

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIRMAN'S ORDER OF 18 NOVEMBER 2011

**in the case of R.V. (II) v/ Governor of the
Council of Europe Development Bank**

THE FACTS

1. The complainant, Mr R. V., has been a permanent staff member of the Council of Europe Development Bank since 15 July 1996, and after evolution of his post was serving as Director of General Administration at the time of his removal from that post. He has asked to be granted anonymity in all public communication.

The complainant has been on sick leave since 30 June 2010. He has a dispute with the Bank, and the Tribunal has already delivered a decision on a question submitted to it (CEAT, Appeal No. 470/2011 – R.V. v/Governor of the Bank, decision of 26 July 2011).

2. On 22 June 2011, the Governor of the Bank brought disciplinary proceedings against the complainant and, in accordance with Article 2, paragraph 2 of Appendix X (Regulations on disciplinary proceedings) to the Staff Regulations, referred the matter to the Disciplinary Board. He considered in fact that the alleged misconduct could carry one of the disciplinary measures prescribed in Article 54, paragraph 2 of the Staff Regulations, which require such referral.

3. On 27 September 2011 the Disciplinary Board delivered its opinion. It considered that the acts held against the complainant should carry a disciplinary measure and proposed a reprimand.

4. In a decision taken on 24 October 2011, the Governor removed the complainant from post on disciplinary grounds with effect from 31 October 2011.

5. On 26 October 2011, the complainant brought an administrative complaint.

6. In a letter dated 27 October 2011 and posted on 28 October 2011, which reached the registry of the Tribunal by e mail on 27 October 2011 and in the original on 4 November 2011, the complainant presented the Chairman of the Administrative Tribunal with a request to be granted a stay of execution of the administrative act of 24 October 2011.

This request was transmitted to the Governor on 3 November 2011 pending receipt of the original by the Tribunal's registry.

7. On 7 November 2011, the Governor submitted his observations concerning the request for a stay of execution.
8. On 10 November 2011, the complainant lodged his comments in reply.
9. Before and after the filing of the latter document, the parties exchanged clarifications regarding certain points of fact and law in this dispute.

THE LAW

10. Under the terms of Article 59, paragraph 9 (former paragraph 7) of the Staff Regulations as applicable to staff of the Bank, an application to stay the execution of the contested act may be lodged if the execution is likely to cause "grave prejudice difficult to redress". According to the same provision the Governor 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".

11. The complainant lodged his application for stay of execution to obtain the suspension of the administrative act of 24 October 2011 ordering his removal from post on disciplinary grounds with effect from 31 October 2011. He is of the opinion that the execution of this decision is likely to cause him prejudice difficult, perhaps outright impossible, to redress.

12. Regarding the existence of grave prejudice the complainant, having recalled the earlier prejudice which he feels he sustained, makes a series of clarifications concerning the medical disadvantages which he is undergoing. Concerning a statutory procedure in progress before the Invalidity Board, the complainant asserts that the prejudice attaching to the decision on removal from post is of a dual nature: he claims to be suffering significant personal and professional disadvantage and incalculable prejudice linked with the impossibility of applying to the Invalidity Board.

13. In his own estimation, he is subject to significant personal and professional prejudice as the decision to remove him from post deprives him of all means of support. Indeed, he is quite physically and mentally incapable of doing a job at present, much less finding a new one, given his still parlous state of health, as certified moreover by his latest sick leave scheduled to last until 6 January 2012. Moreover, although his illness has been certified as having an occupational cause, starting from 30 June 2010, the Governor decided to remove him from post, thus depriving him in the long run of all social protection although extended psychiatric care is still in progress and will definitely have to be intensified having regard to the violence of the further shock sustained.

14. The complainant considers himself to be undergoing incalculable prejudice through the impossibility of applying to the Invalidity Board, as he was removed from post when due to be heard in the very near future by the Invalidity Board, and the Board's decision was to fall in the next few weeks. He adds that effective and immediate removal from post would prevent him from completing this statutory procedure.

According to the complainant, it is moreover open to question whether this might not be the true purpose of a disciplinary measure with final effects (removal from post effective on 31 October 2011), which would deny the staff member *in extremis* the possibility of asserting his rights, including the right to a medical appraisal, dispassionate, already in hand and statutorily prescribed, of his fitness.

The complainant stresses that it is vital for him, in terms of personal reconstruction and medical recognition alike, that the Invalidity Board now be able to complete its appraisal and determine whether he is fit to cope with his job or in need of protection by being brought under a pension scheme.

15. As to the difficulty of redressing the prejudice, the complainant argues that the injuries are immediate and cannot be redressed after the event.

He contends that while he is psychologically and physically afflicted at the present time, the doctors have recognised the occupational character of his illness, moreover since 30 June 2010, that an Invalidity Board was to make a determination of his fitness or unfitness to resume work, and that his immediate removal from post would deprive him of all protection linked with the Regulations and would place him in a position of great fragility and precariousness.

After recalling his difficulties in looking for work under these conditions and meeting his everyday expenses and legal costs, the complainant stresses that the failure to convene the Invalidity Board will be irreparable if he is deprived of his staff member status at a peculiar juncture when the Board is constituted but has not yet been able to rule.

The complainant adds that failing a stay of execution in a case dominated by severe violence towards him and by manifest disproportion between the Disciplinary Board's opinion and the measure imposed on him, he could admittedly have brought an action on the merits at the appropriate time, but would have no guarantee of being able to conduct the action suitably and thus to uphold his most basic rights and have the reality of his medical situation examined in due time by the Invalidity Board prescribed by statute for that purpose.

Thus, some would consider the injuries very difficult, and others completely impossible, to redress.

The complainant stresses that this prejudicial and irreparable character would persist even in the event that, after proceedings on the merits, the Tribunal set aside the measure ordered on 24 October 2011 or considered it unjustified, thereby qualifying the complainant for compensation in respect of the prejudice incurred.

These are the circumstances in which the complainant requests that a stay of execution of the Governor's administrative decision taken on 24 October 2011 be ordered.

16. Finally, in accordance with the provisions of Article 59, paragraph 9 of the Staff Regulations, the complainant recalls that the Governor is required to stay the execution of his decision of 24 October 2011 without delay, for as long as the Chairman has not ruled on this request.

17. In his observations, the Governor acknowledges that the gravity of the prejudice arising from removal from post is incontestable. To his mind, in the present case it should be ascertained whether or not the various heads of damage invoked by the complainant are "difficult to redress".

18. Concerning the personal and professional prejudice, the Governor contends that the complainant has no intention of working at the end of his sick leave, whether at the Bank or elsewhere, and is only requesting a stay of execution of his removal to be able to obtain a disability pension with all dispatch. According to the Governor, in these circumstances his comments on the complainant's situation which allegedly prevents him from holding a job let alone finding a new one have no great relevance: one cannot see what professional prejudice could befall a staff member who contemplates nothing but a disability pension as his sole "professional future" even though, as in this case, the value of the pension might be high.

As to the complainant's argument that his removal from post would deprive him of all means of subsistence, the Governor maintains that such prejudice cannot be called difficult to redress. If in fact the decision on removal is set aside, either by the Governor or by the Tribunal at appeal, the Bank will have to compensate the complainant not only for the remuneration which he should have received but also for the other heads of damage directly linked with his removal.

After looking into the facts regarding both the complainant's state of health and the procedure before the Invalidity Board, the Governor says it is plain, having regard to the task assigned to the Chairman in the context of these proceedings, that the complainant's state of health does not constitute a "specific element" such as to warrant the granting of a stay of execution. He adds that what caused the complainant's state of health was not the decision of 24 October 2011 whose execution he wants to be stayed, and moreover the execution of the decision will not have any more irreparable consequences than if the complainant was in good health.

Indeed, in all conceivable eventualities, the prejudice could be redressed in the form of financial compensation should the removal from post be set aside (by the Governor or by the Tribunal), unless the complainant benefits from being invalidated.

Lastly, the Governor contests that the complainant is deprived of all social protection.

19. Concerning the question of invalidity procedure, the Governor presents a series of arguments that equally contemplate the possibility of resuming the procedure of examining the

application for invalidity if at any stage of the litigation the removal measure is set aside, and the possibility of redressing the prejudice.

20. In his observations in reply, the complainant, after making rectifications concerning the various argument put forward by the Governor, maintains that he needs the protection of the Staff Regulations forthwith, not in a few months, and only a measure of stay of execution, transitional by nature, taken by the Chairman can give him access to it.

The complainant reasserts that the prejudice is difficult, indeed quite simply impossible, to redress. In his view, his state of health, its occupational origin, his physical and psychological unfitness to find a new job at short notice, and the already effective and since 6 October 2011 final constitution of an Invalidity Board – whose various members have questioned the complainant and which is thus expected to deliver its opinion shortly – are all factors that make his situation singular indeed and his request for stay of execution so urgent and legitimate.

These are the circumstances in which the complainant asks the Chairman to order stay of execution of the Governor's decision taken on 24 October 2011.

21. The Chairman recalls at the outset that there can be no question of analysing at the present stage arguments attaching to the validity of the grievances expressed by the complainant in connection with his administrative complaint, as these issues need not be discussed, much less examined, in the context of this procedure concerning only the adoption of urgent measures (cf. Order of the Chair of 3 July 2003, paragraph 10, in the case of *Timmermans v. Secretary General*). This observation concerns both the question whether the disciplinary measure was unwarranted and that of its excessiveness by comparison with the Disciplinary Board's finding.

22. The Chairman notes that the arguments put forward by the complainant to claim that there will be grave prejudice difficult to redress if he does not obtain stay of execution of the decision complained of are based on two elements: the existence of significant personal and professional prejudice and an incalculable prejudice linked with the impossibility of availing himself of the Invalidity Board.

23. Where the first element is concerned the Chairman observes that, as indicated by the appellant himself, at the present time he is unable because of his state of health to find another job, let alone resume his own; however, this argument cannot constitute adequate reasoning to warrant suspending the effects of the decision on removal. As to the difficulties inferred from the loss of all means of subsistence, the Chairman observes that this is not so much a consequence of executing the decision on removal as the direct outcome of the actual decision.

The Chairman notes, on the basis of the current factual elements which have been brought to his attention and need not be reiterated here in detail to avoid encroaching on the complainant's private sphere, that the execution of the measure complained of, during examination of the complaint and of the appeal that could ensue, is not likely to cause "serious prejudice difficult to redress" that would justify staying the execution of said measure, since the complainant can seek pecuniary compensation that would redress the prejudice sustained if he wins on the substance of the dispute. In that respect, the Chairman does not share the doubts

expressed by the complainant about having no guarantee of suitably conducting his action on the merits.

24. Consequently, the arguments put forward by the complainant as to the existence of personal and professional prejudice cannot justify granting a stay of execution.

25. As to the prejudice linked with the invalidity procedure, the Chairman recalls that this application for stay of execution does not concern the invalidity procedure but the removal from post on disciplinary grounds. Therefore, he has not to rule here on the question whether or not there are grounds to suspend a possible decision – which moreover he does not know has been taken to date – to halt the invalidity procedure, an administrative decision which could be challenged according to the Tribunal's case-law on overlap of disciplinary and invalidity procedures. Nor has he to consider at this stage the indirect effects which the contested decision, that is removal from post, could have by repercussion on the administrative situation of the staff member concerned.

26. The Chairman therefore considers that the arguments put forward by the complainant concerning the invalidity procedure do not give him sufficient reason to stay the execution of the decision to remove him from post.

27. The Chairman recalls that some restraint is imperative in exercising the exceptional power conferred on him by Article 59, paragraph 9 (former 7) of the Staff Regulations (cf. CEAB, order of the Chair of 31 July 1990, paragraph 12, in the case of Zaegel v. Secretary General; and CEAB, order of the Chair of 1 December 1998, paragraph 26, in the case of Schmitt v. Secretary General, order of the Chair of 14 August 2002, paragraph 16). Since the purpose of summary procedure is to ensure the full effectiveness of administrative litigation, the application for stay of execution must demonstrate that the requested measure is necessary to avert 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 Bank.

28. As this is not so in the instant case, there is no reason to grant the requested stay of execution.

On these grounds,

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,

WE, CHAIRMAN OF THE ADMINISTRATIVE TRIBUNAL,

Decide as follows:

- the application for stay of execution brought by Mr V. is dismissed.

Done and ordered at Kifissia (Greece) on 18 November 2011.

The Registrar of the
Administrative Tribunal

The Chairman of the
Administrative Tribunal

Sergio SANSOTTA

Christos ROZAKIS