ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

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Greffe du Tribunal Administratif

Registry of the Administrative Tribunal

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 7 April 2005

JUDGMENT IN CASE No. 58

Mr. W.

v/ Secretary-General

The English version constitutes the authentic text.

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JUDGMENT IN CASE No. 58 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Wednesday 16 March 2005
at 9 a.m. in Annex Monaco of the OECD,
2 rue du Conseiller Collignon, Paris

The Administrative Tribunal consisted of:

Mr. Jean MASSOT, Chairman,
Professor James R. CRAWFORD
and Mr. Justice Dermot KINLEN,

with Mr. Colin McINTOSH and Mrs. Christiane GIROUX providing Registry services.

By decision of the Secretary-General of 15 July 2004, Mr. W., administrator in the Environment Directorate, was suspended with pay pending completion of a disciplinary procedure.

By letter of 4 August 2004, Mr. W. asked the Secretary-General to withdraw this decision, a request which was rejected by the Executive Director, on behalf of the Secretary-General, by letter of 3 September 2004.

On 15 September 2004, Mr. W. filed an application (No. 058) requesting the Tribunal to annul the Secretary-General's decision of 15 July 2004 and to award him damages under various headings, as well as legal costs. This application was distributed on 22 September 2004.

On 22 November 2004, the Secretary-General submitted his comments asking for the application to be dismissed in its entirety.

On 21 December 2004, the Staff Association submitted written comments on the case, stressing the need for OECD staff to benefit from all necessary protection during disciplinary, or pre-disciplinary, procedures.

On 23 December 2004, the applicant submitted a reply, distributed on 3 January 2005.

On 4 February 2005, the Secretary-General submitted his comments in rejoinder supplemented, on 15 February 2005, by "additional information" consisting essentially of three further documents.

The Tribunal heard:

Maître Daniel Laprès, Barrister, Counsel for the applicant;

Mr. David Small, Head of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General,

and Mr. Adolfo Aladro, on behalf of the Staff Association.

It handed down the following decision:

Outline of the dispute

1. On 13 July 2004 the applicant was summoned to a meeting with the Head of Human Resources Management (HRM). At that meeting he was told that allegations of personal and sexual harassment had been made against him and that the Organisation, following the Report of the Enquiry, had found these to be *prima facie* justified. He was given the choice of voluntary resignation or suspension with pay pending disciplinary proceedings under Regulation 21, the decision to be made within 48 hours. The applicant, who had no prior notice of the complaints or the investigation and who was not represented at the meeting, contested the charges.

2. On 15 July 2004 the applicant, not having elected to resign, was suspended with pay pursuant to Instruction 121/1.3. This is the contested decision.

3. The dispute between the applicant and the Organisation subsequently widened, involving serious allegations on both sides and criminal proceedings brought by the applicant against individual employees before the French courts. Some of these proceedings are ongoing.

4. Although in the course of their oral arguments the representatives of both parties tended to stray into the merits of the underlying allegations, the Tribunal must emphasise that the present case concerns exclusively the validity of the decision of 15 July 2004. Nothing the Tribunal says in this decision reflects any conclusion as to the substance of the claims and charges made either by the Organisation or by the applicant.

The Tribunal's jurisdiction

5. The Secretary-General does not contest the Tribunal's jurisdiction to deal with the validity of the decision to suspend the applicant with pay. He argues however that the complaint concerning restriction on access to other OECD staff members is inadmissible because the applicant never requested the Secretary-General to modify the scope of that restriction. He also argues that until a final decision is taken on the complaints, claims for damages concerning the right of defence are not ready for decision.

The substance of the claims

6. The applicant contests the legality of the decision of 15 July 2004 on four grounds. In addition he alleges that steps subsequently taken to suppress half of his former job violated Article 4(d) of the Statute of the Tribunal.

(a) <u>The absence of any statutory provision authorising suspension with pay pending disciplinary proceedings</u>

7. Instruction 121/1.3 for the implementation of Regulation 21 of the Staff Regulations relating to the procedure for disciplinary cases provides that "where the fault of which an official is suspected is such that the appropriate disciplinary measure would be suspension without salary or dismissal, the Secretary-General may suspend the official on salary pending the completion of the procedure set out in this Instruction".

8. The applicant argues that a step so harmful to an agent's career as suspension pending disciplinary proceedings (even with pay) can only be taken under express statutory authority, and that Instruction 121/1.3 is not a sufficient basis. He points to the express provisions made in the rules of other organisations for such a step.

9. The Secretary-General argues that suspension under Instruction 121/1.3 is not a sanction but a precautionary measure pending action taken under Regulation 21. Despite its character as a public international organisation, the OECD does not lack the normal powers of an employer to dispense with the attendance of an employee at work pending disciplinary proceedings. In any case where proceedings under Regulation 21 may involve a serious sanction ranging from suspension without pay to summary dismissal, it will usually be undesirable for the official concerned to continue at work.

10. The Tribunal agrees with the Secretary-General on this point. Suspension of an official with pay pending disciplinary proceedings is not itself a sanction. If the proceedings are terminated or withdrawn or if the charge is not established, the official will return to his or her position and will be fully reintegrated. Instruction 121/1.3 is an adequate basis for action by the Secretary-General in this regard.

(b) Challenges to the decision on certain substantive grounds

11. Secondly, the applicant challenges the decision on certain substantive grounds—as a violation of his right to treatment with dignity and as a disproportionate violation of his right to work and of his right to privacy. In response the Secretary-General argues that the circumstances surrounding the allegation fully justified the action taken.

12. In the Tribunal's view, the mere fact of suspension with pay under a power such as that set out in Instruction 121/1.3 is not in itself a violation of any right of an employee.

13. The conditions for the exercise of the power under Instruction 121/1.3 were examined by the Tribunal in Case No. 47, *A. v. Secretary-General*. There the Tribunal set out the conditions for lawful suspension with pay under Instruction 121/1.3 in the following terms:

> "The Tribunal emphasises that the decision it is called upon to take today does not in any way prejudge the outcome of any dispute which might arise if a disciplinary measure were actually to be pronounced. It must therefore reach its decision by determining whether the conduct of which Mrs. A. is accused, were it to be proved, would justify a disciplinary measure of a nature such that she could, in the meanwhile, be suspended on salary. It is only if it appeared that there was nothing in the file, at the time the Tribunal gives its ruling, to support the accusations made against Mrs. A. that it could annul the suspension.
>
> While its decision cannot be interpreted as a judgment as to the existence, or otherwise, of the fraud of which Mrs. A. is accused, the Tribunal finds that the file is not devoid of any element in support of such fraud. It notes that if such elements were to be proved, the disciplinary measure called for could be at least suspension without salary. In these circumstances, the Tribunal considers that Mrs. A.'s application must be dismissed."

14. The applicant argued that the allegations against him are much more serious than those in the *A.* case. But the *A.* case did not concern a maximum threshold for the exercise of the power to suspend with pay—rather it concerned the minimum threshold. The more serious the allegations the more likely it is to be appropriate that that power be exercised. Provided that necessary procedural requirements are complied with, the exercise of the power in a case such as the present cannot be preemptively challenged before the Tribunal in advance of a decision on the merits of the charges pursuant to Regulation 21. Furthermore, as in Case No. 47 so in the present case, the file is not devoid of any element in support of the charges made by the Organisation.

(c) The failure to accord to the applicant any opportunity to explain his case

15. Thirdly the applicant argues that the decision of 15 July 2004 was vitiated by procedural defects. He refers in particular to paragraphs 16-18 of the Decision of the Secretary-General concerning the Policy to Prevent and Combat Harassment ("the Harassment Decision"). So far as relevant for present purposes, this provides as follows:

> "**Enquiry**
>
> 16. The Head of Human Resource Management will examine the information that is submitted and if appropriate will immediately initiate an enquiry. The enquiry should be completed within

30 days from the date that the Head of Human Resource Management receives the written version of the complaint.

17. 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.

18. Depending on the circumstances of the case and the conclusions of the enquiry, the Head of Human Resource Management will take appropriate measures. These may include initiating a disciplinary action under Staff Regulation 21."

16. The applicant notes that the Report of the Enquiry set in place by the Organisation records a decision, apparently taken late in the day, not to confront the applicant with the charges against him. In his view, that failure was not remedied during the interview of 13 July 2004, at which he was simply confronted with the conclusions of the Enquiry (without being handed a copy of the Report itself) and given the opportunity to resign.

17. The Secretary-General argues that in the circumstances the decision of the Enquiry not to question the applicant was justified, and that he had a full opportunity, at the meeting of 13 July 2004 and subsequently, to present his side of the case.

18. The Tribunal notes in the first place that the charges against the applicant concerned alleged personal and sexual harassment contrary to the Harassment Decision. The apprehensions that the applicant might engage in "possible violent retribution" did not reflect any previous record on the part of the applicant in that regard, and did not dispense the Organisation from complying with paragraph 17. If violence was apprehended in response to the disclosure of the charges, appropriate precautions could have been taken and the police informed; none of this was done.

19. The Report of the Enquiry discloses a detailed investigation, taking several months and involving interviews with 16 people. The Report reaches a definite conclusion that the applicant had engaged in the conduct alleged against him (Conclusions, paras. 151, 162). The members of the Enquiry state that their original intention was to interview Mr. W. using the same method and procedures as with other witnesses, but that following testimony that Mr. W. "had reportedly expressed thoughts of possibly harming his colleagues in the workplace itself", it was decided not to do so. "This decision did not exclude the possibility that Mr. W. could be interviewed at some future date" (ibid., p. 28).

20. In principle it is a matter for the Organisation to decide how best to investigate charges of harassment. The task of an enquiry could have been limited to interviewing the complainants and others, leaving to the Head of Human Resources Management the duty of confronting the person concerned and seeking his explanations. In such a case, however, the Tribunal would expect the report of the Enquiry to have been formulated accordingly and to have avoided definite conclusions. The right to be heard which is specified by paragraph 17 of the Harassment Decision is not optional and does not exist merely to deal with cases in which the enquirers feel that the evidence they have gathered is not already adequate.

21. The Secretary-General argued that the applicant was given an opportunity at the meeting of 13 July 2004 to give his explanations. But – as the statement of the Head of HRM at the meeting indicated – the purpose of the meeting was to express a conclusion which had already been reached, not to continue an enquiry with a view to reaching such a conclusion. Nor were adequate time or facilities afforded to the applicant to present his explanations before he was suspended. The decision of 15 July 2004 was already decided on in principle and announced at the meeting two days earlier.

22. The Secretary-General also argued that a fault could be suspected for the purpose of Instruction 121/1.3 even without compliance with paragraph 17 of the Harassment Decision, and stressed that the applicant would eventually have a full opportunity to be heard in the course of proceedings under Regulation 21. But the purpose of the Harassment Decision is to specify the procedure to be followed in the course of inquiries falling within the specific scope of that Decision. The Decision is directed at the situation where allegations of harassment are made and the Organisation is deciding what measures are to be taken, including "initiating a disciplinary action under Staff Regulation 21". The Organisation having formulated precise directions on the point it was incumbent on it to comply with them. Nothing that had occurred during the course of the enquiry took the matter outside the scope of the Decision.

23. Paragraph 17 of the Harassment Decision not having been complied with, the decision of 15 July 2005 was vitiated by procedural error and must be set aside.

(d) The restriction imposed on the applicant not to contact OECD employees

24. When suspending the applicant on 15 July 2004, the Organisation prohibited him from contacting any other employee without its consent. The applicant complained that this was disproportionate and that any such restriction should have been limited to the complainants.

25. The Tribunal notes that subsequently this restriction was relaxed and that in its new form, at least, the restriction was not disproportionate. Moreover the applicant has not demonstrated that his opportunity to prepare materials in his defence was impaired by the restriction. The restriction having been appropriately modified, the Tribunal concludes that this aspect of the complaint is moot.

(e) Subsequent action by the Organisation to partially suppress the applicant's post

26. Article 4 of the Council resolution on the Statute and Operation of the Administrative Tribunal provides that:

> "d) Although the filing of applications shall not suspend the application of contested decisions, the Secretary-General, during the period within which applications may be filed or while the proceedings are under way, shall endeavour not to take any further steps which would alter the situation within the OECD to the detriment of the applicant and would thereby render impossible the redress claimed by the latter, should the Tribunal the application well-founded."

27. The applicant argued that measures subsequently taken towards partial suppression of his post were in breach of Article 4 d). The Secretary-General responded by pointing out that Article 4 d) is not a strict obligation, that the steps taken were not definitive, and that they concerned budgetary constraints which arose subsequently and were wholly unrelated to the charges against the applicant.

28. The Tribunal agrees that the use of the word "endeavour" in Article 4 d) means that there is no obligation on the Secretary-General to take no action whatsoever. In the circumstances the Tribunal concludes that these issues do not involve a distinct basis of claim but go rather to the possible remedial situation arising following the decision of 15 July 2004, a matter to which it now turns.

The remedial situation

29. The decision of 15 July 2004 having been set aside, the applicant is entitled to redress. However as the Secretary-General points out, the extent of redress appropriate depends on the outcome of the complaint, and it may also be affected by the outcome of other pending proceedings. The Tribunal notes that its jurisdiction under Article 1 of its Statute extends to all questions concerning the suspension or loss of employment of an official. The conduct of the members of the Enquiry, no less than that of the Director of HRM, was carried out in the exercise of their functions on behalf of the Organisation.

30. In the circumstances the Tribunal considers that it is necessary to defer considering the issues of compensation and costs pending the conclusion of all other outstanding claims or litigation brought by or concerning the applicant.

The comments of the Staff Association

31. The Tribunal noted the comments of the Staff Association to the effect that staff are entitled to the protection afforded by the principles of natural justice and the presumption of innocence.

DECISION

For these reasons:

The Tribunal:

(1) holds that the decision of 15 July 2004 to place the Claimant on leave with pay was unlawful as contrary to paragraph 17 of the Decision of the Secretary-General concerning the Policy to Prevent and Combat Harassment;

(2) reserves all questions concerning compensation and costs pending the conclusion of all outstanding claims or litigation concerning the matters in issue.