

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 4 January 2010

In the case of Gail MITCHELL-O'RIORDAN v. Secretary General

THE FACTS

1. The complainant, Ms Gail Mitchell-O'Riordan, works for the Organisation as a permanent staff member. Together with her salary, the complainant receives a sum by way of allowance in respect of dependent children. The complainant's husband works in Germany and receives a "*Kindergeld*" for the children.
2. On 6 November 2009, the Directorate of Human Resources informed that complainant that from 1 January 2010 the "*Kindergeld*" which her husband receives would be deducted from the dependent child allowance which she receives from the Organisation.
3. On 8 December 2009, the complainant lodged an administrative complaint under Article 59 of the Staff Regulations. She requested the Secretary General to annul the decision of the Directorate of Human Resources and to continue payment in full of the dependent child allowance to which she was entitled on account of her family situation.
4. On 16 December 2009, the complainant applied to the Chair of the Administrative Tribunal for a stay of execution (Article 59 paragraph 7 of the Staff Regulations).
5. On 21 December 2009, the Secretary General submitted his observations on the application for a stay of execution.
6. On 22 December 2009, the complainant submitted her memorial in reply.

THE LAW

7. Under Article 59 paragraph 7 of the Staff Regulations, an application for a stay of execution of an act of the Administration 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 act until the Chair of the Administrative Tribunal has ruled on the application in accordance with the Tribunal's Statute.

8. By her application, the complainant requests the Chair to adopt a decision staying the execution of the decision of the Directorate of Human Resources to reduce from 1 January 2010 the dependent child allowance which she receives for her six children, pending the Administration's response to her administrative complaint.

9. The complainant maintains that if that decision were to be applied it would cause her grave and irreparable prejudice.

10. After setting out arguments which relate rather to the merits of the administrative complaint, the complainant observes that if the decision were to be applied, it would result in a reduction of 1,083 euros in the dependent child allowance. That would lead to a reduction in her overall monthly remuneration of 14% of her net income. The complainant claims that it would have the consequence that:

- first, her husband would have to decide whether or not to continue to work, since if he were to continue to work that would lead to a significant cut in the household's income.

- second, she would have to move from the family home, as she would no longer be in a position to make the repayments on a loan taken out in order to acquire the main home. The complainant further submits that such a loan was not taken on the basis of prognostications as to the possibility of receiving an dependent child allowance from the Council of Europe, but in the certainty that she was entitled to that allowance, which the Directorate of Human Resources confirmed for many years in full knowledge of her situation and that of her husband and under the provision currently in force, which is clear and has not been amended.

11. In the complainant's submission, her private and family life, recognised by Article 8 of the European Convention on Human Rights, would be violated by the execution of the decision of the Directorate of Human Resources. She maintains that such a change, which she considers to be without any legal basis, cannot in any event take effect at such short notice.

12. Consequently, the complainant requests the Chair to adopt a decision staying the execution of the decision of the Directorate of Human Resources to reduce from 1 January 2010 the dependent child allowance which she receives for her six children, pending the Administration's response to her administrative complaint.

13. The Secretary General observes at the outset that as 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. In the present case, the complainant has failed to show such prejudice, in so far as if her claim or any action she might bring should be upheld, it would be perfectly possible to reimburse retroactively the amounts deducted.

14. That being said, and without prejudice to any argument which he reserves the right to put forward in his response to the complainant, the Secretary General informs the Chair that, in accordance with Article 59 paragraph 7 of the Staff Regulations, the deduction of the amount of the "*Kindergeld*" from the dependent child allowance paid to the complainant for January has been cancelled pending the decision of the Chair on that application.

15. In that regard, the Secretary General observes that there can be no question at this stage of any assessment of the arguments concerning the merits of the complainant's complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are only concerned with urgent measures.

16. In those circumstances, and in the light of those elements, the Secretary General requests the Chair to reject the application for a stay of execution as both inadmissible and unfounded.

17. In her memorial in reply, the complainant agrees with the Secretary General that "there can be no question at this stage of any assessment of the arguments concerning the merits of the complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are only concerned with urgent measures."

18. The complainant observes, however, that not only has the factual situation not changed but, in addition, the situation in law has not been amended; so that the decision of the Directorate of Human Resources came as a complete surprise and its application would not give the complainant time to take the necessary steps to organise her family life.

19. As for the merits, she observes, first of all, that the Secretary General puts forward no argument to support his claim that the application is inadmissible, but merely asserts that it is. The complainant therefore clearly disputes the Secretary General's position on that point.

20. In addition, according to the complainant, the reasons for the request that the Chair should declare her application ill-founded is supported only by an assertion: the Secretary General does not deny that his decision would cause her serious prejudice should it be applied, but states that "in so far as if [the] claim or any action she might bring should be upheld, it would be perfectly possible to reimburse retroactively the amounts deducted."

21. The complainant adds that in so doing the Secretary General forgets, in the first place, that the aim of the suspension procedure is to "prevent a complainant from suffering grave prejudice difficult to redress on account of the execution of a contested decision before it is subsequently withdrawn by the Organisation or annulled by the Tribunal should it prove to be flawed" (see Order of the Chair of 30 May 2006 in *Remmert v. Secretary General*, paragraph 18). In the second place, still in the complainant's submission, the Secretary General fails to take into account the arguments which she put forward in her application for a stay of execution, concerning the consequences of the application of the proposed measure on her right to family life, the occupational activity of her husband and the raising and maintenance of her six children. Those consequences would be irreversible, at least in the short and medium term, and therefore difficult to redress.

22. Consequently, the complainant maintains in full the arguments set out in her application for a stay of execution and requests the Chair to allow her application pending the Secretary General's response to her administrative complaint and, in the event that the Secretary General should refuse to uphold that complaint, the action that she will bring before the Tribunal.

23. The Chair takes note of the Directorate of Human Resources' intention to stay, in application of Article 57 paragraph 7 of the Staff Regulations, execution of the contested decision in January 2010 until the Chair has adjudicated on the application for a stay of execution. He notes, however, that that measure does not render the application for a stay of

execution devoid of purpose, since the decision adopted has only a limited and temporary scope pending the decision of the Chair.

24. The Chair must first of all consider the question of the inadmissibility of the application raised by the Secretary General.

25. He finds that, as the complainant observes, the Secretary General has failed to state reasons for his plea of inadmissibility.

26. It follows that the request for a declaration of inadmissibility submitted by Secretary General must be rejected.

27. As regards the merits of the application for a stay of execution, the Chair recalls that, as the parties have correctly observed, there can be no question at this stage of any assessment of the arguments concerning the merits of the complainant's complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are only concerned with urgent measures (see Order of the Chair of 3 July 2003, paragraph 10, *Timmermans v. Secretary General*).

28. The Chair notes that the dispute between the complainant and the Directorate of Human Resources concerns a question of a financial nature.

29. However, by definition, and except in the specific case of a complainant in a very precarious financial situation, a dispute of a purely financial nature is not capable of causing "grave prejudice difficult to redress" (order in *Remmert*, cited above, paragraph 52).

30. The Chair must therefore examine whether in the present case the complainant pleads a situation that would justify granting the requested stay of execution.

31. The Chair notes that the arguments put forward by the complainant to substantiate the existence of grave prejudice that would be difficult to redress relate to the consequences that her husband and children would suffer if the contested decision were executed. She also refers to negative effects on her family home. The complainant also refers to Article 8 of the European Convention on Human Rights, in so far as here right to private and family life would be violated by the implementation of the contested decision.

32. However, the Chair notes that the complainant has adduced no evidence on which he might conclude that she would suffer grave prejudice that would be difficult to redress by the execution of the decision the merits of which she challenges. Admittedly, she refers to decisions to be taken by her husband in relation to his work. However, she does not explain what those decisions consist of and, in particular, why he would have to take them and why those decisions would have negative consequences for her family. In fact, the "significant cut in the household income" following the contested decision is compensated by the payment of the "*Kindergeld*". Nor does the complainant give any indication of the consequences for the upbringing and maintenance of her six children or any details of her other obligations concerning her loan for the acquisition of her home. Thus, the complainant does not establish that the consequences to which she refers "would be irreversible, at least in the short and medium term, and therefore difficult to redress". The Chair notes, moreover, that he reaches that conclusion after taking the complainant's arguments into consideration both individually and jointly.

33. 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 that is not so in the present case, it is not appropriate to grant the stay of execution sought.

34. It is clearly for the complainant to state during the contentious proceedings the prejudice that she might suffer owing to the execution of the contested decision and, if she is successful, to claim compensation for damage resulting from the act complained of (Article 60 paragraph 2 *in fine* of the Staff Regulations).

For these reasons,

Ruling on the urgent application under Article 59 paragraph 7 of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Rule 21 of the Rules of Procedure,

Having regard to the urgency,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- that Ms Mitchell-O'Riordan's application for a stay of execution is rejected.

Done and ordered in Oberwil (Switzerland) on 4 January 2010.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

Sergio SANSOTTA

Luzius WILDHABER