

CONSEIL DE L'EUROPE————— —————**COUNCIL OF EUROPE**

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER of 24 August 2012

In the case of Joan STAFFORD (I) v. Secretary General

THE FACTS

1. The complainant, Ms Joan Stafford, is a staff member of the Organisation.
2. On 12 April 2012, the complainant submitted an initial administrative complaint to the Secretary General pursuant to Article 59, paragraph 2, of the Staff Regulations. In it, she complained about the Director of Human Resources' response to her request under Article 59, paragraph 1, of the Staff Regulations to destroy files containing private and confidential information on a large number of staff.

On 14 May 2012, the Secretary General informed the complainant about steps taken to locate and identify any files which might contain private and confidential information. The Secretary General concluded that the administrative complaint required no further action.

On 13 July 2012, the complainant lodged an appeal (No. 532/2012) with the Tribunal, asking it to annul the Secretary General's decision not to destroy immediately any confidential information concerning her which might be found in files other than administrative ones.

3. According to the information which the complainant supplied to the Tribunal, it appears that a file containing confidential information on all the staff in the complainant's department was in a cupboard which could be accessed by anyone walking down the corridor. That file is now in the possession of the complainant.

4. Following a telephone conversation on 26 July 2012 between the complainant and the Director of Human Resources, on 27 July 2012 the legal counsel of the Central Division of the Directorate General of Administration sent the complainant an email summing up the situation with regard to the paper file in question as follows:

"The file is not your property and the fact that you don't hand it over is not acceptable.

Despite that, we can grant you a bit more time. We understood that you declared yourself ready to give us the folder and we count on this promise.

Due to the holiday time, the next meeting for the verification of the folder's content will not be scheduled before 20 August. We understand that you will give us the folder at the latest by then.

We will decide what to do with this folder after we have seen its content. In any case, we will keep you informed on the follow-up”.

5. On 16 August 2012, the complainant lodged a new administrative complaint with the Secretary General pursuant to Article 59, paragraph 2, of the Staff Regulations. She asked him “to annul the decision of 27 July and introduce appropriate guarantees of [her] substantive and procedural rights”.

6. On 16 August 2012, the complainant applied to the Chair of the Tribunal for a stay of execution (Article 59, paragraph 9, of the Staff Regulations).

7. On 20 August 2012, the Secretary General submitted his observations on the application for a stay of execution.

8. On 23 August 2012, the complainant submitted observations in reply.

THE LAW

9. Under the terms of Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution of the act complained of 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.

According to paragraph 2 of the said Article 59, “Staff 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.”

10. The appellant begins by pointing out that she lodged her appeal no. 532/2012 in order to complain *inter alia* about the Secretary General's violation of basic principles which protect the confidentiality of personal data and hence the privacy of staff members. She states that her appeal revolves around the existence of a paper file containing confidential information on all the staff in her department. She adds that the file was located in a cupboard which could be accessed by anyone walking down the corridor and that she had twice reported the matter to her line managers and asked them to inspect the file so that it could then be destroyed, but to no avail. Apparently, it was only after she lodged her administrative complaint on 12 April 2012 (paragraph 2 above) that the Administration showed an interest in recovering the file. The complainant adds that the file in question – in particular following the lodging of her appeal – has become incontrovertible evidence and that if it were now to fall into the sole possession of the respondent, no one could guarantee that major and substantive changes would not be made to it.

11. The complainant asserts that the execution of the Administration's decision to ask her to return the file by 20 August 2017, a decision against which she has lodged an administrative appeal, is liable to cause her prejudice difficult to redress and she therefore asks that execution be stayed. She states that, for her part, she is amenable to any arrangement that would provide her with an assurance that the file will not be tampered with or altered. She hopes that the Secretary General will make suitable suggestions to this effect as soon as possible.

12. The Secretary General argues firstly that the present application for a stay of execution is inadmissible *ratione materiae*.

13. After noting the wording of Article 59, paragraphs 2 and 9, of the Staff Regulations, the Secretary General submits that the complainant's application for a stay of execution is not directed against an "administrative act" within the meaning of Article 59, paragraph 2, mentioned above. As he sees it, the email at issue, sent on 27 July 2012, can in no way be deemed to constitute a decision by the Administration that is liable to adversely affect the complainant but was rather a request for her to co-operate with the Administration so that it could carry out its mission.

14. The Secretary General adds that, in any event, the email does not constitute an administrative act in respect of which the complainant is entitled to lodge an application for a stay of execution. In his view, it is difficult to see what act the complainant believes should be suspended since it is up to her either to comply with the Administration's request or to refrain from doing so.

15. The Secretary General infers from this that the application is inadmissible *ratione materiae*.

16. As regards the merits of the application for a stay of execution, the Secretary General contends that the complainant's situation does not present any of the elements that could be considered to result in a "grave prejudice difficult to redress", a condition which is required for the granting of a stay of execution.

17. The Secretary General notes that the Administration's request follows in the wake of the administrative complaint of 12 April 2012 and is intended to protect the private and confidential information in question, in line with the concerns expressed by the complainant in her complaint. As was explained in the email at issue, moreover, it is unacceptable that the complainant should keep a file which does not belong to her, particularly if it contains private and confidential information on the Organisation's staff.

18. Lastly, the Secretary General observes that there can be no question, at this stage, of analysing arguments attaching to the substance of the complainant's administrative complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures.

19. In these circumstances and in the light of these elements, the Secretary General asks the Chair to dismiss the application for a stay of execution as inadmissible and/or ill-founded.

20. In her observations in reply, the complainant submits, on the subject of the admissibility of the application for a stay of execution, that it is specious to claim that the email sent on 27 July 2012 does not constitute an administrative act but merely a "request" for her to co-

operate with the Administration so that it can “carry out its mission”. In her view, a “request” which demands the staff member’s full and total “co-operation” so that the Administration can carry out its mission is called an order.

The complainant points out that provided her behaviour did not affect the pursuit of the Administration’s “mission”, she could decide for herself whether to comply or not. For example, she could ignore or decline an invitation to attend a language course, or a preparation-for-retirement course. She suspects, however, that the Administration would be less accommodating if not downright averse to any refusal on her part to attend a training course on, say, new software which she was going to have to use every day. In that case, by refusing to undergo training that was essential for the smooth flow of work, she would be jeopardising the performance of her department’s “mission”, or even that of the Council of Europe as a whole and would be liable to administrative action.

In the present case, however, if the Administration is anxious to recover the file, it is clearly because it recognises that the existence of the file and, probably too, its contents are a problem. According to the complainant, the Administration has a specific and real interest in the compilation, composition and preservation of this file. The material which it contains may have been gathered unlawfully and the Administration may have failed in its duty to uphold the rule of law in the creation and management of personal data. Consequently, the compilation (or non-compilation) of such a file, the inspection of its contents and the inclusion (or removal) of personal documents form part of the Administration’s “mission” and the order instructing her to hand over the file in question is indeed an administrative act which is directed at her and with which she is required to comply or else face sanctions.

In any event, the Secretary General, in his observations to the Chair, states that it is unacceptable that the complainant should keep a file which does not belong to her, thus expressly confirming that, as far as he is concerned, the injunction contained in the email is indeed an order and hence an administrative act.

21. As to the merits of the request for a stay of execution, the complainant contends that the Secretary General merely states that her situation does not present any of the elements that could be considered to result in a “grave prejudice difficult to redress”, without addressing the points which she makes.

The complainant reiterates her arguments, namely that it would be very risky for her to hand over the file to the Administration without any guarantees that its contents will remain completely intact. Firstly, she would be giving the Administration, on mere demand, evidence that is crucial for her appeal, when its failure to act in the past and its lack of interest in this file are at the centre of the “main” dispute. And secondly, she would be affording the Administration a means, should it so wish, to unilaterally alter the contents of the file by removing, where necessary, any material which, in its opinion, should not be there.

The complainant further contends that her fears are based not on mere speculation or a remote possibility and that it is highly probable, if not certain, that evidence will be destroyed given the reply which she received on 14 May 2012 to her administrative complaint of 12 April 2012: “If these measures result in the identification of private and confidential data, they will be deleted and/or placed in the administrative file of the staff member concerned”.

22. In conclusion, the complainant submits that were she to hand over the file to the Administration, in response to a specific request which was more akin to an instruction than a simple appeal, there would be a very high risk that the documents on which she is basing her appeal would disappear, thereby causing irreparable prejudice in that she would be unable to prove her claims and obtain compensation for the damage suffered as a result of the creation of the said file.

The complainant adds that she has no objection, however, to the Tribunal ordering that the file be deposited with it, pending the outcome of the proceedings which began with her administrative complaint of 16 August 2012 concerning the lawfulness of the decision requiring her to hand over the file to the Administration.

23. The Chair notes firstly that the complainant lodged the present request for a stay of execution in connection with the proceedings instituted on 16 August 2012 by presenting the Secretary General with a second administrative complaint which is being examined alongside but separately from appeal no. 532/2012 pending before the Tribunal. His decision relates only to the former proceedings, therefore.

24. The Chair notes firstly that there can be no question at this stage of assessing arguments concerning the admissibility and/or the merits of the complainant's administrative complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures (Order of the Chair of 3 July 2003, paragraph 10, *Timmermans v. Secretary General*).

25. The Chair notes that the Secretary General argues that the request for a stay of execution is inadmissible *ratione materiae*, as the email at issue does not, in his view, constitute an administrative act amenable to challenge by means of an administrative complaint under Article 59, paragraph 2, of the Staff Regulations. The issue of whether the said email does or does not constitute an "administrative act" amenable to challenge by means of an administrative complaint under Article 59, paragraph 2, of the Staff Regulations relates to the merits of the case, however, and hence any appeal which the complainant may lodge if her administrative complaint is dismissed. For the sole purposes of examining the merits of the present request for a stay of execution, however, it is sufficient for the Chair to accept the Secretary General's assertion that the email does not constitute an administrative act within the meaning of Article 59, paragraph 2, of the Staff Regulations. The Chair is compelled to agree with this finding despite the complainant's claim to the contrary, not only because it was made, for the purpose of examining the admissibility of the request for a stay of execution, by the party which adopted the impugned act but also and above all because, for the purposes of the admissibility of the request for a stay of execution, this statement is not *pro domo sua*, that is to say, in the Secretary General's interest.

26. There can be no question, therefore, of examining at this stage the issue raised by the Secretary General and his objection that the request for a stay of execution is inadmissible must be dismissed.

27. As to the merits of the request for a stay of execution, the Chair notes that the complainant's justification for her request is that, following the lodging of her appeal no. 532/2012, the file became incontrovertible evidence. She expresses the fear that, were she to comply with the request to hand over the file, which would then fall into the sole possession of

the respondent, no one could guarantee that major and substantive changes would not be made to it.

28. The Chair does not see how handing over the file in question to the Administration at this stage in the proceedings could cause the complainant grave prejudice difficult to redress. The complainant – who fears that major and substantive changes might be made to the file in question – is clearly familiar with the file and could, possibly in agreement with the Administration, take any measures that might reassure her. In this context, and without knowing either what has been done outside the framework of these proceedings or the contents of the file, the Chair wonders whether the Council of Europe mediator could intercede, so as to allay any doubts on the part of the complainant and safeguard the Administration's interest in having access to the file. The parties, moreover, have both stated their intention to find a solution: on the one hand, the complainant says she is amenable to any arrangement that would provide her with an assurance that the file would not be tampered with and, on the other hand, the Directorate General of Administration has let it be known through its legal counsel that its aim is to check the contents of the file.

29. The Chair notes that the Secretary General has stressed that it is unacceptable that the complainant should keep a file which does not belong to her, especially if it contains private and confidential information on Council of Europe staff. It should be pointed out, however, that, during the present stay of execution proceedings, the Secretary General also stated that the complainant was at liberty to refuse the request to hand over the file.

30. The Chair notes lastly that in examining this request, he has not considered the question of any measures which the Secretary General might feel entitled to take on account of the appellant's refusal under Article 30 (Responsibility for performance of duties), paragraph 2, of the Staff Regulations. In effect, even though the complainant disputes the Secretary General's description of the impugned act and mentions the possibility of disciplinary measures, the fact remains that the Secretary General told the Chair that the email of 27 July 2012 in no way constitutes a decision on the part of the Administration, one which could potentially be considered an "order" under the terms of the said Article 10, but was rather a request for co-operation with which it is for the complainant to comply or not.

31. The Chair points out that the exercise of his exceptional power under Article 59, paragraph 9, 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*). 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.

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

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- that the request for a stay of execution submitted by Ms Stafford is dismissed.

Done and ordered at Kifissia (Greece), on 24 August 2012.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS