

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR OF 28 June 2013

**In the case of Sevda GÜNDÜZ and Others v. Secretary General**

### THE FACTS

1. The seven complainants, Mses Sevda Gündüz, Clelia Cucchetti-Rondanini, Anne Gury, Marie-Paule Gutfreund, Nasera Kessour, Martine Lang and Christine Rhinn, are nationals of several countries who already work for the Organisation as permanent staff members with fixed-term contracts. They are employed at grade B2. Some of them had already worked for the Organisation as long-term temporary staff members on monthly contracts.

2. The seven complainants were recruited in 2008 following a competition (Vacancy Notice No. e25/2008) held in accordance with Article 16 of the Regulations on Appointments (Appendix II to the Staff Regulations), in order to fill vacancies for administrative support assistants in finance/accounting. Their contracts expire either on 30 June 2013 or 31 July 2013, depending on the circumstances.

3. Between 26 March 2013 and 18 April 2013, the complainants were given notice of the termination of their fixed-term contracts, in accordance with Article 20 *bis* of the Regulations on Appointments.

4. Six of the complainants applied for a competition – also being held under Article 16 of the Regulations on Appointments – to recruit support assistants in accounting and financial management (grade B1/B2), organised following the publication of Vacancy Notice No. e059/2013. The seventh (that is to say the first complainant) did not apply. She asserts that she wished to do so but was discouraged by the Directorate of Human Resources.

5. On 17 May 2013, the six complainants received an email informing them that a list of applicants best matching the vacancy notice criteria had been drawn up and that their applications had been rejected.

6. On 22 May 2013, the six complainants received a second email explaining that the rejection of their applications was not due to any lack of competence on their part, but to the fact that Article 16 of the Regulations on Appointments prohibited them from applying for another competition in the same category.

7. By a third email, the complainants were informed that the relevant provision was actually Article 20 *bis* of the aforementioned Regulations, which establishes that the total length of employment within the Organisation under fixed-term contracts in the same category cannot exceed five years.

8. On 29 May 2013, the complainants sent a letter to the Deputy Secretary General.

9. On 5 June 2013, the complainants lodged an administrative request pursuant to Article 59, paragraph 1, of the Staff Regulations seeking compensation for the damages they consider they sustained due to the failure to correctly inform them of the possibility of joining an unemployment insurance scheme. The Secretary General has a 60-day time limit to take a decision. However, the complainants indicated that, in view of the urgency, if no reply had been received within one week, they would consider their request refused.

10. On 14 June 2013, the complainants lodged an administrative complaint with the Secretary General in accordance with Article 59, paragraph 2, of the Staff Regulations. They complained about the rejection of their applications for competition No. e059/2013, as well as the failure to inform them of their rights with regard to unemployment insurance.

Their main request was that they be allowed to continue working within the Organisation and that their contracts be reclassified as indefinite-term contracts.

In the alternative, the complainants requested the suspension of competition No. e059/2013, its replacement with a competition organised according to Article 15 of the Regulations on Appointments and their admission to this competition.

In the further alternative, in the event that neither of these possibilities were to be allowed, or if they should be unsuccessful in the competition provided for under the second option, they sought complete reimbursement of the allowances they could have received under the “special expatriate” unemployment insurance scheme of the Pôle Emploi employment office, after deduction of the contributions they would have paid if they had been better advised and looked after by the Directorate of Human Resources.

11. In accordance with Article 59, paragraph 5, of the Staff Regulations, the complainants requested that their complaint be referred to the Advisory Committee on Disputes.

12. Through an application lodged the same day, the complainants applied to the Chair of the Administrative Tribunal for a stay of execution under Article 59, paragraph 9, of the Staff Regulations. They asked the Chair to order the Secretary General to stay execution of the decision to terminate their contracts, so that they could continue working in the Organisation until the completion of the procedure relating to their administrative complaint.

13. On 19 June 2013, the Secretary General lodged his observations concerning the request for a stay of execution.

14. On 21 June 2013, the complainants submitted their observations in response.

## THE LAW

15. Under Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution of an administrative decision may be lodged if its execution is likely to cause “grave prejudice difficult to redress”.

According to the same provision, the Secretary General must, save for duly justified reasons, stay the execution of the decision until the Chair of the Administrative Tribunal has ruled on the application in accordance with the Tribunal’s Statute.

16. The complainants lodged their application for a stay of execution with a view to having the Chair order the suspension of the decision to terminate their contracts so they could continue to work in the Organisation until the end of the procedure relating to their administrative complaint.

17. The complainants believe that if they leave the Organisation at the end of their contract, they will clearly suffer “serious irreparable damage”.

The complainants state that they would find themselves in a very difficult situation without any “financial cushion” that would allow them tranquilly to look for another job outside of the Organisation. As a result of having worked for years in an international organisation they were cut off from all social benefit systems during this period. They add that if they do not find work immediately (and for the moment none of them have anything in view), they will have to draw on their savings, and, for those who want to stay in France, the active solidarity income, which is the main allowance that they can receive (provided they are entitled to it), comes to approximately 500 euros for a single person.

The complainants state that, for some of them, their personal circumstances make them more vulnerable. Several of them are older than 45, and therefore of an age at which it is extremely difficult to find another job, especially in the current economic climate. Some of the complainants provide details about their private lives.

18. For his part, the Secretary General argues that the application for a stay of execution is inadmissible *ratione materiae*.

19. In his contention, it follows from Article 59, paragraph 9, of the Staff Regulations that an application for a stay of execution must target the decision complained of in the administrative complaint. However, in this instance, the complaint does not challenge the decision to terminate their contracts, and nor do they argue that this decision is unlawful per se. Their complaint contests the decision, as far as six of them are concerned, to reject their applications in the context of competition No. e059/2013, as well as an alleged lack of information from the Directorate of Human Resources concerning the possibility of individually paying contributions to a French unemployment insurance scheme. The acts contested in the administrative complaint are not directly linked to the decision to terminate the complainants’ employment.

20. With regard to the merits of the application, the Secretary General refrains from making any comment on its substance and confines himself to stating that the request for a stay of execution is unfounded.

He argues that the complainants themselves, in the context of this application, have failed to establish “the existence of grave prejudice difficult to redress”. As can be seen from the Administrative Tribunal’s case-law, it falls to the person who applies for a stay of execution to prove that they risk prejudice difficult to redress if the stay of execution is not granted, and not to the Secretary General to provide evidence to the contrary. Yet, the complainants do not provide any evidence in support of their allegation that they are at risk of suffering any form of prejudice.

Quite the contrary, still according to the Secretary General, it should be noted that the complainants cannot claim a serious prejudice difficult to redress, since they were always informed – as from their initial participation in competition N° e25/2008 – that the total duration of their employment within the Organisation under fixed-term contracts could not exceed five years. By participating in competition N° e25/2008 and then signing the employment contracts linking them to the Organisation, they accepted all of the conditions, including the maximum length of employment set at five years. They were also clearly informed that there was no unemployment insurance scheme at the Council of Europe as from the beginning of their employment. With regard to the possibility for staff members to individually pay into an unemployment insurance scheme, this is an entirely individual step which everyone must take according to their own needs and interests, without the Organisation having any obligation in the matter.

Moreover, if the complainants really thought the termination of their fixed-term contracts was such as to cause prejudice of any sort, it would have been logical for them to lodge a complaint contesting the legality of that decision, along with a request for a stay of execution, as early as possible, and in any event well before 14 June 2013, particularly since the notices of termination of their employment had been sent on 26 March and 18 April 2013. By waiting nearly three months to lodge such an application for a stay of execution, while not contesting the legality of the termination of their contracts following the maximum length of five years, the complainants have shown that the decision to terminate their contracts is not likely to cause them grave prejudice difficult to redress and therefore that their situation does not justify an urgent measure.

It is clear from the foregoing that the complainants’ situation is devoid of any of the elements that constitute a “grave prejudice difficult to redress”, the condition necessary for a stay of execution. Consequently, the prejudice cited by the complainants, should it exist, would not be such as to justify a stay of execution in the context of proceedings concerning their admission to a competition – for six of them – as well as an alleged lack of information with regard to their possibility of individually paying contributions to a French unemployment insurance scheme.

Since the purpose of the urgent procedure is to ensure that the administrative proceedings are fully effective, an application for a stay of execution must demonstrate that the requested measure is necessary to avoid a grave prejudice difficult to redress. Otherwise, this would jeopardise not only the smooth running of departments, but also the management of important sectors of the Organisation. For the reasons stated above, the complainants cannot claim a grave prejudice difficult to redress.

Lastly, the Secretary General points out that at this stage there can be no question of making any assessment of the arguments concerning the merits of the complainants’ grievances in connection with their administrative complaint, as those issues are not to be discussed, let

alone examined, in the context of this procedure, which solely concerns the adoption of urgent measures.

For this reason, in these circumstances and in view of these elements, the Secretary General asks the Chair to reject the application for a stay of execution lodged by the complainants as inadmissible and ill-founded.

21. In their observations in reply, the complainants contest, above all, the Secretary General's assertion that their application for a stay of execution is inadmissible.

22. In their opinion, the only way to avoid grave prejudice difficult to redress, due to the decision to reject their applications for competition No. e59/2013 and due to the lack of information with regard to the question of unemployment insurance, would be to allow them to remain in the Organisation by extending their contracts until the end of the administrative complaint procedure.

23. They then add that, with their administrative complaint, they are not contesting the impossibility to continue working for the Organisation beyond five years by reason of competition No. e25/2008, but rather the fact that the regulations prevent them from applying for a new competition and, if successful, from regaining the right to work for five years within the Organisation. They also contest the lack of information with regard to unemployment insurance and, in this context, allege that they have suffered grave prejudice difficult to redress.

Lastly, the complainants disagree with the statement that their application is late (*rectius*, not swiftly submitted), since they were informed of the facts they are contesting through their administrative complaint only on 17 May 2013 and at the end of May 2013.

24. With regard to the merits of their application, the complainants reaffirm that they will suffer grave prejudice difficult to redress if their application for a stay of execution is not accepted, because they risk finding themselves on the employment market without any financial resources.

25. After having reiterated their arguments with regard to the existence of the alleged prejudice, the complainants persist in their submissions, not without contesting the Secretary General's assertion that their continued employment would jeopardise not only the smooth running of departments, but also the management of major sectors of the Organisation.

26. The Chair notes firstly that, in order to save work, there is a need to rule through a single order – not so much because the complainants have, while departing from the current rules, lodged a single and identical application for a stay of execution signed by the seven complainants, but rather since the facts and arguments are identical for all the complainants and, additionally, this is consistent with the practice followed with regard to applications for a stay of execution lodged at the administrative complaint stage (cf. the Orders Courades and others of 19 November 1994, Kiliç and others of 7 October 2011 and Yuksek and others of 24 November 2011).

27. The Chair points out that it cannot be a question at this stage of analysing arguments concerning the admissibility and/or the merits of the grievances raised by the complainants in connection with their complaint, since those matters should not be discussed, let alone examined, in this procedure which only concerns 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). It is therefore not necessary here to reiterate the Tribunal's case-law concerning the possibility – which, unlike in recent cases, the Secretary General does not challenge in this instance – for an applicant (whether already a staff member or not) to contest a decision excluding them from a recruitment procedure, nor to repeat the observations that were made concerning the changes introduced to the regulations, on 7 July 2010, following Tribunal decisions on this issue (cf. the Chair's Order of 17 January 2013 in the case of Menard).

28. With regard to the objection that the application for a stay of execution is inadmissible *ratione materiae*, the Chair concurs with the Secretary General that doubts can be raised concerning the admissibility of the application in that the complainants are complaining about their non-admission to competition No. e59/2013. In respect of this grievance, it would indeed have been more correct to request a stay of execution of the decision to reject their applications, rather than of the decision on their leaving the Organisation due to the termination of their employment linked to competition No. e25/2008. Unless, of course, they were to allege – but that is not the case in this instance – and to prove that other staff members in the Organisation, finding themselves in the same situation and whose applications were accepted, have been maintained in their functions until the termination of the new recruitment procedure.

29. However, given that the complainants' other grievance concerns the lack of information as to the possibility of benefiting from unemployment insurance after leaving the Organisation, the Chair concludes that, at least in part, the application for a stay of execution is admissible. Consequently, the Secretary General's objection must be rejected and the application must be examined on the merits.

30. With regard to the merits of the application, the Chair notes that the different arguments put forward by the complainants cannot constitute proof that the implementation of the impugned decision would be likely to cause them grave prejudice difficult to redress. The existence of the financial problems they cite is not linked to their non-admission to the new recruitment procedure but to the fact that, whatever happens – whether they are or are not admitted to the new recruitment procedure – the complainants must leave the Organisation upon the termination of their contracts under procedure No. e25/2013. Already in the past, the Chair had considered that financial difficulties inherent in the termination of a contract were not a reason to grant a stay of execution.

31. It is true that the complainants allege that these difficulties are linked to the fact that they cannot benefit from unemployment insurance because the Organisation failed to provide information. However, they could receive compensation if they succeed in their complaint on the merits or in the appeal they may lodge if the Secretary General rejects their administrative complaint.

32. Lastly, the complainants refute the Secretary General's statement and maintain that their provisional continued employment in the Organisation would not jeopardise the smooth running of departments or the management of significant sectors of the Organisation; on the contrary, it would also allow the Organisation to continue employing competent and experienced staff members. For his part, the Chair notes that this argument cannot justify granting the requested stay of execution. A temporary continuation outside of a stay of execution is a decision that comes within the discretionary power of the Secretary General, which the Chair is not required to address at this stage of the procedure.

33. The Chair points out that some restraint is required in the exercise of the exceptional power conferred on him by Article 59, paragraph 9, of the Staff Regulations (cf. ABCE, 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 and Chair's Order of 18 December 1998, paragraph 16, in the case of Schmitt v. Secretary General,). Since the purpose of the urgent procedure is to ensure the full effectiveness of the administrative proceedings, any application for a stay of execution must show that the requested measure is necessary to avoid grave prejudice difficult to redress. Otherwise, this would jeopardise not only the smooth running of departments, but also the management of significant sectors of the Organisation. Since that is not the case in this particular instance, it is not necessary to grant the requested stay of execution.

On these grounds,

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 Article 21 of the Rules of Procedure of the Administrative Tribunal,

**I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,**

Decide that

- the application for a stay of execution lodged by the seven complainants is rejected

Done and ordered in Strasbourg on 28 June 2013.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS