# CONSEIL DE L'EUROPE
# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF
## ADMINISTRATIVE TRIBUNAL

**ORDER OF THE CHAIR OF 27 June 2012**

**Ellen PENNINCKX v. Secretary General**

**THE FACTS**

1. The appellant, Ms Ellen Penninckx, participated in a recruitment procedure for assistant lawyers to work in the Registry of the European Court of Human Rights (vacancy notice no. e243/2011).

2. On 3 May 2012, the appellant received an offer of employment on a fixed-term contract for one year starting on 1 July 2012. Seeing that the monthly salary did not include an expatriation allowance, the appellant asked the Directorate of Human Resources twice for further information on 15 and 21 May 2012; in a memorandum dated 24 May 2012, the DRH confirmed that the appellant would not be entitled to this allowance.

3. On 30 May 2012, the appellant returned a signed copy of the offer of employment in accordance with the accompanying instructions regarding acceptance of the offer. She added the following sentence: "I reserve the possibility to avail myself of Article 59, paragraph 2, of the Staff Regulations regarding the failure to grant the expatriation allowance".

4. On 31 May 2012, the appellant submitted an administrative complaint to the Secretary General under the aforementioned Article 59, paragraph 2, together with a number of documents intended to prove that she was resident in Belgium.

5. On 7 June 2012, the Director of Human Resources informed the appellant that he was unable to accept the "reservation [of 30 May] making acceptance of the offer conditional on an administrative complaint". He asked the appellant either to send him the signed offer without this specific reservation or not to accept the offer made to her.

6. On 14 June 2012, the appellant applied to the Chair of the Tribunal for a stay of execution (Article 59, paragraph 9, of the Staff Regulations).

7. On 20 June 2012, the Secretary General filed his observations on the request for a stay of execution.

8. On 21 June 2012, the appellant submitted observations in reply.

9. Having been granted leave to file a rejoinder, the Secretary General submitted comments on these observations in reply.

10. The appellant replied on 26 June 2012.

**THE LAW**

11. Under the terms of Article 59, paragraph 9, of the Staff Regulations, the complainant may "apply […] for a stay of execution of the act complained of if its execution is likely to cause him or her grave prejudice difficult to redress".

Under this 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.

According to paragraph 2 of this Article 59, "[s]taff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression 'administrative act' shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General".

12. The complainant contends that the memorandum from the Directorate of Human Resources constitutes a denial of justice. She says that if she signs the offer of employment unconditionally, she no longer has any interest in bringing proceedings within the meaning of Article 59, paragraph 2, of the Staff Regulations and will be implicitly waiving her statutory rights. On this point, she refers to the Tribunal's case law (ATCE, appeal no. 392/2007, Dagalita v. Secretary General, decision of 29 January 2008, paragraphs 39-40). She adds that if she refuses to sign the offer as it stands, she will lose the benefit of the offer of employment and hence have no interest in bringing proceedings. She infers from this that, in both eventualities, she would suffer prejudice difficult to redress within the meaning of paragraph 9 of Article 59 of the Staff Regulations.

13. The complainant therefore asks the Chair to give suspensive effect to her administrative complaint and to call on the Directorate of Human Resources to stay execution of the memorandum of 7 June 2012 asking her to forego either the offer of employment or her statutory rights under Articles 59 and 60 of the Staff Regulations and under Article 6 *ter* (Expatriation allowance for staff recruited on or after 1 January 2012) of Appendix IV to the Staff Regulations.

14. For his part, the Secretary General submits that the administrative complaint and this application for a stay of execution are inadmissible for lack of capacity to bring proceedings and that the application is inadmissible *ratione materiae.*

15. As to the first ground, the Secretary General, after reiterating the wording of Article 59, paragraphs 2 and 9, emphasises that the complainant is not a Council of Europe staff member.

16. He argues that the precondition for the complainant to become a staff member of the Organisation is acceptance of the offer of employment or conclusion of the contract. According

to settled international administrative case law, the contract is considered as having been entered into once the offer has been accepted. He refers in this connection to several judgments of the Administrative Tribunal of the International Labour Organisation (see, among others, ILOAT judgments no. 1964 of 12 July 2000, no. 339 of 5 May 1978, no. 1916 of 3 February 2000, no. 1687 of 29 January 1998, and, *a contrario*, no. 1775 of 9 July 1998).

It should be noted that, in the instant case, the parties have not entered into a binding contract. Consequently, the complainant lacks capacity to bring proceedings in the instant case. Her complaint and hence her application for a stay of execution are therefore inadmissible for lack of capacity to bring proceedings.

17. As to the second ground, the Secretary General considers it necessary to clarify the scope of the complainant's application to the Administrative Tribunal for a stay of execution. He notes that it is directed at the memorandum of 7 June 2012 in which the Directorate of Human Resources informed the complainant that it could not accept conditional signing of the offer of employment. In the absence of the agreement required for the signing of a contract, the DRH invited the complainant either to accept the offer or to refuse it. The complainant's application is tantamount to her asking the Tribunal to order the DRH to accept her conditional signing of the offer of employment. It is not an application to stay the execution of an act, but an application for the DRH to be ordered to accept the complainant's agreement subject to the submission of an administrative complaint challenging the decision not to grant her the expatriation allowance, a condition which the DRH cannot accept. Yet the Tribunal does not have jurisdiction under Article 59, paragraph 9, of the Staff Regulations to take such a measure. Consequently, the complainant's application is also inadmissible *ratione materiae*.

18. In the Secretary General's view, the complainant's situation lacks all the ingredients of "grave prejudice difficult to redress", which is the precondition for granting a stay of execution.

19. Lastly, the Secretary General wishes to point out that there can be no question at this stage of analysing arguments relating to the merits of the claims made by the complainant in her administrative complaint, which it is inappropriate to discuss, far less examine, in the present proceedings, which only concern the adoption of interim measures.

20. In the light of the foregoing, the Secretary General therefore asks the Chair to dismiss the application for a stay of execution as being inadmissible and/or ill-founded.

21. In her observations in reply, the complainant makes three points.

22. As to the alleged lack of interest in bringing proceedings within the meaning of Article 59, paragraphs 2 and 9 of the Staff Regulations, she notes that the Tribunal has already held on several occasions that a person no longer has any interest in bringing proceedings to challenge the terms of a contract "once he or she has signed the offer of a contract of employment" (previously mentioned Dagalita decision, paragraph 40, and appeal no. 462/2009 - Fiorilli v. Secretary General). In making this statement, she argues, the Tribunal confirms implicitly that a person who has received an offer of employment has an interest in bringing proceedings within the meaning of Article 59, paragraph 2, of the Staff Regulations, and hence also within the meaning of paragraph 9 of the same article.

The complainant further notes that, in one of these appeals, the Secretary General "disputes the appellant's claim that the offer of employment did not constitute a contract and

did not confer on her the status of staff member" (Dagalita decision, paragraph 23); by converse implication, she argues, the Secretary General is therefore saying that the offer of employment constitutes a contract which confers the status of a staff member on its recipient. The Secretary General even specifies that "the appellant should have lodged an administrative complaint within thirty days following receipt of the offer of employment" (*ibid*, paragraph 21). Consequently, the Secretary General himself is defending the argument that a person who has received an offer of employment has an interest in bringing proceedings.

23. Regarding the lack of agreement referred to by the Secretary General, the complainant reiterates her wish to see a positive outcome to the offer of employment, in full compliance with the regulations, starting from 1 July 2012, as provided for in the offer of employment.

In her view, the strict interpretation of Article 59 § 2 of the Staff Regulations favoured by the Secretary General in fact creates a legal vacuum. According to this interpretation, only staff members in the strict sense and "candidates outside the Council, who have been allowed to sit a competitive recruitment examination" (Article 59, paragraph 8, of the Staff Regulations) would be recognised as having a right of appeal, thus depriving 'future staff members' (ie people who have passed a competitive examination and been offered a job) of any right to appeal against administrative decisions taken in respect of them. Because they are denied any interest in bringing proceedings, 'future staff members' have no possibility of defending their statutory rights (entitlement to allowances). The words "having taken due note of the Staff Regulations" written when signing an offer of employment are therefore devoid of legal value.

24. As to the argument that the application for a stay of execution is inadmissible *ratione materiae* (§12 of the Secretary General's observations), the complainant emphasises that the purpose of her application is not to ask the Chair to order or direct the Directorate of Human Resources to accept her conditional signature: she simply wishes to safeguard her right of appeal and retain the benefit of the offer of employment.

25. Lastly, as to the argument that there is no "grave prejudice difficult to redress" within the meaning of Article 59, paragraph 9, of the Staff Regulations, she submits that in the three conceivable scenarios she would suffer irreparable prejudice, of sufficient gravity to meet the requirements of that provision. These scenarios are: a) the administration withdraws the offer of employment, b) she is forced to refuse to accept the offer of employment as it stands, and c) she signs the offer of employment unconditionally.

26. If the Directorate of Human Resources withdraws the offer of employment or she refuses to sign it as such, she loses the benefit of the offer of employment.

If, however, she signs the offer of employment unconditionally, she will be relinquishing her statutory rights permanently and irremediably, thus depriving her of any right of appeal with regard to the secondary elements of the offer of employment, and especially as regards the expatriation allowance.

27. Having been given leave by the Chair to file a rejoinder, the Secretary General points out that he is disputing the complainant's capacity to bring proceedings, and not, as she believes, her interest in bringing proceedings.

28. He adds that the complainant is not a Council staff member and, for that reason, her administrative complaint and, hence, her application for a stay of execution are inadmissible.

29. In his view, because the complainant is not a staff member (no contract having been entered into), she does not have access to the Tribunal and, as a result, she cannot rely on statutory rights or plead any prejudice. She has no statutory rights and is suffering no prejudice for which the Council of Europe could be held responsible. He adds for the record that success in a competitive examination does not confer a right to recruitment.

30. In reply, the complainant emphasises that she at no time made her acceptance of the contract conditional on being granted the expatriation allowance. Her aim in entering the reservation when signing the offer of employment was simply to have her entitlement to the expatriation allowance verified by the competent authorities.

She points out that she is not seeking to negotiate the terms of her contract but to have the competent authorities check whether the refusal by the Directorate of Human resources to grant her the expatriation allowance is lawful. She explains that she is not "demanding" the allowance, as the Secretary General claims, but asking for respect for her procedural right to verification of the decision not to grant her the expatriation allowance.

31. The Chair notes first of all that there can be no question at this stage of analysing arguments relating to the admissibility and merits of the complainant's administrative complaint, which it is inappropriate to discuss, far less examine, in the present proceedings, which only concern the adoption of interim measures (cf. Order of the Chair of 3 July 2003, paragraph 10, in the case Timmermans v. Secretary General).

32. The Chair notes more specifically that there can also be no question of considering, as part of the examination of this application for a stay of execution, whether the complainant can lodge an appeal or not, as it would only be possible to deal with this question when examining the merits of a possible appeal.

33. As to the merits of the application for a stay of execution, the Chair notes that the complainant cannot legitimately claim at this stage of the procedure that she is likely to suffer grave prejudice difficult to redress if the stay of execution is not granted.

34. Admittedly, the complainant has identified three possible scenarios (paragraph 25 above), one of which is unconditional acceptance of the offer of employment and the consequences which would ensue based on the "Dagalita case law" (previously cited decision). It should be pointed out, however, that there are two possibly significant differences between the present case and that of Ms Dagalita.

35. First, the offer received by the complainant says nothing about whether she is entitled to the expatriation allowance or not, whereas Ms Dagalita – who subsequently initiated proceedings contesting the grade at which she had been recruited – was given precise information about the grade in the offer of employment and knowingly accepted it. The mere fact of not mentioning entitlement to the expatriation allowance cannot be regarded *ipso facto* as an administrative decision to refuse it.

36. Secondly, Ms Dagalita had accepted the offer and signed her contract before contesting the grade to which she had been appointed (previously cited decision, paragraphs 9-12). In the Tribunal's view, in so doing she had "freely and unconditionally accepted" the offer of

employment (*ibid,* paragraph 39). In the instant case, however, the complainant expressed reservations from the outset on one aspect of the offer.

37. With regard to the other two scenarios, the Chair was not told that the Organisation would have withdrawn the offer (if such were the case, but he does not think so). Furthermore, the complainant does not seem disposed to refuse the offer of employment, in which she contests only one component of the salary, which she herself describes as a "secondary aspect of the contract". Moreover, one may even wonder whether the words added by the complainant on 30 May 2012 when accepting the offer can be regarded as a true reservation making her acceptance of the offer of employment subject to a condition, rather than an indication of her intention to exercise statutory rights in a separate procedure.

38. In the view of the Chair, it follows that any prejudice can be redressed after the proceedings if the complainant wins her case.

39. The Chair points out that the exceptional power conferred on him under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint in its exercise (cf. CEAB, Order of the Chair of 31 July 1990, paragraph 12, in the case Zaegel v. Secretary General; and ATCE, Order of the Chair of 1 December 1998, paragraph 26, in the case Schmitt v. Secretary General). The purpose of the interim order procedure being to guarantee the full effectiveness of administrative proceedings, an application for a stay of execution must show that the measure is necessary to avoid grave prejudice difficult to redress. Otherwise, not only proper departmental functioning but also the management of important parts of the Organisation would be jeopardised. Since that does not apply in the present case, there is no reason to grant the requested stay of execution.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59, paragraph 9, of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Rule 21 of the Rules of the Procedure,

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

Decide that

- the application by Ms Penninckx for a stay of execution is dismissed.

Done and ordered in Kifissia (Greece) on 27 June 2012.

| The Registrar of the Administrative Tribunal | The Chair of the Administrative Tribunal |
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| S. SANSOTTA | C. ROZAKIS |