

In the case of P.M.C.

v.

Secretary General

STAY OF EXECUTION ORDER

21 December 2023

THE FACTS

1. The complainant, P.M.C., a former Council of Europe staff member, applied for an external competition for the recruitment of a mail distribution and reception operator in the European Directorate for the Quality of Medicines and HealthCare (EDQM) following the publication of vacancy notice no. e19/2023 on 5 July 2023.
2. On 4 October 2023, the complainant was informed by the Directorate of Human Resources (DHR) that, in view of her performance in the tests, she had been placed on the pre-selection list for the competition.
3. On 4 December 2023, in response to an email from the complainant dated 3 December 2023 in which she asked for an update on the competition, the EDQM department in charge of human resources informed the complainant that the job referred to in the vacancy notice had been filled. She was also told that she was still on the pre-selection list, which would be valid for four years, and that she might be contacted at a later date if the need arose.
4. On 12 December 2023, the complainant lodged an administrative complaint pursuant to Article 14.10.3 of the Staff Regulations, in which she alleged that the recruitment procedure was unlawful. In the complaint, she asked that “any appointment or entry into service of a candidate be halted”, that “her profile be re-examined impartially with the DIO” and that she be “permitted to attend an interview with a view to being recommended for appointment”. The complainant also sought compensation for the non-pecuniary damage suffered.
5. The same day, the complainant applied to the Chair of the Administrative Tribunal for a stay of execution of the decision contested in her complaint, in accordance with Article 14.8 of the Staff Regulations. Through this request, the complainant sought the suspension of “the decision not to interview [her]” and the suspension of “any recruitment, appointment or entry into service of a candidate” following external recruitment procedure No. e19/2023, pending the outcome of any appeal that might be lodged if her complaint were to be dismissed.
6. On 18 December 2023, the Secretary General submitted her observations on the request for a stay of execution.
7. The same day, the complainant submitted her observations in reply.

THE LAW

8. According to Article 14.10.3 of the Staff Regulations, the administrative complaints procedure is open to job candidates, insofar as their complaint concerns irregularities in the selection process directly affecting them.
9. Under the terms of Article 14.8 of the Staff Regulations, filing a complaint does not suspend the contested administrative decision. The Administrative Tribunal may however be asked to suspend the implementation of an administrative decision in cases of particular urgency where the implementation of the said decision would cause serious and irreparable damage to the staff member.

10. According to Article 12.1 of the Statute of the Administrative Tribunal, the Secretary General is to, unless there are duly justified reasons, suspend the execution of the contested administrative decision until the Chair of the Tribunal has ruled on the request.

11. According to Article 12.2 of the same Statute, the Chair, on behalf of the Tribunal, is to rule within 15 days on requests for a stay of execution, by giving a reasoned decision, which may be subject to certain conditions. The decision must not rule on the merits of the appeal or the complaint. Decisions on a stay of execution are not subject to appeal.

I. THE PARTIES' SUBMISSIONS

12. In her request, the complainant asks the Chair of the Tribunal to suspend the execution of the decision not to invite her to an interview and to suspend any appointment or entry into service of a candidate selected following external recruitment procedure no. e19/2023.

13. In support of her request for a stay of execution, the complainant states that her request is of particular urgency and that the contested decision would cause her serious and irreparable damage if it were to be executed.

14. With regard to the particular urgency, the complainant points out that the vacancy in question is due to be filled at the beginning of January 2024 and that she would be permanently deprived of the possibility of being appointed to this job if the stay were not granted.

15. As to serious and irreparable damage, the complainant argues that filling the vacancy would deprive her of the opportunity to make her case in an oral interview and, in so doing, would destroy her chances of being appointed to the only job available. The complainant also states that the recruitment in question is of a specific type and the first such exercise in many years, as there have been few openings that call for these skills.

16. The Secretary General, for her part, notes that the request for a stay of execution is devoid of purpose and, in the alternative, that it is unfounded.

17. Firstly, the Secretary General observes that the request for a stay must be dismissed as being devoid of purpose insofar as the vacancy in question has already been filled following the appointment of the successful candidate and the conclusion of his contract of employment. In the Secretary General's opinion, the fair balance between the parties to the dispute would be upset if the complainant were to, by means of a request for a stay of execution, succeed in having the entry into effect of the candidate's contract of employment suspended, thus prejudicing the rights of the candidate in question, as well as those of the Organisation, which would be contractually liable to him.

18. Secondly, the Secretary General argues that not only has the complainant not provided proof that she would suffer serious and irreparable damage, but she cannot claim that the impugned decision would cause her any damage whatsoever, since the fact that she was placed on the pre-selection list did not in any way entitle her to be invited to an interview – still less to be appointed - and the successful candidate was recruited fully in keeping with the prescribed procedure. If the complainant was not invited to an interview, it was because she was not one of the three candidates whose profile best matched the profile sought: only the latter were invited to the interview, in accordance with Article 490.5 of the Staff Regulations.

19. The Secretary General notes that, in any event, if the Tribunal were to rule in favour of the complainant, any damage suffered could be remedied through payment of compensation.

20. Lastly, the Secretary General notes that there can be no question, at this stage, of assessing the submissions relating to the merits of the complainant's administrative complaint. These matters are not for discussion in the current proceedings, which are only concerned with urgent measures.

21. In her observations in reply, the complainant reiterates that the fact that she was not interviewed has caused her serious and irreparable damage with regard to her right to have her application examined impartially. Further proof of this damage, she argues, can be seen in the fact that, when filling vacancies in the future, the Administration could give priority to candidates selected for the interview which she was not invited to attend. The complainant also takes issue with the Secretary General's argument regarding the harm that suspending the successful candidate's entry into service on 1 January 2024 would cause to the interests of the Organisation, noting that the job to which this candidate was appointed had previously been filled using temporary contracts over a period of many years.

22. In conclusion, the complainant maintains all the submissions made in her request for a stay of execution.

II. THE CHAIR'S ASSESSMENT

23. Firstly, the Chair must consider whether the present request for a stay of execution is devoid of purpose (see paragraph 17).

24. In this respect, the Chair notes that, in her request, the complainant seeks the suspension, firstly, of the decision not to invite her to an interview as part of the procedure for filling a vacancy that will take effect on 1 January 2024, and secondly, of "any appointment or entry into service of a candidate concerning the external recruitment procedure e19/2023". The wording used by the complainant to identify the decision or decisions whose suspension she is seeking therefore refers not only to the decision to appoint the candidate who is to take up his duties on 1 January 2024, but also to any other appointment decision that might be taken as a result of the interviews which she was not invited to attend.

25. With regard to the decision to appoint the successful candidate who will take up his duties on 1 January 2024, the Chair notes that while it is true that this decision is already effective in that the appointed candidate has accepted the offer of employment and signed his employment contract, the decision has yet to be implemented since it is only from 1 January 2024 that the contract will be fully operative and that the candidate in question will take up his duties. Since the decision in question has not yet been implemented, the Chair considers that it may be the subject of a request for a stay of execution. This conclusion is in line with the relevant case law (see ATCE, Order of the Chair of 22 March 2021, in the case of *A (II) v. CCNR*, paragraph 38, and cited case law).

26. As regards any other appointment decision that might be made on the basis of the interviews conducted, however, the complainant has not provided any evidence that there are, at the present time, any such decision(s) that could be suspended in the context of these proceedings.

27. The Chair deduces from this that only the appointment decision named by the complainant and against which she directed her administrative complaint is capable of being suspended. The Chair further notes that under the aforementioned provision of Article 14.8 of the Staff Regulations, she only has the power to suspend an administrative decision and in no respect to impose other types of provisional measures or to amend the disputed decision in any way.

28. In order to examine the merits of the present request for a stay, the Chair notes that the recruitment procedure at issue, as described in Article 490 of the Staff Regulations, is a process consisting of several stages which may culminate in an appointment decision. As part of this process, the candidates who, like the complainant, perform best in the evaluation process are placed on a pre-selection list which is valid for four years (Article 490.3 of the Staff Regulations). During this period, if a vacancy arises, candidates on the pre-selection list with the most suitable profile are invited to an interview to assess their suitability for the specific job (Article 490.5 of the Staff Regulations). Candidates who are successful at the interview stage are recommended for appointment, while candidates who are not appointed remain on the pre-selection list (Article 490.6 of the Staff Regulations).

29. In the light of the aforementioned provisions, the complainant, who is still on the pre-selection list drawn up in connection with recruitment procedure no. e19/2023, may yet be called for an interview if the conditions set out in Article 490.5 of the Staff Regulations are met. The fact that she was not invited to an interview to fill a specific vacancy in no way prejudices her chances of being invited to such an interview if vacancies arise in the future. The complainant offers no proof to the contrary: her argument that job vacancies involving profiles for which she possesses the requisite skills arise only rarely is no more than an unsubstantiated allegation. The Chair notes that the complainant has been on the pre-selection list only since October 2023, and that it is valid for four years. She also considers that it is difficult to anticipate the constantly changing needs of the Organisation over such a long period of time, and that it cannot be assumed, as the complainant does, that the vacancy that was filled will be the only one available before the Secretary General and/or the Administrative Tribunal rules on her case.

30. The Chair notes that there can be no question, at this stage, of assessing the submissions relating to the merits of the complainant's administrative complaint. These matters are not for discussion in the present proceedings, which are only concerned with urgent measures (see Chair's Order of 3 July 2003, paragraph 10, in *Timmermans v. Secretary General*).

31. The Chair also points out that the exercise of her exceptional power under Article 14.8 of the Staff Regulations calls for some self-restraint (ABCE, Chair's Order of 31 July 1990 in the case of *Zaegel v. Secretary General*, paragraph 12; ATCE, Chair's Order of 1 December 1998 in the case of *Schmitt v. Secretary General*, paragraph 26).

32. In addition, according to settled case law, the purpose of the urgent procedure is to ensure that the administrative disputes procedure is wholly effective and that the judgment on the substance of the case takes full effect. For the purpose of achieving that objective, the measures sought must be urgent insofar as, in order to avoid serious and irreparable harm, they must be adopted and produce their effects before a decision is reached in the main action (ATCE, *Order of the Chair of 23 December 2021*, in the case of *D. v. Secretary General*, paragraph 33, and cited case law). In any case, it is for the party requesting the suspension of

the contested decision to show that they cannot wait until the outcome of the proceedings without suffering harm of a kind that would justify the requested suspension.

33. In the light of the above, the Chair concludes that in the instant case, the complainant has provided no proof of damage, nor of the serious and irreparable nature of the damage she is likely to suffer if the stay of execution is not granted.

34. This conclusion is without prejudice to the Tribunal's decision on the merits of the case or to the complainant's ability to refer during the contentious proceedings to any harm she might suffer as a result of execution of the contested decision and, if successful, to seek compensation for the damage resulting from the act complained of.

For these reasons,

Ruling in accordance with Article 14.8 of the Staff Regulations, Article 12 of the Statute of the Administrative Tribunal and Rule 20 of the Rules of Procedure of the Administrative Tribunal,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- dismisses the request for a stay of execution.

Done and ordered in Zagreb (Croatia), on 21 December 2023, the French text being authentic.

The Registrar of the
Administrative Tribunal

Christina Olsen

The Chair of the
Administrative Tribunal

Nina Vajić