

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER OF 10 January 2012

in the case of Gail MITCHELL-O'RIORDAN (II) v. Secretary General

FACTS

1. The complainant, Ms Gail Mitchell-O'Riordan, works for the Organisation as a permanent staff member. In addition to her salary, the complainant is awarded a dependent child allowance. Her husband works in Germany and receives *Kindergeld* (child support).

2. By order of 4 January 2010, the Chair ruled on a first application for a stay of execution of the Organisation's decision, contested in an administrative complaint, to deduct the *Kindergeld* paid to the complainant's husband from the dependent child allowance she received from the Organisation.

3. This initial dispute was settled without an appeal being lodged with the Tribunal under Article 60 of the Staff Regulations. In his reply to the administrative complaint, the Secretary General informed the complainant that although the decision that had been sent to her was still legally valid, out of a desire for fair treatment and by way of exception, he had decided to grant her application, without nonetheless acknowledging its merits. He added that accordingly, the Directorate of Human Resources would be making the necessary calculations and taking the administrative steps entailed by his decision.

4. On 4 November 2011, the Secretary General signed Rule No. 1339 of 4 November 2011 on eligibility for the allowance in respect of dependent children.

As stated in the new Rule, the purpose of this legal instrument was to clarify the conditions for entitlement to dependent child allowance and revise some aspects of Rule No. 1129, which had governed the matter up to that point and was in force during the first dispute.

Rule No.1339 repealed Rule No. 1129 from the date of its entry into force.

5. On 21 November 2011, the Directorate of Human Resources informed the complainant that following the entry into force of Rule No. 1339 and under Article 3 thereof, the Organisation would continue to pay dependent child allowance for the complainant's children and from 1 January 2012, would deduct the *Kindergeld* received by her husband from this payment.

6. On 30 November 2011, the complainant submitted a request to the Secretary General, which reached the Directorate of Human Resources on 6 December, under Article 59, paragraph 1, of the Staff Regulations.
7. On 20 December 2011, the complainant lodged an administrative complaint with the Secretary General under Article 59, paragraph 2, of the Staff Regulations.
8. On the same day, the complainant applied to the Chair of the Tribunal for a stay of execution of the act complained of (Article 59, paragraph 9, of the Staff Regulations).
9. On 20 December 2011, the Secretary General submitted his observations on the application for a stay of execution. These reached the registry by e-mail on 2 January 2012 and in the original on 10 January 2012.
10. On 5 January 2012, the complainant submitted observations in reply.
11. In the meantime, on 21 December 2011, the Director of Human Resources had dismissed the request of 30 November 2011.

THE RELEVANT LAW

12. Under Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution may be lodged if that execution is likely to result in “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.

13. In her application the complainant asks the Chair to stay the execution of the decision by the Directorate of Human Resources to reduce the dependent child allowance she receives for her six children from 1 January 2012 on, pending the reply which Administration may give to her administrative complaint.

14. The complainant argues that if this decision were to apply, it would cause her grave prejudice difficult to redress.

She refers to the text of the administrative complaint lodged during the first dispute with regard to her complaints against the Directorate of Human Resources: not only has there been no change in the factual situation but the undertaking that was made is still valid.

In the complainant's view no reasons were provided for the decision, and the conditions under and means through which it was communicated to her – and poorly explained – do not meet the minimum requirements of substantiation of negative decisions by a management body in respect of one of its staff members. The legitimate trust in the Organisation which has employed her for many years and legal certainty have been seriously undermined by the implementation of this decision.

15. Subsequently, the complainant points out that if this decision were applied, it would result in a decrease of €1 203 in her dependent child allowance. This would lead to a decrease in her overall monthly pay of 15% of her net income. Having given details of a loan she had contracted, the complainant adds that this would have the following effects:

- firstly, her husband would have to decide if he was going to continue to work given that if he did, this would result in a significant cut in the household's income;
- secondly, the family would have to move out of its current home as she would no longer be able to afford the repayments on a loan taken out for the purchase of their main place of residence. She added that this loan was not contracted based on a supposition that she may receive an allowance for dependent children from the Council of Europe but on the certainty that she was entitled to this allowance – a state of affairs which the Directorate of Human Resources had confirmed over many years in full knowledge of her situation and that of her husband, and under the authority of the text currently in force, which was clear and had not been changed.

16. In the complainant's opinion, it is therefore her private and family life, as protected by Article 8 of the European Convention on Human Rights, which has been breached by the implementation of the Directorate of Human Resources' decision. In her view, this legally unfounded change that it is considering cannot on any account take effect with such short notice.

17. Consequently, the complainant asks the Chair to stay the execution of the decision by the Directorate of Human Resources to reduce the dependent child allowance which she receives for her six children from 1 January 2012 on, pending any response by Administration to her administrative complaint.

18. The Secretary General notes at the outset that on 20 December 2011, the complainant filed an administrative complaint and at the same time, lodged an application for a stay of execution of the contested decision. However, contrary to what the complainant states in this application, it was not an administrative complaint that she filed on 30 November 2011 but an administrative request, which only reached the Directorate of Human Resources on 6 December 2011. In such cases, the Secretary General has 60 days to reply.

19. The Secretary General adds that the complainant not only failed to wait for the expiry of the statutory time-limit for a reply to her request but she filed an administrative complaint without even knowing what the reply to her request was, along with the application being examined here.

20. The Secretary General points out that since the purpose of summary procedure is to ensure the full effectiveness of administrative litigation, the application for a stay of execution must demonstrate that the requested measure is necessary to avert grave prejudice difficult to redress. In the instant case the complainant fails to demonstrate that such prejudice will occur because, if her complaint or any subsequent appeal were successful, it would be perfectly possible to reimburse the deduction made retroactively.

21. In this connection, the Secretary General wishes to point out that there can be no question, at this stage, of analysing arguments attaching to the substance of the complainant's administrative complaint as these matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures.

22. In these circumstances and in view of this evidence, the Secretary General asks the Chair to dismiss the complainant's application for a stay of execution as inadmissible and ill-founded.

23. In her observations in reply, the complainant makes comments on the admissibility and the merits of her application for a stay of execution.

24. As to the admissibility of her application, she emphasises that in a memorandum dated 21 December 2011, the Director of Human Resources rejected her request of 30 November 2011. In her view, it is the decision of which she was notified on 21 November which had the effect that from 1 January 2012, the dependent child allowances paid to her by the Organisation were significantly reduced.

25. The complainant asserts therefore that her application for a stay of execution is admissible.

26. On the subject of its merits, the complainant points out firstly that the Secretary General provides no evidence in support of his claim that the application is unfounded; he simply asserts that it is.

27. She agrees with the Secretary General that "that there can be no question, at this stage, of analysing arguments attaching to the substance of the complainant's administrative complaint as these matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures." The purpose of suspension proceedings is to "prevent an appellant from suffering grave prejudice difficult to redress as a result of the execution of a contested decision before such decision is subsequently withdrawn by the Organisation or annulled by the Tribunal if it is found to be erroneous" (Order of the Chair of 30 May 2006 in the case of Remmert v. Secretary General, paragraph 18).

28. The complainant states that to demonstrate that the loss of the allowance at issue would cause her "grave prejudice difficult to redress" within the meaning of Article 59, paragraph 9, of the Staff Regulations, it is enough for her to describe the factual situation, which has moreover not changed since she filed this application. She reiterates that she took out a loan for the purchase of her main place of residence based not on the supposition that she may be awarded a dependent child allowance from the Council of Europe but on the certainty that she was entitled to this allowance. What is more the allowance had been paid by the Directorate of Human Resources of the Council of Europe for many years in full knowledge of her situation and that of her husband, in accordance with the text currently in force, which was clear and had not been changed.

29. The complainant states that the gap between her pay with the allowance and her pay without amounts to over a third of the monthly payments to the bank. The Secretary General's argument that acceptance of her administrative complaint would completely repair the damage therefore does not correspond to reality as she has to make her loan repayments on a fixed date at the end of each month and the measure taken by Administration causes her immediate and genuine harm – without any notice.

30. In her opinion, the reduction in this allowance is liable to completely disrupt the balance of her family life, as the resultant loss of earnings, which is very substantial, could for example prompt her husband to consider giving up work to limit day-care costs for their six children.

The impact of the decision to reduce the allowance on her family life, her husband's work, their main place of residence and her children's upkeep would therefore be irreversible, at least in the short to medium term, and hence difficult to redress.

The complainant infers from this that this change, which she considers having no legal basis, can on no account take effect so suddenly.

31. Consequently, the complainant stands entirely by the arguments presented in her application for a stay of execution and asks the Chair to order the Secretary General to suspend the execution of the decision to withdraw her dependent child allowance until the end of the current proceedings.

32. The Chair must begin by examining the Secretary General's claim that the application for a stay of execution is inadmissible.

33. The Chair notes that in the instant case, during the thirty-day statutory time-limit to file an administrative complaint (Article 59, paragraph 2, of the Staff Regulations) against the contested decision of 21 November 2011, the complainant also filed a request for an administrative measure (Article 59, paragraph 1, of the Staff Regulations). In this request the Secretary General was asked to take a decision in the complainant's interest within the time-limit of sixty days which expires after the aforementioned thirty-day time-limit. Without there being any need to consider whether such a request had to be filed for the purpose of the contentious proceedings, the Chair notes that the existence of the decision of 21 November 2011 enabled the complainant to file an administrative complaint and, as a result, to submit an application for a stay of execution without waiting for the Secretary General's decision on her administrative request. On this point the Chair refers to the Tribunal's case law on the connections between an administrative request and an administrative complaint and the consequences of whether they are used or not (ATCE, Appeal No. 340/2004 – Diebold (II) v. Secretary General, decision of 17 June 2005, paragraphs 30-34).

34. It follows that the Secretary General's plea of inadmissibility must be rejected.

35. As to the merits of the application for a stay of execution, the Chair points out, as the parties have duly noted, that there can be no question, at this stage, of analysing arguments attaching to the substance of the complainant's administrative complaint – such as the absence of a legal basis and reasons for the disputed measure, and the failure to meet the minimum requirements concerning the conditions for and means of communicating this decision – as these matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures (see Order of the Chair of 3 July 2003, paragraph 10, in the case of *Timmermans v. the Secretary General*).

36. The Chair notes that the dispute between the complainant and the Directorate of Human Resources relates to a matter of a pecuniary nature.

37. Yet, as was pointed out in relation to the complainant's first application for a stay of execution, by definition and save in the specific case where a complainant is in a very vulnerable financial situation, a financial dispute is not likely to cause "grave prejudice difficult to redress" (Order cited above of 4 January 2010, paragraph 29).

38. Consequently, it is for the Chair to ascertain in the instant case whether the complainant describes a situation which would merit granting the stay applied for.

39. The Chair notes that the complainant's arguments to the effect that there will be grave prejudice difficult to redress relate to the repercussions for her husband and her children of the execution of the disputed decision. She also talks of the negative impact on her family home. The complainant refers to Article 8 of the European Convention on Human Rights, arguing that her right to a private and family life would be infringed if the disputed decision were implemented. She also asserts that the disputed decision cannot be executed with such a short period of notice as proposed in the instant case.

40. However, the Chair notes that the complainant has not provided any evidence which would lead him to conclude that she is undergoing grave prejudice difficult to redress as a result of the execution of the decision, taken on the basis of a regulation which came into force after the end of her first case, whose merits she contests. It is true that she refers to decisions that her husband will have to take about his job to reduce day-care costs for the children. The complainant also provides information about her obligations in relation to the loan for the purchase of her home and talks of the risk that the family will have to move because it will be impossible to make the loan repayments which were calculated based on the assumption that she would be receiving sums which are now in dispute. However, these submissions are not such as to prove that the prejudice that the complainant is liable to suffer is grave and difficult to redress. In addition, despite the fact that the complainant highlights the short-term impact of the disputed decision, she does not provide sufficient evidence to prove that the alleged prejudice is currently occurring or likely actually to occur in the near future. For this reason, the complainant fails to establish that the consequences referred to are irreversible, at least in the short to medium term, and hence difficult to redress. The Chair also notes that he has reached this conclusion while taking into account the complainant's arguments both individually and jointly.

41. The Chair also points out that the exercise of his exceptional power under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint (see 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 difficult to redress. Were it otherwise, this would impair not only the proper running of the services but also the management of major sectors of the Organisation. As this is not so in the instant case, there is no reason to grant the requested stay of execution.

42. It is of course for the complainant to draw attention during the contentious proceedings to any prejudice that the execution of the disputed decision may cause her and, if she is successful in her complaint, to claim compensation for damage resulting from the act complained of (Article 60, paragraph 2 *in fine*, of the Staff Regulations).

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,

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- that the application for a stay of execution submitted by Ms Mitchell-O’Riordan is dismissed.

Done and ordered in Kifissia (Greece), 10 January 2012.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

Sergio SANSOTTA

Christos ROZAKIS