

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER of 4 January 2019

in the case of Céline COSSET v. Secretary General of the Council of Europe

THE FACTS

1. At the time of applying for a stay of execution, the complainant, Ms Céline Cosset, had been a permanent staff member of the Council of Europe on a fixed-term contract since 1 October 2015. She held the grade C2 and occupied a post with a planned turnover profile.
2. Under Article 16 of the Regulations on appointments (Appendix II to the Staff Regulations), the total employment with the Organisation under profiles with planned turnover may not exceed the maximum duration set by the Secretary General in a rule. Rule No. 1368 of 16 October 2014 on the Junior Professional Programme and Turnover Profiles sets this maximum duration at 5 years.
3. Under Article 17 of the Regulations on appointments, the complainant was subject to a two-year probationary period which initially corresponded to the duration of her fixed-term contract.
4. After the probationary period was interrupted because of long-term sick leave, the complainant's probationary period was extended on three occasions, based on the extension of the sick leave, pursuant to Article 18, paragraph 2, of the Regulations on appointments which reads as follows:

"Where the probationary period has been interrupted for reasons outside the staff member's control, the Secretary General may, on the advice of the Board, extend it by the length of the interruption."
5. In the decisions to extend the probationary period (only one of which has been brought to the attention of the Chair), it was noted that these extensions did not confer on the complainant the right to have her fixed-term contract automatically extended by the same period. No indication was given, however, as to the legal basis for this lack of entitlement. Nor has the Secretary General provided any information on this subject to the Chair.
6. On 17 July 2018, the complainant was informed via a memorandum from the Director of Human Resources that the Secretary General had decided to extend her probationary period by nine months. The memorandum read as follows:

“In accordance with Article 18, paragraph 2, of the Regulations on appointments (Appendix II to the Staff Regulations), the Secretary General has decided to extend your probationary period by 9 months.

Please note that the fact that your probationary period has been extended does not entitle you to automatic extension of your contract for the same period.

During this period, you will be appraised in accordance with Article 22, para 1, of the Staff Regulations.”

According to the complainant, she was supposed to return to her post at least until March 2019 therefore.

7. The Secretary General states, without submitting any supporting documents, that, in tandem with this, the fixed-term contract which was to expire on 30 September 2018 was extended until 31 December 2018.

8. On 20 November 2018, the complainant was informed in an interview that her fixed-term contract would not be renewed beyond 31 December 2018 for reasons concerning the organisation of work in the department to which she had been assigned.

9. On 30 November 2018, she was officially notified of this decision in a memorandum. The letter read as follows:

“Article 23, paragraph 2, of the Staff Regulations stipulates that fixed-term contracts shall end on their expiry.

For reasons concerning the organisation of work in the department to which you have been assigned, the Council of Europe is unable to renew your contract.

Accordingly, your fixed-term contract will end on 31 December 2018.

(...)”

10. On 18 December, the complainant submitted an administrative complaint to the Secretary General pursuant to Article 59, paragraph 2, of the Staff Regulations.

11. The same day, the complainant applied to the Chair of the Administrative Tribunal for a stay of execution of the act complained of (Article 59, paragraph 9, of the Staff Regulations).

12. On 21 December 2018, the Secretary General submitted his observations on the application for a stay of execution.

13. On 4 January 2019, the complainant submitted observations in reply.

THE LAW

14. 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 cause the complainant “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.

15. Article 8 of the Statute of the Administrative Tribunal states that the Chair shall rule within fifteen days on applications for a stay of execution of an administrative act.

16. The application for a stay of execution having been made on 18 December 2018, this time-limited expired on 2 January 2019. Owing to the end-of-year break, however, the process of examining the complaint was not completed until 4 January 2019. The delay in this instance, however, was not such as to impair the effectiveness of the stay of execution proceedings.

Rule 42 of the Tribunal's Rules of Procedure states, moreover, that: "All matters not provided for in the present Rules shall be dealt with by decision of the Tribunal or, when it is not in session, by decision of the Chairman, which shall be binding only in respect of the particular case."

17. The purpose of the complainant's application for a stay of execution is to obtain the suspension of the Secretary General's decision of 30 November 2018 terminating her appointment as of 31 December 2018.

18. The complainant contends that the impugned decision would cause her grave prejudice difficult to redress because it deprives her of employment and, hence too, of her means of support.

19. After giving a number of personal details which it is not necessary to recap here, the complainant points out that the loss of her salary is a problem that it will be difficult for her to resolve quickly, since she has been given only one month to find a source of income equivalent to her salary.

20. The complainant further submits that the decision to terminate her contract when she is already in financial difficulty because of the health problems she has suffered since 2016 is a sudden decision, which will cause her to lose the equivalent of, at best, 3 months' salary (corresponding to the period that would normally have been covered by the extension of her probationary period granted by the Secretary General), and, at worst, the 3 years of salary that she would have received, had her contract been converted during the probationary period into a fixed-term contract.

According to the complainant, the result is that she suddenly finds herself without a salary, when in fact it ought to have been secure at least until March 2019 and that this will significantly affect her family's quality of life.

21. The complainant maintains that in addition, there is the emotional impact of the decision, which she did not anticipate and for which she was wholly unprepared.

As a result, her personal and family circumstances will be profoundly and lastingly affected by the impugned decision, which she is therefore asking to be temporarily stayed, until the end of the administrative complaint proceedings and any subsequent appeal proceedings that there may be.

22. For his part, the Secretary General states that he wishes to refrain, at this stage of the proceedings, from any comment on the merits and merely notes that the application for a stay of execution is unfounded and should not be granted.

23. In his view, firstly, the complainant's application should be dismissed in light of the Tribunal's case-law since the application for a stay of execution is intended not to preserve but

to change the status quo. In this respect, the Secretary General points to the terms of the Order made by the Chair of the Administrative Tribunal on 22 December 2006 in a similar case (*Kehl v. Secretary General*) according to which: “Furthermore, the Chair considers that, in so far as the appellant seeks to obtain an extension of her contract, the stay of execution requested would not be such as to preserve the status quo but would have the effect of changing it (cf. the Chair’s order of 14 August 2002, paragraph 17, in appeal no. 309/2002 - *Belyaev v. Secretary General*).”

24. The Secretary General adds 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, by means of a fast-track procedure, a new contract, thus changing the legal situation resulting from the expiry of the complainant’s contract. Accordingly, the Tribunal has consistently rejected applications to stay the execution of decisions not to renew fixed-term contracts (see, in particular and among others, the Order made by the Chair of the Tribunal on 28 June 2013 in *Günduz and Others*).

25. Secondly, the Secretary General notes that Article 23, paragraph 2, of the Staff Regulations, provides that “fixed-term contracts shall end on expiry”.

26. The Secretary General goes on to contend that the complainant has not established, in the present application, the existence of any “grave prejudice difficult to redress”. As is clear from the case law of the Administrative Tribunal, “it is for the person applying for the stay of execution to show that he or she is likely to suffer prejudice difficult to redress if the stay of execution is not granted, and not for the Secretary General to provide evidence to the contrary”. In the Secretary General’s view, however, the complainant has provided no evidence to support her claim that she is likely to suffer prejudice.

27. On the contrary, maintains the Secretary General, the complainant cannot claim to have suffered grave prejudice difficult to redress as she was informed, from the outset of her appointment, that fixed-term contracts are by definition time-limited, and that they are not necessarily or automatically renewed. In signing these contracts, she accepted all the terms and conditions thereof and cannot now claim to have suffered any damage. From the memorandum from the Director of Human Resources dated 17 July 2018, the complainant was perfectly aware that she was not entitled to automatic renewal of her contract based on the extension of her probationary period. The notice concerning the non-renewal of the complainant’s contract was neither “sudden” nor “premature”, therefore, as it was a reminder of the provisions of the Staff Regulations and the terms of her fixed-term contract.

28. With regard to the alleged failure to comply with the two-month notice period provided for during the probationary period, the Secretary General points out that this notice period will be formally respected since, in view of the date on which the complainant was officially notified of the decision not to renew her contract – 30 November 2018 - and of the date on which that contract was to end – 31 December 2018 -, an amount equivalent to one month’s salary will be paid to the claimant in January 2019 in order to comply with the requirement to give two months’ notice.

29. With regard to the prejudice allegedly arising from the loss of earnings and the difficulty - which the complainant anticipates without providing any evidence of it - of finding an “income equivalent to the one she has been receiving until now”, the Secretary General maintains that any prejudice which the complainant might claim to have suffered cannot be such as to be incapable of being redressed through compensation for the damage suffered, as provided for in

Article 60, paragraph 2, of the Staff Regulations. Furthermore, the Tribunal could order redress for any other damage, particularly non-material, resulting from the annulled decision.

30. The Secretary General contends that if the Tribunal were to accept the complainant's argument on the basis of such cursory allegations as the damage resulting from loss of earnings, granting a stay of execution would become the norm for all decisions not to renew fixed-term contracts. Any such outcome would be in flagrant breach of the Tribunal's case-law and the principle that the Chair must exercise restraint in exercising the exceptional power conferred under Article 59, paragraph 9, of the Staff Regulations.

31. That being so and having regard to these factors, the Secretary General requests the Chair to dismiss the request submitted by the complainant for a stay of execution as unfounded.

32. In her observations in reply, the complainant reiterates the arguments already submitted and points out that there was no intention to terminate her contract in December 2018, it having been decided on 17 July 2018 to extend her probationary period until the end of March 2019. Nor had she been informed that her contract could be terminated before the probationary period ended. Indeed, she still does not understand how a probationary period can have a duration different from the length of the contract to which it corresponds.

33. The complainant argues that if her contract was terminated in December 2018, i.e. three months before the end of her probationary period, it was only as a result of the precautionary measures taken by the Secretary General following the Russian Federation's decision not to pay its contribution to the Organisation's ordinary budget. The Secretary General has decided to terminate all fixed-term contracts in force in December 2018 pending developments in the Organisation's political and budgetary situation. Her department is not affected by this issue, however, as it is covered by a partial agreement.

34. At the same time, the complainant admits that she does not understand the argument put forward by the Secretary General on the status quo, because she is in fact seeking to preserve the status quo.

35. Consequently, the complainant reiterates her application for a stay of execution of the impugned decision until the Tribunal has ruled on her administrative complaint and any appeal that she may lodge.

36. The Chair notes from the outset that it must rule only on the issue of whether the enforcement, during the administrative complaint stage and, possibly, the appeal stage, of the contested administrative decision is likely to cause the complainant "grave prejudice difficult to redress" even if she is ultimately successful. Therefore, there can be no question of analysing at the present juncture the arguments relating to the merits of the complainant's 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 the Chair's Order of 3 July 2003, paragraph 10, *Timmermans v. Secretary General*). These issues clearly include the question of the two months' notice mentioned by those appearing before the Tribunal.

37. Turning to the merits of the application, the Chair notes, firstly, that it is a necessary condition for a stay of execution order that executing the act complained of before a final decision on the dispute "is likely to cause ... grave prejudice difficult to redress" (Article 59, paragraph 9, of the Staff Regulations).

38. Accordingly, the Chair agrees with the Secretary General's observation that according to the Tribunal's case-law, the impugned measure does not in itself, and in the absence of specific elements, constitute grounds for assuming that the complainant would suffer "grave prejudice difficult to redress". It is thus the Chair's duty to assess whether the arguments put forward by the complainant in support of her application may constitute specific elements that would justify granting the requested stay of execution. In the light of the Tribunal's established case-law, it must be acknowledged that specific elements means facts or circumstances which arise during the proceedings, the existence of which shows that the complainant would suffer prejudice difficult to redress if no stay of execution is granted (see Chair's Order of 20 June 2018, Brechenmacher v. Secretary General of the Council of Europe, paragraph 49, Chair's Order of 5 September 1994, Ernould (II) v. Governor of the Council of Europe Social Development Fund, paragraph 12, Chair's Order of 27 September 2002, Kling v. Secretary General of the Council of Europe, paragraph 28).

39. As the Secretary General acknowledges, if the complainant wins her case, she may obtain back-payment of wages, continuity of service and redress for any other damage, particularly non-material, resulting from the annulled measure. Consequently, the existence of material or non-material damage cannot be considered a basis for granting a stay of execution, despite the claims made by the complainant, especially in her comments on the Secretary General's observations, seeking to prove there is damage in the present case.

40. It should also be noted that the complainant highlights the financial difficulties arising from the rapid execution of a decision which she did not anticipate and for which she was wholly unprepared. She mentions her income-related struggles and, at the same time, the difficulty of finding a new job that would provide an income equivalent to her Council of Europe salary. She also underlines the impact which this will have on her personal and family circumstances.

41. Although these circumstances are not without significance, they do not constitute reasonable grounds for staying the execution of the measure complained of. The complainant fails to substantiate her allegation with evidence which could prove the existence of grave prejudice difficult to redress if no stay of execution is granted (see Chair's Order of 20 June 2018, Brechenmacher cited above, paragraphs 51-52).

42. The Chair points out 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 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, in the case of Schmitt v. Secretary General, Chair's Order of 14 August 2002, paragraph 16). 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,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- dismisses the application for a stay of execution submitted by Ms Cosset.

Done and ordered in Zagreb on 4 January 2019.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

N. VAJIĆ