

ORGANISATION  
FOR ECONOMIC  
CO-OPERATION  
AND DEVELOPMENT



ORGANISATION DE  
COOPÉRATION ET  
DE DÉVELOPPEMENT  
ÉCONOMIQUES

**ADMINISTRATIVE TRIBUNAL**

Judgment of the Administrative Tribunal

handed down on 14 February 2024

**JUDGEMENT IN CASE No. 102**

AA

v.

Secretary-General

**JUDGMENT IN CASE No. 102 OF THE ADMINISTRATIVE TRIBUNAL**

Hearing on 5 December 2023

In Château de la Muette,

2 rue André-Pascal à Paris

The Administrative Tribunal composed of :

*Louise OTIS, Chair,*

*Pierre-François RACINE,*

*And Chris DE COOKER*

*with Nicolas FERRE and David DRYSDALE providing Registry services.*

*The Tribunal heard*

*Laure LEVI, counsel of the Applicant; and*

*Diana BENOIT, Head of the General Legal Affairs Division and Diane GIRARD, Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General.*

## **I. INTRODUCTION**

1. In her application for annulment and compensation dated 10 December 2021, AA (hereinafter “the Applicant”), challenges the Secretary-General’s decision of 10 June 2021 to terminate her contract, which was confirmed on 30 September 2021.
2. She asks the Tribunal to order reinstatement, payment of 35 000€ for moral damages and loss of salary as well as payment of all costs.

## **II. PROCEEDINGS**

3. The application was lodged on 10 December 2021.
4. The Secretary-General (hereinafter “the Respondent”) submitted his comments in response on 7 March 2022.
5. The Applicant submitted a reply on 7 April 2022.
6. The Respondent presented its surrejoinder on 9 June 2022.
7. By letter dated 3 March 2022, the Applicant filed a complaint with allegations of harassment and abuse of power against BB, her former supervisor. The complaint also contained allegations of institutional mismanagement regarding how her earlier unofficial complaints had been dealt with by the OECD.
8. On 12 May 2022, the Applicant was informed that a formal investigation would be performed regarding her complaint.
9. On 20 July 2022 the Applicant requested that the hearing in the present case be postponed.
10. On 22 July 2022 the Applicant submitted a list of witnesses. The Respondent commented on 3 August 2022.
11. On 10 August 2022, the Tribunal postponed the hearing, initially scheduled for 15 September 2022, until the issuance of the investigation report. It did so without expressing any opinion and making any assessment on the connection between an

alleged situation of harassment and the current application which concludes to the annulment of the termination of contract.

12. The investigation report was issued on 10 March 2023. It was not subject of any reference or discussion at the hearing concerning the present case.
13. On 4 October 2023, the President of the Tribunal granted the request to produce additional evidence, which was submitted on 20 October 2023. The Respondent was allowed to comment thereon by 15 November 2023.
14. The President added that the Tribunal understood that the Applicant would testify at the hearing on 5 December 2023. The Applicant was further allowed to call four named witnesses. Their written statements were to be communicated to the Tribunal by 15 November 2023. The Respondent was allowed to call on three named witnesses.
15. On 15 November 2023, the Tribunal received written statements of respectively CC (a former staff member in the Development Centre ("DEV")), DD (former Deputy Director in the Trade and Agriculture Directorate ("TAD")), EE (former Head of Division in TAD), and FF (Professor of Economics). It heard the Applicant, DD, II (Division Head in DEV)GG (Head of the Agro-Food Trade and Markets Division in TAD), and HH (Deputy Director in the Statistics and Data Directorate).
16. The Staff Association did not submit a statement of intervention.

### **III. FACTUAL BACKGROUND**

17. The Applicant joined the OECD on 8 December 2009 as a Trade Policy analyst in TAD. She was graded A3. In 2014, she was temporarily assigned to the Centre for Entrepreneurship, SMEs, Regions and Cities (CFE) in the Directorate for Financial and Enterprise Affairs (DAF), where she worked as Senior Policy Analyst/Project Coordinator, at the A4 Grade level. On 15 March 2015, the Applicant's fixed-term appointment was converted into an open-ended appointment.
18. In July 2018 she was put under the management of a Head of Division in TAD, but not laterally transferred.

19. In the second half of 2019, a restructuring of DAF's Investment Division (DAF/INV) took place and several functions at grade A4, including those of the Applicant, became redundant. As a consequence, the Applicant was notified by the Head of the Human Resource Management Service (HRM) of the Secretary-General's intention to terminate her appointment. The Applicant requested that, in case no redeployment was found, to put the termination date on 15 March 2020 so that she could receive the leaving allowance under the pension scheme.
20. HRM assisted the Applicant in seeking available functions and on 12 March 2020 a solution was found in the form of a temporary assignment, at grade A3, in the Development Centre (DEV). In her letter dated 31 March 2020, the Acting Head of HRM emphasized the temporary nature of the functions to which the Applicant would be reassigned, and that any extension of those functions would be contingent on the availability of appropriate financing. Rather reluctantly the Applicant accepted the offer on 14 April 2020.
21. At the end of 2020, it became apparent that in view of DEV's budgetary situation, the Applicant's temporary functions in DEV could not be maintained beyond April 2021.
22. On 22 December 2020, the Applicant received a letter dated 15 December 2020 from the Head of HRM informing her that the Respondent intended to terminate her employment following the suppression of her position due to the evolution of DEV's programme of work and budget reductions.
23. After the Christmas break the Applicant had many meetings with HRM and DEV's Client Service Group Manager to discuss potential redeployment.
24. On 2 April 2021, the 3-month search period for potential redeployment came to an end, with no alternative functions having been found for the Applicant.
25. A meeting of the joint Staff Review Board (SRB) was convened to assess the regularity of the procedure. On 7 April 2021, the SRB had a first meeting. It heard the Applicant.
26. The Applicant's functions in DEV ended on 9 April 2021 and the Applicant was informed that she would be exempted from service until the conclusion of the consultation process before the SRB.
27. On 20 April 2021, the SRB reconvened and concluded that the termination process had strictly followed all applicable rules and procedures.

28. On 5 May 2021, the Applicant was interviewed for a function of Senior Economist in the Economics Department (“ECO”).
29. On 26 May 2021, the Applicant requested to serve her entire notice period, *i.e.* until 22 July 2021. On 7 June 2021, the Head of HRM denied her request. The Applicant was assured, however, that if she were selected to a vacant function in the Organisation prior to the date of 22 July 2021, she could be reinstated, with no discontinuity in service.
30. By letter dated 10 June 2021 the Applicant was notified of the Secretary-General’s decision to terminate her appointment and informed that she would receive payment in lieu of notice for the remainder of her notice period.
31. On 12 July 2021, the Applicant was informed that her application to the Senior Economist vacancy in ECO was unsuccessful. The Applicant was provided with the evaluation and conclusions of the interview panel for this vacancy.
32. On 10 August 2021, the Applicant sent a written request to the Secretary-General, requesting him to withdraw his decision of 10 June 2021 terminating her appointment.
33. By letter dated 30 September 2021, the Secretary-General confirmed the decision to terminate the Applicant’s appointment. This is the impugned decision.

#### **IV. ARGUMENTS OF THE PARTIES**

##### *a. Arguments of the Applicant*

34. The Applicant presents four main arguments. She contends that:
  1. the Respondent did not fulfill its duty under the Staff Regulations to assist her effectively in her search for redeployment;
  2. the Respondent made a manifest error of assessment by taking the contested decision;
  3. the Respondent disregarded the principles of non-discrimination and legal certainty; and
  4. the Respondent breached its duty of care.
35. Regarding the first ground, the Applicant refers in particular to the case law of the International Administrative Tribunal of the International Labour Organization (ILOAT)

in support of her claim that she has preference and priority rights to vacant positions. She admits that the OECD Staff Regulations do not place an obligation of result on the Respondent to find a vacant position for a redundant official, but that it must nonetheless do all what is necessary to assist effectively the Applicant in finding a position, including helping her to identify positions that may be relevant for her. In effect she alleges that HRM did not help her in identifying any vacant positions. She submits that HRM started its search late and was not aware of many vacancies and that she had to find them by herself and apply for nineteen positions in total. She was interviewed for only two. She even heard of additional vacancies after she had left the Organisation.

36. The Applicant furthermore contests the 10 June 2021 decision informing her that her contract would terminate on 11 June 2021. She had repeatedly requested to be allowed to serve the entire notice period, i.e. until 22 July 2021. This diminished her chances to be reappointed.
37. She further alleges that the Respondent was slow in organizing outplacement services and that the performance evaluations had not been completed concerning her last two years of service.
38. In her second set of arguments the Applicant contends that the Respondent made manifest errors of assessment by taking the contested decisions. She raises two main points under this heading: she questions (i) the Respondent's argument on the alleged budgetary restrictions, and (ii) the latter's claim that there were no positions commensurate to her profile.
39. Moreover, the Applicant submits that DEV kept recruiting despite the alleged budgetary difficulties and that she was the only one to be terminated. She felt to have been assured by HRM that there would be longer-term financing and that the withdrawal by some member states from the programme would not have a negative impact on her career. The Respondent had not indicated the real reasons for the termination of her appointment.
40. In a third argument the Applicant contends that the Respondent breached the principle of legal certainty and the principle of non-discrimination. The Respondent violated the principle of legal certainty because it did not provide for clear rules regarding direct redeployment of redundant staff.

41. The Applicant also contends that the termination of her contract infringes her acquired rights. Before accepting the post offer in DEV she claimed in her acceptance letter that she would only agree to the offer with the understanding that the Respondent would support her career continuity and not let her go after a year. She therefore had a reasonable expectation to be redeployed.
42. With regard to the principle of non-discrimination the Applicant alleges that she has been treated differently during the same DAF restructuring in 2019 from a male colleague who was in the same situation.
43. In her fourth argument the Applicant contends that the Respondent should have paid more attention to her health and private situation, of which the OECD services were aware. Moreover, it is difficult to understand why she was not redeployed, given her excellent profile and experience.
44. She alleges that it is the duty on the part of management to inform staff at least six months before the prospective end of their contract on the continuity of their functions. This was not done.
45. The Applicant requests the Tribunal to:
- annul the 10 June 2021 decision of the Secretary-General terminating her contract on 11 June 2021;
  - annul the implicit decision of the Secretary-General to dismiss the Applicant's written request for withdrawal of the 10 June 2021 decision;
  - annul the 30 September 2021 decision denying the Applicant's written request for the withdrawal of the 10 June 2021 decision;
  - order the Respondent to overturn the contested decisions;
  - order the Respondent to reinstate the Applicant within the Organisation by reassigning her to a vacant position;
  - order the Respondent to pay a compensation for the prejudice suffered by the Applicant estimated *ex aequo et bono* at €35,000 for the moral prejudice, and the loss of salary since the end of the Applicant's contract until her reinstatement or, in the case of no reinstatement, during five years; and
  - order the Respondent to pay all costs.

*b. Arguments of the Respondent*



46. The Respondent argues that it did not fall short on its obligations vis-à-vis the Applicant. The Respondent's duty to assist the Applicant was fully respected. Many efforts were made by HRM to identify opportunities of reassignment for the Applicant. The fact that the search was unsuccessful is not the result of the Respondent's alleged inaction or lack of care but is because no functions matching the Applicant's qualifications, skills and experience were then available. The Respondent subsequently offered outplacement services to the Applicant to facilitate her search for employment outside the Organisation.
47. The Respondent refers in this respect to numerous, almost weekly, meetings that were held regarding redeployment possibilities.
48. The Respondent further argues that the discontinuation of the Applicant's functions in DEV was justified and that proper procedures were followed in her case in accordance with the rules and standard policies and practices.
49. Regarding the Applicant's claim that the Respondent violated the principle of legal certainty by not providing clear rules on the direct redeployment of redundant staff, it observes that these rules do not provide for a right to direct reassignment but rather they establish the right to receive the assistance of HRM in seeking alternative functions.
50. It also rebukes the Applicant's claim of discrimination observing that there is no truth in comparing different individual situations. The mere fact that the Applicant's colleague is still in the employ of the Organisation is not an indication that the Applicant was discriminated against.
51. With respect to the claim of violation of the duty of care, the Respondent maintains that the Secretary-General did appreciate the personal situation of the Applicant but underscores the general difficulty of termination decisions for anyone concerned. There was no undue harm to the Applicant. The Respondent's decision to terminate the Applicant's appointment, as permitted under its rules, cannot be viewed in itself as a breach of the Respondent's duty of care.
52. In conclusion, the Respondent submits that the challenged decision is lawful and request the Tribunal to dismiss all the Applicant's claims.

## **V. CONSIDERATIONS AND CONCLUSIONS**

### **a. Preliminary matters**

53. The Tribunal has the following preliminary remarks.
54. It recalls and underlines that the application is lodged against the 10 June 2021 decision to terminate the Applicant's appointment.
55. The present proceedings have been suspended for about a year and a half at the request of the Applicant pending the outcome of an investigation following the harassment claim she had submitted. The Tribunal understands that separate proceedings are underway regarding this investigation. As a consequence, this matter is not part of the present proceedings.
56. It is the responsibility of the parties to present claims in a clear and concise manner and to submit convincing evidence in support of them. Many issues have been raised and the Tribunal would have benefited from a thorough fact-finding exercise by the Joint Advisory Board.
57. The application against the 10 June 2021 decision is admissible.

### **b. The merits**

58. Staff Regulation 11 provides in relevant part:

a) The Secretary-General may terminate the appointment of an official:

...

iii) where:

- based on the Programme of work and budget of the Organisation, the Secretary-General decides to reduce the total number of officials assigned to a particular output or activity, or performing a particular type of functions, or carrying a particular category and grade;

- further to the redefinition of the functions, the official's skills and qualifications no longer match the needs of the Organisation;

-the functions assigned to the official have become unnecessary or redundant;

...

c) In cases falling under a) i), iii), v) or vii) above:

i) the decision shall be taken after the relevant advisory body has been consulted on the regularity of the procedure;

ii) an official shall be notified in writing, before the consultation of the relevant advisory body, of the Secretary-General's intention to terminate his/her appointment, indicating the grounds for such intended termination.

59. The implementing Staff Instructions then provide in relevant part:

*Termination pursuant to Regulation 11 a) iii)*

Instruction

*111/1.5 In cases in which the appointment of an official is terminated pursuant to Regulation 11 a) iii):*

*a) the Organisation shall assist the official by seeking actively and spontaneously available functions in the Organisation corresponding to the official's qualifications and experience, and, if this search is unsuccessful, by facilitating the official's search for employment outside the Organisation;*

*b) the Secretary-General shall, unless the official renounces thereto in writing, seek such functions during a period of three months following the beginning of the notice;*

*c) if the Secretary-General has been unable to find such functions by the end of the search period or has not searched for such functions because the official concerned has renounced redeployment, the Secretary-General may then terminate the official's appointment, after consultation with the advisory body referred to in Instruction 107/19, paying him/her the emoluments and allowances corresponding to the balance of this period of notice.*

60. The main question to be answered is whether the Respondent did fulfill its obligation under Staff Regulation 11 to *assist the official by seeking actively and spontaneously available functions in the Organisation corresponding to the official's qualifications and experience, and, if this search is unsuccessful, by facilitating the official's search for employment outside the Organisation.*

61. The Tribunal, first of all, emphasises that a meeting of the joint SRB was convened to assess the regularity of the procedure and that the Applicant was heard. The SRB concluded that the termination process had duly respected the rules and HR policies.
62. It follows from the actual wording of Regulation 11 that the main responsibility for the Respondent is to *assist the official by seeking actively and spontaneously available functions in the Organisation*. The regulations do not provide that OECD staff whose appointments are terminated have a priority status for every vacancy corresponding to their qualifications and experience as is the case in some other organisations. The Tribunal holds that the Respondent thus has a margin of discretion in this regard and that the Tribunal has limited review thereof. It follows from this that it is also not for the Tribunal to substitute its assessment for that of the Respondent.
63. The Tribunal observes that the record shows that a great number of functions were actively considered by both parties.
64. In the Applicant's view, the Respondent is required to make every effort to find a suitable redeployment. The Tribunal notes that the test here is not to check whether every effort has been made - which in actual practice is very difficult to do - but rather whether the Respondent has actively and spontaneously made reasonable and serious efforts.
65. On balance, the Tribunal must conclude that it is *"not in possession of information enabling it to assert that the Organisation failed in its obligation under Staff Regulation 11 to seek actively and spontaneously during a period of three months a vacant position commensurate with the qualifications and experience"*<sup>11</sup> of the Applicant and that the Applicant has not convincingly established that the Respondent has failed in its obligations. The Applicant has, moreover, not convincingly established that the Respondent has abused its discretionary powers in this respect.
66. The Applicant alleges that HRM made assurances that her functions in DEV would be extended beyond 12 months and that she would remain employed with the Organisation. She thus had a reasonable expectation to be redeployed. The Tribunal must note, however, that the job description that was presented to her prior to her

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<sup>11</sup> Cf. OECD AT, Case No. 56, p.4.

reassignment, and which she acknowledged, explicitly states that this was a “temporary assignment”. Expectations were indeed that there would be funding for the programme beyond these 12 months, but no guarantee was given, and could not have been given. No evidence was provided in this respect and it cannot be concluded that the Applicant had a legitimate expectation, not to mention an acquired right, to permanent employment. No guarantees were given in this respect.

67. The Applicant raised two main points in her second ground: she questions (i) the Respondent’s argument on the alleged budgetary restrictions, and (ii) the latter’s claim that there were no positions commensurate to her profile.
68. The Applicant contests the budgetary restrictions alleged by the Respondent in rather general terms and fails to provide convincing proof. The Tribunal cannot therefore but accept the Respondent’s position that the budget of the programme was under pressure and that several member states had withdrawn from it.
69. The allegation by the Applicant that the Respondent had claimed that there were no positions commensurate to her profile is not supported by the facts. It is clear from the record that the Respondent had identified a number of positions for which she was considered and, to a lesser extent, formally or informally interviewed. She just was not successful.
70. The Applicant contends in her third ground that the Respondent breached the principle of legal certainty and the principle of non-discrimination. She argues that the Respondent violated the principle of legal certainty because it did not provide for clear rules regarding direct redeployment of redundant staff.
71. It suffices to note that the rules concerned, in particular Staff Regulation 11, are unambiguous: they do *not* provide for direct redeployment of redundant staff. This argument must therefore be rejected.
72. Under the ground of discrimination, the Applicant claims that a former colleague was directly reassigned to other functions, while she had to apply for other functions. The Respondent recalls that the Applicant herself was in 2020, following the earlier suppression of her functions in DAF, directly reassigned to DEV. It further explains that, following the suppression of his functions in DAF in 2019, the other official was also reassigned to functions that were initially also temporary, *i.e.* a situation similar to that of the Applicant in 2020. It submits that there is no truth in comparing different

individual situations and that the mere fact that the Applicant's colleague is still in the employ of the Organisation does not amount to discrimination. The Tribunal concludes that indeed the factual situations are different and that discrimination is not established. It finds the Applicant's contentions in this respect speculative and hypothetical.

73. The Applicant contends that the Respondent failed in its duty of care in that it did not take into account her personal circumstances, *i.e.* being a single bread winner having a mortgage to pay off. The Tribunal observes that the record does not show that the Respondent did not take into account the Applicant's personal circumstances. Although being sympathetic with the situation and circumstances of the Applicant, the Tribunal must hold that personal circumstances do not entail entitlement to permanent employment. This argument must also be rejected.

74. The Tribunal concludes that the application must be rejected in its entirety.

75. This being said, the Tribunal must note some flaws and lacunae in the Respondent's approach which, individually or taken together, do not entail the illegality of the challenged decisions in particular because inferring injurious consequences of them would be speculative. It is, for example, the duty of HRM to ensure that when staff members have to go on the internal (and external) labour market, that their files are in order and up to date. This includes making sure that they have their performance evaluations. Therefore, the Tribunal also considers that the Respondent could have been more transparent and proactive towards the Applicant in a timelier manner.

76. As regards to the duty of care, the Tribunal notes that the Applicant was informed of the intention to terminate her employment following the suppression of her position and of the beginning of the notice period a few days before the Christmas break. This timing was ill-chosen. Moreover, and in spite of her request, the termination of the Applicant's contract took place six weeks before the end of her notice period, while this is supposed to happen only in "exceptional circumstances" according to Instruction 111/1.5 c). Even if this is "standard procedure" as the Respondent contends, there were no reasons why her request was disregarded. This is not good administration and the Applicant must be compensated for these moral damages.

77. The Tribunal thus considers that six (6) months of the Applicant's last emoluments to be an adequate compensation.

78. The Tribunal concludes that the application must be rejected in its entirety.

#### **VI. COSTS**

79. The application being partly successful, the Applicant is entitled to 6000 Euros for costs.

#### **VII. DECISION**

80. For these reasons, the Tribunal decides:

1. The Applicant is entitled to six (6) months of her last emoluments in compensation for Moral damages.
2. The Applicant is entitled to 6000 Euros for costs; and,
3. All other claims are dismissed.