for a stay of execution of an impugned act should be made at the administrative complaint stage and not simultaneously with the lodging of an appeal. If a stay had been applied for at the correct time and granted by the Chair of the Administrative Tribunal, it could have been upheld for the duration of the appeal proceedings. In the event, since the appellant applied for it at the same time as she lodged her appeal, her application is inadmissible.

14. Moreover, the measure requested, namely staying of the recruitment procedure in question, was not applied for by the appellant in her administrative complaint. Consequently, her application is also inadmissible because internal remedies have not been exhausted.

15. Concerning the merits of the application the Secretary General stresses that since the purpose of the procedure in question is to ensure that the rules for managing administrative disputes are fully effective, any application for a stay of execution must show that the measure applied for is necessary in order to prevent grave prejudice difficult to redress. If it were otherwise, that would jeopardise not only the smooth functioning of the Council’s operations but also the management of major sectors of the Organisation. The Secretary General argues that the appellant cannot claim to have suffered grave prejudice difficult to redress here.

16. The Secretary General refers here to the Order made by the Chair of the Administrative Tribunal on 29 May 2008 in the case of *Simonet (2) v. Secretary General*. He notes that the Chair began by pointing out (paragraph 19 of the Order) that the complainant had not proved that he had suffered “grave prejudice difficult to redress” because his argument that it would be difficult to organise new tests was not conclusive. The Secretary General argues that in this case too the appellant has not produced any additional evidence that she suffered such prejudice.

17. As the facts of the case are similar the Secretary General asks the Chair to reject the application for a stay of execution as inadmissible and ill-founded.

18. The Chair is required in the first instance to consider the Secretary General’s pleas of inadmissibility.

19. She notes that it was routine for appellants to apply for a stay of execution after lodging their appeal and the Secretary General never challenged the admissibility of this (see the order for a stay of execution in *Feriozzi-Kleijssen v. Secretary General*, appeal No. 172/1993, and, most recently, in *Radziwill v. Secretary General*, appeal No. 384/2006).

20. Whilst the Secretary General has latterly challenged the admissibility of such applications, the Chair has not seen fit to depart from the established practice of deeming admissible any application for a stay of execution made after the appeal is lodged (order for a stay of execution of 20 June 2008 in *Tomasi v. Secretary General*).

21. Concerning the matter of whether or not internal remedies have been exhausted because the appellant did not apply for a stay of execution at the administrative complaint stage, the Chair notes that in her order of 29 May 2008 in the *Simonet (2)* case she expressly mentioned the possibility of making a fresh application for a stay of execution during the appeal proceedings (*ibid.*, paragraph 21) following a first application made at the administrative complaint stage. The whole point of an application for a stay of execution is that application may be made during the appeal proceedings even though it has not been made previously at the administrative complaint stage. Appellants may legitimately feel that it is only after lodging their appeal that they are in danger of suffering “grave prejudice difficult to redress” owing to the execution of the impugned act.

22. Consequently, the Secretary General’s pleas of inadmissibility must be rejected.

23. Concerning the merits of the application for a stay of execution, the Chair states that there is no question at this stage of analysing arguments relating to the merits of the allegations made by the appellant in her appeal, as it is inappropriate to discuss, let alone analyse, this question in the context of these proceedings which are concerned solely with the adoption of urgent measures (see Chair Order of 3 July 2003, paragraph 10, in *Timmermans v. Secretary General*). In the event the Chair notes that the appellant has not proved that she has suffered “grave prejudice difficult to redress” (Article 59, paragraph 7 of the Staff Regulations). The argument that she would be disadvantaged if called for interview later is without merit. And, as the Secretary General rightly observes, the Chair dismissed a similar argument in her Order of 29 May 2008 in *Simonet (2) v. Secretary General*, to which she refers *in extenso*.

24. The Chair points out that the exceptional power conferred on her under Article 59, paragraph 7 of the Staff Regulations calls for some self-restraint in its exercise (see Appeals Board of the Council of Europe, Chair Order of 31 July 1990, paragraph 12, in *Zaegel v. Secretary General*; also, ATCE, Chair Order of 1 December 1998, paragraph 26, in *Schmitt v. Secretary General*, and Chair Order of 14 August 2002, paragraph 16). Since the purpose of the procedure in question is to ensure that the rules for managing administrative disputes are fully effective, any application for a stay of execution must show that the measure applied for is necessary in order to prevent grave prejudice which is difficult to redress. If it were otherwise, that would jeopardise not only the smooth functioning of the Council’s operations but also the management of major sectors of the Organisation.

I, THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Hereby decide as follows:

- Ms Winter’s application for a stay of execution is rejected.

Done and ordered at Göteborg, 23 January 2009.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

Elisabeth PALM