

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 28 May 2009

JUDGMENT IN CASE No. 65

Miss C.

v/ Secretary-General

Translation

(the French version constitutes the authentic text)

JUDGMENT IN CASE No. 65 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Friday 15 May 2009
at 10.30 a.m. in the Château de la Muette,
2 rue André-Pascal, Paris

The Administrative Tribunal consisted of:

Mr. Jean MASSOT, Chairman,
Professor James R. CRAWFORD
and Dr. Carl Otto LENZ,

with Mr. Colin McINTOSH and Mr. Christophe FAVRE providing Registry services.

In a letter of 13 May 2008, Miss C., a grade B3 official of the Organisation, was informed by the Head of Human Resource Management that no further action was going to be taken in respect of her complaint of having been subjected to personal harassment by several of her colleagues.

On 9 July 2008, Miss C. addressed a prior request to the Secretary-General asking for the modification or withdrawal of this decision of 13 May. This request was refused, as notified to Miss C. in a letter from the Executive Director dated 13 August 2008.

On 29 October 2008, Miss C. filed an application (No. 065) asking the Tribunal to annul the Secretary-General's decision notified on 13 August 2008, to conclude that the Organisation had failed in its obligation to treat its officials with dignity and avoid inflicting on them any unnecessary or excessive harm, and to order the OECD to compensate the prejudice she had suffered.

On 12 January 2009, the Secretary-General submitted his comments asking the Tribunal to conclude that the applicant's claims for compensation were inadmissible, to consider that the request made by Miss C. for the annulment of the decision of 13 May 2008 was unfounded, and to dismiss the application in its entirety.

On 11 February 2009, the applicant submitted her reply.

On 16 February 2009, the Staff Association submitted written comments asking the Tribunal to give a favourable hearing to the applicant's submissions.

On 17 March 2009, the Secretary-General submitted his comments in rejoinder.

The Tribunal heard:

Maître Caroline Barbe, Counsel for the applicant;

and Mr. Nicola Bonucci, Head of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General.

It handed down the following decision:

The facts

Miss C. was recruited by the Organisation to work as an assistant in the Competition Division. She was first given auxiliary contracts, renewed on several occasions between 10 September 2001 and 20 October 2004, then, as from that date, a fixed-term appointment as a grade B3 official running until 15 August 2005, then renewed for a period of three years, expiring on 15 August 2008.

At the end of the year 2005, Miss C. complained to her Head of Division, Mr. P., about her excessive workload and about what she called personal harassment by one of her colleagues.

In June 2006, Miss C. was posted, temporarily and then permanently, to the Development Co-operation Directorate on a project post in the Metagora Unit until 31 December 2007. On 24 January 2007, Miss C. complained to Human Resource Management about the behaviour of her new Head of Service which she felt was lacking in respect.

On 1 December 2007, Miss C. submitted a complaint alleging personal harassment by two persons from her previous Service, Miss A. and Mrs. K., and two persons from Metagora, the Head of Service, Mr. S. and Miss W. Miss C. asked for disciplinary action to be taken against these four persons.

At the same time, Miss C. expressed a wish not to return to the Competition Division at the end of her Metagora mission. She did, indeed, receive another posting until the expiry of her appointment.

On 28 January 2008, the Head of Human Resource Management, Mrs. P., commissioned Mr. François Rousseau, a former legal adviser in the Organisation's Directorate for Legal Affairs, to conduct an enquiry into the facts on which the applicant's complaint was based.

The enquiry report was submitted to Mrs. P. on 18 April 2008.

On 13 May, Miss C. was received by Mrs. P. who informed her orally and in writing that «having regard to all the information collected, the conclusion of the enquiry is that none of the four persons accused could be convicted of personal harassment» and that she had «decided to follow these conclusions»; «that, consequently, no further action will be taken on your complaint».

On 17 May 2008, Miss C. wrote to Mrs. P. that she deeply regretted the decision taken and asked to be shown the enquiry report in its entirety.

On 4 June 2008, Mrs. P. replied, pointing out that she had informed Miss C. of the report's conclusions and drawing her attention to the fact that this report was intended exclusively for the Head of Human Resource Management and had to be treated with the utmost confidentiality given the personal information it contained. Accordingly, Mrs. P. did not feel able to communicate the report to Miss C. any more than she could do so to the four persons accused.

On 9 July 2008, Miss C. asked the Secretary-General to withdraw or modify this decision not to take any further action in respect of her complaint, a decision which she felt to be illegal for two reasons: first, the non-adversarial nature of the enquiry, and secondly because the Organisation had not complied with the policy it had laid down with regard to harassment.

On 13 August following, the Executive Director informed the applicant that he was maintaining the decision of the Head of Human Resource Management.

In her application of 13 August 2008, Miss C. asked the Tribunal

- to annul this decision,
- to order the Organisation to pay her 100 000 euros in compensation for the prejudice she considered she had suffered as a result of the failure of her employer to treat her with dignity and to avoid inflicting on her any unnecessary or excessive harm,
- to order the Organisation to pay her 2 500 euros in respect of her costs.

On the decision to take no further action in respect of the complaint.

On the text applicable

Having regard to the date of the events in question and of the applicant's complaint, the text applicable is the Decision of the Secretary-General concerning the Policy to Prevent and Combat Harassment set out in Annex XX to the Staff Regulations before the amendment thereof which only entered into force on 16 October 2008, as indeed did the new Annex XXV relating to the Investigation Procedure within the Organisation.

On the obligations and powers of the Organisation

Paragraph 18 of Annex XX, applicable at the time, provides that «Depending on the circumstances of the case and the conclusions of the enquiry, the Head of Human Resources management will take appropriate measures. These may include initiating a disciplinary action under Staff Regulation 21.» This means that any decision to take no further action in respect of the complaint or to initiate a disciplinary procedure falls within a largely discretionary power and cannot be challenged before the Tribunal except on grounds of *ultra vires*, a formal or procedural defect, a manifest error of appreciation, a material error or a misuse of power.

On the allegation of a formal or procedural defect

The applicant complains both about the insufficient motivation given in the written decision communicated to her on 13 May 2008 and about a breach of the adversarial principle inasmuch as she was not in a position to challenge the statements of the persons accused since she had no knowledge of them, or indeed of the report in its entirety, before the decision was taken. Contrary to the arguments submitted by the Organisation, it matters little that she did not formally refer to the lack of communication of the report in her claim to the Secretary-General inasmuch as this ground of complaint relates to the same submissions as those contained in this claim.

The Tribunal recognises that, as pointed out by the Organisation, § 17 of Annex XX says simply that «The enquiry will be conducted with due respect for the rights of both the complainant and the person accused. Specifically, the alleged harasser will be given the opportunity to answer the allegations and to produce evidence to the contrary. The enquiry may also involve a meeting between the alleged harasser and the complainant, if so requested and agreed upon by all involved parties.» While the accusations made by the complainant must of course be communicated to the persons accused, it is not expressly stated in this text that the arguments in defence used by the persons accused of harassment must be communicated to the author of the complaint. And while the person conducting the enquiry did in this case propose a meeting between the persons accused and the complainant, this proved impossible since all the involved parties did not agree to it.

The Tribunal nevertheless considers that, in such a procedure, the complainant must have a minimum of knowledge about the arguments invoked in defence by the persons accused. Such knowledge could have resulted from communication of the report before the Head of Human Resource Management took her decision. If that was deemed impossible for reasons of confidentiality, at least the main outline of the arguments should have been presented to Miss C. at the meeting she had with Mrs. P. on 13 May 2008. Without a written record of this meeting, the Tribunal is not in a position to assess whether it provided the

complainant with the minimum information she was entitled to expect and which in any event was not included in the written decision notified to her.

But, even if Miss C. was not correctly informed before 13 May 2008, nor perhaps even on that date, about the reasons which led to no further action being taken in respect of her complaint, this failing does not necessarily mean that the decision must be annulled, and that for at least three reasons.

In the first place, as set out in § 17 of Annex XX, the adversarial principle applies to the person accused of harassment and not as such to the complainant. At the enquiry stage, there are no proceedings between two parties, one of whom being the author of the complaint. It is only incumbent on the Organisation, acting in a manner which respects the rights of the complainant, to investigate by all the means at its disposal, notably an enquiry, whether any follow-up should be given to the complaint. As will be seen below, the Organisation conducted this investigation in a correct manner.

In the second place, the lack of prior information given to Miss C. about the reasons for the decision not to take further action was not, in this instance, in breach of any statutory rule or general principle of international civil service law.

In the third place, Miss C. received a copy of the report in the context of the proceedings before the Tribunal and had ample opportunity to challenge the substance and conclusions thereof in her reply. These comments will be addressed below. But the Tribunal can only note that on the day on which its ruling is given, the lack of prior information given to the complainant has been corrected. It would therefore make little sense to annul a decision on grounds of a formal defect when it could be taken again in the same terms and for the same reasons.

In short, assuming compliance with paragraphs 17 and 18 of Annex XX, it was for the Organisation to take the decision whether or not to take further action on the complaint. In this case, the validity of the decision not to take further action is not affected by the fact that the complainant did not receive prior information about the reasons which led the Organisation to take it.

On the allegations of material error or partiality in the report

Neither the written comments nor the oral arguments have convinced the Tribunal that the few material errors complained of, moreover very minor in nature, could have influenced the conclusions of the enquiry. As for the fact that the report finishes with a conclusion in favour of one of the two possible outcomes, the Tribunal points out that it is the text itself of § 18 of Annex XX which obliges the person conducting the enquiry to present conclusions and not simply to summarise the different allegations. Given the very short time limit imposed upon him, which moreover was not entirely respected (30 days according to § 16 of Annex XX), and the mass of documents produced by Miss C., the person conducting the enquiry carried out comprehensive investigations nothing about which gives rise to any suspicion of unfavourable prejudice against the applicant. No such prejudice appears from the records of the many meetings Mr. Rousseau had with Miss C..

In conclusion, nothing in the report, the main points of which should no doubt have been communicated earlier to the complainant, allows the Tribunal to consider that the conclusions of the enquiry or the decision taken in light of these conclusions are based on any manifest error of appreciation.

On the granting of indemnities to compensate for the consequences of the Organisation's alleged failure to protect its officials

Even though the Tribunal is convinced that these submissions were not presented in the claim made to the Secretary-General and are therefore not admissible, it feels they can be dismissed as to the substance inasmuch as it is in no way established that Miss C. had informed her line managers of the difficulties she

was experiencing before the first measures enabling her to change Service were taken. The Organisation also agreed to assign Miss C. to a third Service as from the time when she initiated the harassment complaint procedure against persons from her two previous postings. The Tribunal does not find here any failure in the Organisation's duty to protect its staff. In any event, no prejudice resulting from these alleged failings has in any way been established.

On the intervention of the Staff Association

The Tribunal notes the comments of the Staff Association in support of the application by Miss C..

On costs

The Tribunal considers that in the circumstances of the case, Miss C. is entitled to reimbursement of her costs up to 1 000 euros.

The Tribunal decides:

- 1) The application is dismissed
- 2) The Organisation shall pay Miss C. the sum of 1 000 euros in respect of her costs.