

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 24 April 2019

In the case of Vincent WIRTZ v. Secretary General

THE FACTS

1. The appellant, Mr Vincent Wirtz, already works for the Organisation on a fixed-term contract. He was assigned to the European Directorate for the Quality of Medicines & HealthCare (EDQM) as a production operator.

2. The complainant applied to sit a competitive examination for the external recruitment of a laboratory support assistant (grade B1/B2) to be employed on a fixed-term contract in the EDQM (vacancy notice no. e 5/2019).

3. On 8 April 2019, the complainant was informed that his application had been rejected because he did not satisfy all the criteria listed in the vacancy notice, in particular the requirement to “have at least 12 months of professional experience in a pharmaceutical analysis laboratory or school/university laboratory or 24 months of professional experience of undertaking housekeeping/maintenance duties in a technical environment.”

4. The following day, he asked the Directorate of Human Resources (“DHR”) to reconsider his application and to allow him to sit the written tests in the said competition.

5. On 11 April 2019, DHR confirmed to the complainant, after consulting the EDQM, the reasons why his application did not meet the criteria set out in the vacancy notice, in the opinion of the recruiting department. It noted in particular:

“In effect, the line of work in which you are currently employed in the DRSL, i.e. production operator, essentially involves producing samples and reference standards and not housekeeping/maintenance as required by the one of the eligibility criteria in the vacancy notice.”

6. On 12 April 2019, the complainant lodged an administrative complaint under Article 59 of the Staff Regulations. He contested the decision to reject his application and asked for it be reconsidered so that he could sit the written tests in the said competition.

7. The same day, the complainant made an application to the Chair of the Administrative Tribunal for a stay of execution of the Secretary General’s decision not to allow him to sit the written tests (Article 59, paragraph 9, of the Staff Regulations). More specifically, he asked that the Secretary General be ordered to suspend, pending the outcome of the administrative complaint

proceedings and any subsequent appeal that might be lodged with the Tribunal, the execution of the decision to reject his application for the competition in question and to allow him, on a provisional basis, to sit the written tests that were to take place on 18 April 2019.

8. On 16 April 2019, the Registry received the Secretary General's observations on the application for a stay of execution.

9. The following day the complainant lodged his observations in reply.

THE LAW

10. Under Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution of an administrative act may be lodged if its execution is likely to result in "grave prejudice difficult to redress".

11. The complainant has lodged his application in order to obtain a stay of execution of the decision to reject his application for the competition in question. He also asks to be allowed to take part in the written tests which were to be held on 18 April 2019.

12. To justify his request for a stay of execution, the complainant argues that "the decision which I am contesting, in that it prevents me from sitting the written tests in competition e 5/2019, is such as to cause me grave prejudice difficult to redress. (...) If I cannot sit these tests, I will suffer grave prejudice difficult to redress, since my chances of passing this competition examination will be irreparably compromised."

13. The Secretary General notes firstly that under Article 59, paragraph 9, of the Staff Regulations he 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."

14. Accordingly, in order to comply with his obligations having regard to the time-limits for proceedings in the present case, in particular under Article 8 of the Statute of the Administrative Tribunal (Appendix XI to the Staff Regulations), the Secretary General decided to postpone until 20 and 21 May 2019 the tests which were originally to have been held on 18 April 2019 in the case of the written tests and 30 April in the case of the interviews. These new dates will allow the tests to take place after the Chair of the Tribunal has ruled on the present application, in accordance with the provisions of Article 59, paragraph 9, of the Staff Regulations.

15. As regards the merits of the application for a stay of execution, the Secretary General goes on to observe that the complainant's situation does not warrant suspending the decision not to allow him to sit the written tests in this competition. In effect, the complainant has not established, in the present application, the existence of "grave prejudice difficult to redress". As is clear from the Tribunal's case-law, "it is for the person who lodges the application for a stay of execution to prove that he or she is likely to suffer grave prejudice difficult to redress if the stay of execution is not granted". Proceeding as planned with the tests in this competition is in no way likely to cause the complainant such prejudice, however.

16. In effect, in the unlikely event that the Tribunal were to rule in favour of the complainant following any appeal which he might bring, the Secretary General, being bound by the ruling of

the Tribunal, would have to execute that decision, in accordance with Article 60, paragraph 6, of the Staff Regulations. The Secretary General refers here to the decision delivered by the Chair of the Tribunal on 17 January 2013 in a case very similar to that of the complainant, namely Ménard v. Secretary General, in which the Chair of the Tribunal dismissed the complainant's application for a stay of execution on the ground that proceeding as planned with a competition and the subsequent recruitment of a financial specialist (Grade A1/A2) was unlikely to cause him grave prejudice difficult to redress (paragraphs 22-24 below).

17. The Secretary General contends that the prejudice relied on by the complainant in this instance is not such as to warrant granting a stay of execution in connection with this competition, whose rapid conclusion is crucial for the smooth and timely operation of the EDQM's laboratory, through the recruitment of a support assistant with the appropriate profile. Suspending the competition would place the EDQM in a difficult position. In addition, if the recruitment procedure were to be suspended for several months, even though the complainant is contesting the recruiting department's assessment that his application does not meet the criteria listed in the vacancy notice, that would compromise the smooth running of the EDQM laboratory.

18. The Secretary General reiterates that the purpose of the urgent procedure being to ensure that the administrative disputes procedure is wholly effective, the request for a stay of execution must demonstrate that the measure sought is necessary to prevent grave prejudice difficult to redress. Otherwise, this would compromise not only the proper functioning of departments but also the management of important sectors of the Organisation. For the reasons outlined above, the appellant cannot claim grave prejudice difficult to redress. In addition, suspension would compromise the interests of the Organisation, by severely hampering important activities. Also, there can be no question of analysing at the present juncture the arguments relating to the merits of the complaints submitted by the complainants in their administrative complaints, since there is no cause for this question to be discussed, still less examined, in the context of the present procedure which is aimed only at the adoption of emergency measures.

19. Under these circumstances, the Secretary General asks the Chair of the Administrative Tribunal to reject the application for a stay of execution submitted by the complainant as ill-founded.

20. In his observations in reply, the complainant contends that it was never his intention to have the competitive tests postponed, let alone have the recruitment procedure suspended for several months as the Secretary General suggests. He is simply asking the Tribunal to order the Secretary General to suspend, pending the outcome of the administrative complaint proceedings, his decision to reject the appellant's application for this competition. The complainant regrets, therefore, the Secretary General's decision to postpone the competitive tests, something which could have been avoided.

21. As to the merits of his application, the complainant reiterates that if he were unable to sit the written tests, his chances of passing the competitive examination in question would be irreparably compromised and his administrative complaint would no longer serve any purpose. The grave and irreparable damage which he would suffer in that event is patent, therefore, as he would be deprived of the only real opportunity open to him to become a Council of Europe staff member on a post that matches his qualifications. In effect, no one can say whether another opportunity of this kind will arise in the future.

22. In conclusion, the complainant asks that his application for a stay of execution of the impugned act be granted.

23. The Chair reiterates that there can be no question of analysing at the present juncture the arguments relating to the merits of the complaint submitted by the complainant in his administrative complaint, since there is no cause for these questions to be discussed, still less examined, in the context of the present procedure which is aimed only at the adoption of emergency measures (see Chair's Order of 26 February 2009, paragraph 22, in the case *Golubok v. Secretary General*).

24. In this instance, on the basis of all the documents submitted by the complainant in support of his application for a stay of execution, the Chair considers that, unlike in the *Ménard* case to which the Secretary General refers (paragraph 16 above), the complainant has established the existence of "grave prejudice difficult to redress" (Article 59, paragraph 9, of the Staff Regulations). In effect, the arguments he adduces, namely that his chances of passing the competitive examination in question would be irreparably compromised if he did not sit the written tests (paragraph 21 above), are founded insofar as the recruiting department has already done some extensive shortlisting. In these circumstances, any post-facto testing of the complainant, i.e. after the tests sat by the other candidates, would risk placing him at a disadvantage vis-à-vis the other candidates, at least one of whom works, according to the complainant, in the same recruiting department. Needless to say, the prejudice would be even more grave and difficult to redress if the Secretary General were to make an appointment.

25. The Chair notes that, thanks to the Secretary General's decision to postpone the written tests (paragraph 14 above), it is possible for her to deal with the complainant's administrative complaint within the time-limit provided for in Article 59, paragraph 4, of the Staff Regulations, i.e. before the written tests commence. The Chair notes, however, that the Secretary General has adduced no compelling evidence that would lead her to conclude that the complainant would not suffer "grave prejudice difficult to redress" if he were not allowed to sit the written tests. The Secretary General mentions the need to conclude the competition in question quickly to enable the EDQM laboratory to operate efficiently. He further asserts that suspending the competition would place the EDQM in a difficult position (paragraph 17 above). The Chair notes, however, that the Secretary General does not back up his assertion with specific, detailed arguments. The Chair further notes that the post in question is an entry-level category B support post in a structure that seems to have a large contingent of staff and she is surprised at the Secretary General's assertion that granting the stay of execution "would compromise the interests of the Organisation, by severely hampering important activities" (paragraph 18 above).

26. The Chair also notes that the stay of execution of the decision to exclude the complainant from the competition is granted subject to the positive outcome of the present dispute. The Chair further observes that the complainant has requested that the decision be stayed until the written tests without specifically referring to the interviews and the ensuing recruitment. In view of the fact, however, that the tests have been postponed and in order to ensure that the stay of execution is effective, it is appropriate that the stay of execution be granted until the end of the contentious proceedings which gave rise to this stay of execution (outcome of the administrative complaint or any subsequent appeal which might be lodged if the administrative complaint is rejected).

27. 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 Chair's Order of 26 February 2009, mentioned above, paragraph 28 and the other references cited therein).

The purpose of the urgent procedure being to ensure that the administrative disputes procedure is wholly effective, the request for a stay of execution must demonstrate that the measure sought is necessary to prevent grave prejudice difficult to redress. Otherwise, this would compromise not only the proper functioning of departments but also the management of important sectors of the Organisation. As this is not so in the instant case, there is no reason to grant the requested stay of execution.

For these reasons,

Making a provisional ruling in accordance with Article 59, paragraph 9, of the Staff Regulations, with Article 8 of the Statute of the Administrative Tribunal, and with Rule 21 of the Rules of Procedure of the Administrative Tribunal,

Having regard to the urgency of the matter,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- grants the requested stay of execution insofar as it relates to the Secretary General's decision not to allow the complainant to sit the tests in connection with vacancy notice e5/2019 and, hence, to the outcome of the latter.

- decides that the stay of execution shall expire on the day on which the Tribunal delivers its decision at the latest.

Done and ordered in Supetar, on 24 April 2019.

The Deputy Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

Eva HUBALKOVA

Nina VAJIĆ