



**ADMINISTRATIVE TRIBUNAL**

Judgment of the Administrative Tribunal

handed down on 1<sup>st</sup> February 2019

**JUDGEMENT IN CASE No. 91**

Mr. AA  
Applicant

v.

Secretary-General

**Translation** (the French version constitutes the authentic text).

**JUDGMENT IN CASE No. 91 OF THE ADMINISTRATIVE TRIBUNAL**

Sitting on 21<sup>st</sup> January 2019  
At 10 a.m. in Château de la Muette,  
2 rue André-Pascal in Paris

The Administrative Tribunal consisted of :

*Mrs. Louise Otis, Chair*  
*Mr. Pierre-François Racine*  
*And Mr. Joao Manuel Da Silva Miguel*

*with Mr. Nicolas Ferré and Mr. David Drysdale providing Registry services.*

The Tribunal heard:

*For the Applicant: Mr. Jean-Didier Sicault, counsel of the Applicant ; He was assisted by Ms. Niki Arame*

*For the Organisation: Mr. Rémi Cèbe ; He was assisted by Mr. Auguste Nganga-Malonga, and Mr. Gaëtan Van Der Horst.*

*For the Staff Association: Mr. Jean-Pierre Cusse, Mrs. Anya Demarle and Mrs Bérénice Pinel.*

It handed down the following decision:

## Introduction

1. The Applicant took up his duties at the OECD on 28 April 1997; on 17 September 2012, he was notified of a decision confirming that his appointment as Senior Policy Analyst would be terminated on 31 December 2012.
2. In a letter to the Secretary-General on 16 November 2012, the Applicant filed a prior request for the withdrawal or modification of this termination decision.
3. On 8 February 2013, the Applicant was notified of a decision rejecting this prior request by the Executive Director, on behalf of the Secretary-General.
4. The Applicant then took the matter to the Administrative Tribunal of the OECD and filed an application (No. 73) dated 30 April 2013, requesting the Tribunal to order the Organisation to reinstate him within the OECD and grant him an open-ended contract effective on 1 January 2013, or failing that to order payment of the equivalent of four (4) years of salary including pension entitlements.
5. On 7 February 2014, after hearing the parties, the Tribunal annulled the Secretary-General's decision not to convert Mr AA's appointment into an open-ended contract and, consequently, ordered that Mr AA be reinstated within the OECD retroactively on 1 January 2013 with salaries and allowances.
6. On 15 September 2014, the Applicant was reinstated within the Organisation on an open-ended contract, A4, Step 14. The Organisation assigned him a position at SIGMA, on the SIGMA Strategy and Reform Team.
7. On 9 March 2017, the Organisation notified the Applicant of its decision to terminate his open-ended appointment, effective on 15 March 2017. This decision was received by the Applicant on 13 March 2017.
8. On 3 April 2017, the Applicant filed a prior request with the Secretary-General to withdraw or modify his decision.
9. On 28 July 2017, the Organisation sent the Applicant a proposal, in the form of a draft agreement, which the latter rejected on 12 September 2017.
10. On 27 November 2017, the Organisation rejected the Applicant's prior request and confirmed the initial decision to terminate his open-ended appointment.
11. On 9 February 2018, the Applicant lodged an application with the Registry of the Tribunal requesting that the Organisation's decision be annulled.

12. On 14 May 2018, the Organisation submitted comments, which were followed by the Applicant's reply and, finally, by the Organisation's rejoinder.
13. The Staff Association submitted written comments.
14. At the hearing, the parties called four (4) witnesses: Mr BB and Mr CC for the Applicant and Ms DD and Mr EE for the Organisation. The Tribunal deplores the refusal to testify of Ms FF, who was Head of the SIGMA programme in 2014 and 2015.

## **The dispute**

15. The Applicant alleges that the decision to terminate his appointment is unlawful in that:
  - i. The discriminatory conditions of his reinstatement distorted the assessment of his performance and, consequently, undermined the lawfulness of the process.
  - ii. The decision to terminate his appointment arises from an improper exercise of authority and was taken in breach of the contractual and statutory texts.
  - iii. The motivation for the decision to terminate his appointment is contradictory and erroneous.
16. In view of the foregoing, the Applicant asks the Tribunal to declare his application admissible, to annul the Secretary-General's decision, to order his reinstatement and to grant him one year of pensionable salary as moral damages.
17. Failing his reinstatement, the Applicant seeks compensation of four (4) years of pensionable salary in addition to one year of pensionable salary as moral damages.
18. In addition, the Applicant requested that the period from 1 January 2013 to 15 September 2014 be subject to administrative validation and that all the required pension amounts be paid accordingly, and also sought the issuance of an employment certificate indicating an uninterrupted employment record. These requests have been accepted by the Organisation.
19. Finally, the Applicant requests the reimbursement of the sum of €38,500 as procedural costs.

## **The facts**

20. After reviewing the documentary and witness evidence submitted by the parties, the Tribunal indicates the following facts as relevant:

21. Following Judgment no. 73, the Organisation opted for reinstatement rather than asking the Tribunal to fix an amount of compensation in accordance with Article 12 c) of the Statute of the Tribunal. The Applicant had claimed compensation of four (4) years of salary.
22. The representatives of the Organisation therefore entered into discussions with the Applicant regarding his reinstatement. Two meetings between the Organisation and the Applicant's counsel were held on 2 and 22 April 2014.
23. As the search for a position corresponding to the Applicant's level and qualifications in the various directorates of the Organisation or in other international organisations proved unsuccessful, it was decided that he should be reinstated within the SIGMA programme, with delayed effect to allow the Applicant to serve the two (2) months' notice required for his job at that time.
24. On 15 September 2014, the Applicant took up his duties at SIGMA, on the *SIGMA Strategy and Reform Team*.
25. SIGMA (Support for Improvement in Governance and Management) is a programme of the Directorate for Public Governance and Territorial Development (GOV). As a joint initiative of the OECD and the European Union (EU), and financed almost exclusively by the latter, SIGMA aims to strengthen public governance, working in the vital areas of horizontal governance and public administration reform.
26. The Applicant's objectives set for the end of 2014 at a preparatory meeting on 27 August (Annex 10 to the application) were to draft a 20-page policy paper on the reforms supported by SIGMA in the Western Balkans and Turkey, to create a toolkit for administrative reform in the Balkans and to prepare notes on successful reform experiences conducted in 2014 in the European Union's southern and eastern neighbours with the support of SIGMA.
27. At the end of November 2014, the Applicant handed over to Mr CC, who headed the *SIGMA Strategy and Reform Team*, the documents relating to the three (3) projects entrusted to him. During a unit meeting on 12 December, it was agreed that the policy paper should be updated.
28. On 18 December 2014, the Applicant fell ill and had to be taken to hospital. He was on sick leave until 24 December 2014. His meeting with Mr CC, which had been scheduled for 19 December 2014, was therefore postponed.
29. On 26 January 2015, the Applicant met Mr CC for a progress report on his tasks and to set his objectives for 2015. On 5 February 2015, Mr CC sent the Applicant a memo (Annex 21) stating that none of the three tasks assigned to the Applicant had been fully completed. The memo specified the schedule for the completion of the 2014 objectives and announced a new objective to be achieved by 17 May 2015, namely the preparation of project information sheets on SIGMA's support for two regional institutions, GIFT-MENA and CEF-SEE.

30. On 10 February 2015, the Applicant expressed his disagreement (Annex 22) and repeated some suggestions for assignments that could be entrusted to him as well as his interest in one or more training courses in case his suggestions were not accepted.
31. Mr CC then proposed a new meeting in the presence of a third person from the Management Support Unit (MSU), Mrs GG. At this meeting held on 18 March 2015, Mr CC handed the Applicant a new work programme which included, in addition to the objectives described, a new assignment from 1 July 2015, namely coordination with Morocco (Annex 24).
32. The Applicant informed the Deputy Head of Human Resources, Mr HH, of this; the latter replied on 19 March 2015: *'I have had the opportunity to receive these objectives and discuss them with SIGMA's management. They seem to be precise, measurable and interesting objectives, in particular assuming responsibility for a country follow-up with Morocco, gradually and then fully after the summer and the retirement of the colleague currently in charge. I hope that you are satisfied with the revised objectives.'* (Annex 25)
33. However, the Applicant requested a further meeting with Mr CC and Mrs GG which was held on 17 April 2015. During this meeting, he expressed his continued dissatisfaction with the objectives that had been set.
34. As the Applicant had previously requested and after discussions with the Deputy Head of HRM in June and July 2015, it was finally agreed that the Applicant's services would be made available on loan to the College of Europe for one year from 1 September 2015 and that he would also receive training during this period at the *Ecole Polytechnique* from October to December, two days per week, at Harvard University from 15 January to 15 February 2016 and finally at INSEAD for 15 days in April and 15 days in July. These points were outlined in a loan memorandum signed by the Head of HRM and in a Memorandum of Understanding signed by the OECD, the College of Europe and the Applicant. (Annex 50).
35. It was agreed that the Applicant's remuneration would continue to be fully covered by the Organisation and that he would also receive an expatriation allowance.
36. In the meantime, from 11 May 2015 to 24 July 2015, the Applicant was off work due to illness. He then took his annual leave until 27 August and was also granted eight days of exceptional paid leave under Regulation 20 j) of the Staff Regulations.
37. The Applicant's performance of his duties as Senior Adviser to the Development Office at the College of Europe was positively assessed by Mr II, Director of the Development Office. At the same time, certificates of completion of training were issued by the *Ecole Polytechnique* and INSEAD (with a pass in both cases) and by the Harvard Kennedy School of Government.
38. Although his loan period was due to end on 31 August 2016, the Applicant was informed on two occasions, in October 2015 during an interview with the Director of GOV, Mr. EE, and in

January 2016 during an interview with the Deputy Head of HRM, Mr HH, that it was not certain that he would be reassigned to SIGMA.

39. On 4 May 2016, the Applicant was formally informed by the Head of HRM and the Director of Legal Affairs that his return to SIGMA was not guaranteed, since during his absence, his functions in a programme financed by the European Commission for 18-month cycles had been awarded to other agents at the same level. He was therefore advised to apply for any position that should become vacant.
40. Without waiting for the end of his loan period, the Applicant applied on 19 July 2016 for the position of Senior Policy Analyst/Team Leader (reference 10725). Having been invited after a first selection to take a written test, he was informed on 20 September that he had not been selected for a second phase (Annex 56 to the application) on the grounds that the three markers, who had marked the tests anonymously, had given him the lowest score of the nine candidates.
41. At the end of his loan period on 31 August 2016, the Applicant received five successive dispensations from service until 15 November 2016.
42. He was advised on 26 October 2016 that his 31 August application for the position of Senior Policy Adviser Strategy and Reform (reference 10827) had not been successful on the grounds that *'your profile does not sufficiently match the requirements for this position'*.
43. His application for the position of Senior Policy Analyst Eurasia, Global Relations Secretariat (reference 10727) was also rejected.
44. Then, on 9 November 2016, the Head of HRM sent the Applicant a letter announcing the Secretary-General's intention of terminating his appointment (Annex 80 to the application), exempting him from service during the notice period provided for in Regulation 11 e) of the Staff Regulations to enable him to devote himself fully to seeking a new position within the Organisation or to the search for employment outside it. The Applicant thus benefited from the effective support of HRM (Annexes 17 and 18 to the response of the Secretary-General) as well as from the services of the outplacement company Oasys.
45. As the position of Senior Policy Adviser Strategy and Reform was re-advertised (under the new reference 11030), the Applicant re-applied and was invited along with eight other pre-selected candidates for a video interview as well as a written test. However, the panel rejected his application for the position, in view of the mark given to his written test, which was marked anonymously by three separate markers, and the weakness of the video interview. The applicant was informed of this on 16 December 2016.
46. He was also informed on 2 March 2017 that his application for the position of Advisor-Sherpa Office and Global Governance Unit (reference 10869) had been rejected.

47. Finally, the Applicant's application for the position of Head of OECD Washington Centre (reference 10776) has so far only received an acknowledgement, on 3 May 2017, and the procedure still appears to be in progress.
48. In a letter on 15 February 2017 (Annex 71 to the application), the Applicant was informed that the statutory period of redeployment had come to an end, and that in accordance with Staff Instruction 111/1.5 c), the termination of his appointment would be submitted to the Staff Review Board on 27 February.
49. After hearing the Applicant, the Board issued an opinion on 6 March stating that the end of appointment procedure was regular.
50. In a letter dated 9 March 2017 (Annex 72 to the application), the Head of HRM informed the Applicant that the Secretary-General had decided to terminate his appointment with effect from 15 March of that year, as announced in the letter of 9 November 2016, since during the redeployment period following the end of his loan period, no function corresponding to his qualifications and experience could be identified. The letter of 9 November 2016, the opinion of the Staff Review Board and a provisional statement of the amounts which would be due to the Applicant in the form of statutory indemnities, namely €259,000 were attached to this letter.
51. On 3 April 2017, the Applicant filed the written request prior to the filing of an application to the Tribunal in accordance with Article 3 a) of Annex III to the Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation.
52. Discussions were subsequently initiated to end the dispute. With the aim of closing the case, the Organisation finally offered the Applicant the additional payment of a fixed and final indemnity of €167,804, with associated pension entitlement, the benefit of the Omesys medical and social system and the free services of an outplacement company for 12 months. The additional indemnity of €167,804 was to be added to the statutory indemnities of €259,000.
53. In a letter dated 12 September 2017, the Applicant rejected the Organisation's offer and the case followed the course of adversarial proceedings up to the hearing.

## **Analysis**

54. It is necessary first to go back to Judgment no. 73 in order to assess the remedial measure and identify its limits.
55. The basis of Judgment no. 73 is as follows: the conversion of the Applicant's contract, in the general context of the implementation of a new employment framework within the



Organisation and the reorganisation of SIGMA's services, was not carried out according to the uniform and fair procedure applicable to all. In the particular case under consideration, the Applicant had a legitimate expectation that his contract would be converted.

56. The Tribunal accordingly annulled the decision not to convert the Applicant's contract into an open-ended contract. The Secretary-General still had the option of asking the Tribunal to substitute compensation for reinstatement in the Organisation<sup>1</sup>.
57. The purpose of the original application no. 73 was not to seek reinstatement to a specific post as though the case concerned a promotion, the annulment of the elimination of a position or the annulment of a dismissal. Both the application and the judgment that dealt with it essentially concerned the conversion of a fixed-term contract into an open-ended contract. In other words, the conferral of permanent staff status with a grade and a step.
58. In view of this, the Organisation, in the fair exercise of its discretion in the allocation of positions and functions, was required to reinstate the Applicant and ensure his permanent staff status, but nevertheless retained the right to allocate a position and functions in accordance with the needs and interest of the service and in keeping with the dignity of the official.
59. This is precisely what the Organisation did: it awarded the Applicant an open-ended contract in category A, grade 4, step 14 and, after discussions, assigned him to a post in the SIGMA programme, in accordance with the immediate needs of the service at the time of his reinstatement, with increasing responsibilities in the short term.<sup>2</sup>

### **Existence of discrimination**

60. As mentioned in paragraph 22, the Organisation chose to reinstate the Applicant rather than ask the Tribunal to fix the indemnity that would be due to him if he was not reinstated, a possibility provided for in Article 12 c) of the Tribunal's Statute; it therefore took the necessary steps to implement the Tribunal's decision effective on 15 September 2014.
61. However, it soon became clear that the practical details of his reinstatement were not in line with the Applicant's expectations that he would simultaneously and immediately have a contract and a position similar to the one he held in 2012. This being the case, the Applicant very soon began to complain to his line management of discriminatory treatment.
62. The Applicant mainly points to the low consistency and the small number of assignments given to him, criticising in particular the fact that he was not entrusted with any coordination for any of the target countries of the SIGMA programme, his lack of automatic inclusion on many email distribution lists and the absence of any assignment in the SIGMA programme target countries.

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<sup>1</sup>Statute of the Tribunal, Article 12 c); ILOAT 11-7-1996,1553; UNAT 21-7-1995.

<sup>2</sup>WBAT, no. 472, 13 February 2013.

63. It should be recalled that the objectives initially assigned to the Applicant were for the last three months of 2014. From this point of view, the three objectives originally set for him cannot be viewed, despite their relative modesty, as a sign of discriminatory treatment.
64. Nor can the Tribunal see Mr JJ's recruitment for a short-term assignment of ten months, as a sign of discriminatory treatment of the Applicant, given that this fixed-term job corresponded to a specific need of a country for which the person concerned, who had already been selected before the Applicant's reinstatement, had specific competencies.
65. The absence of automatic inclusion on the numerous email distribution lists of potential interest to the Applicant, given the cross-cutting nature of his assignments, is not disputed. However, the Applicant was duly informed that it was his responsibility to request inclusion on these lists, and even though he had to obtain the agreement of the service responsible for the management of the lists, there is no reason to conclude that if the Applicant had taken these steps his request would have been rejected. However, the Applicant, who has not been heard as a witness, does not claim to have done so.
66. With respect to 2015 and the setting of new objectives, the Applicant had several opportunities to hold discussions with his direct supervisor, Mr CC, on 9 December 2014, on 26 January 2015 and, in the presence of a third party, Ms GG, on 27 February and 17 April 2015. What these numerous discussions indicate is a will for accommodation, not discriminatory treatment. Moreover, it was announced to the Applicant that, in accordance with his wish, he would be tasked with country coordination with Morocco from 1 July 2015.
67. As shown, a change of country coordinator at the end of 2014 would have been difficult and was unrealistic.
68. The volume of tasks assigned to the Applicant in the early months of reinstatement was not consistent with his expectations and, probably, with his skills. According to the Applicant, this situation caused him anxiety to the point where he needed to take time off work.
69. It turned out that the reinstatement required a transition period that the Applicant had not expected. The Applicant was unable to adjust to a temporary and gradual resumption of his activities, although he was being reinstated in the latter part of the year and was receiving his full salary as an A4 official, step 14, during the short transition.
70. On 18 March 2015, six (6) months after his reinstatement, a proposal was made to the Applicant of a new work programme which included, in addition to the objectives described, a new assignment from 1 July 2015, namely coordination with Morocco (Annex 24). Mr HH, who had been following the reinstatement process very closely, felt that this measure fully satisfied the requirements.

71. Given the complex way in which the SIGMA programme was financed and jointly managed by the Organisation and the European Commission, it cannot be concluded from the evidence submitted by the parties that the Applicant suffered discriminatory treatment between September 2014 and May 2015, the date from which the Applicant was on either sick leave or annual leave before his services were provided on loan to the College of Europe.
72. The evidence submitted to the Tribunal does not support the conclusion that during this very short period, the Organisation deliberately refrained from proposing to the Applicant any assignment that was consistent with his competencies. This was a transition that required some fundamental adjustments.
73. In any case, from September 2015 the person concerned, who had requested this in case his proposals for objectives were not accepted, benefited from on the one hand going on loan to the College of Europe in Bruges for a year, and from on the other hand and at the same time participating in three shorter training courses as specified in paragraph 32. The Applicant's remuneration during this period was borne entirely by the Organisation, as were the costs involved in the loan arrangement and the training, despite receiving nothing immediately in return. This certainly cannot be seen as a sign of discriminatory treatment.
74. Moreover, as it is clear from the documentary evidence, the compensation claimed by the Applicant in case no. 73 was well below the emoluments received by the Applicant from 1 January 2013 to 1 March 2017.
75. Although the Applicant claimed compensation of four (4) years' salary instead of reinstatement, current practice in the context of the present case would more probably have led the Tribunal to award a sum of around €350,000, compensation of between two and three years' worth of salary.
76. Yet from 1 January 2013 to 1 March 2017, the Applicant received a basic salary of €603,000 for less than one year of actual services to the Organisation. In addition, €56,050 of training fees were paid directly by the Organisation.
77. In conclusion on this first complaint, the Tribunal finds that the evidence adduced by the Applicant does not clearly establish that the Organisation – which could have avoided reinstating the Applicant at lower cost by paying him a compensation sum determined by judgment – implemented the reinstatement under deliberately discriminatory conditions which inevitably led to its failure<sup>3</sup>.

### **Improper exercise of authority**

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<sup>3</sup> ILOAT, Judgment 4036, 2018.

78. The Applicant argues that the decision to terminate the appointment is based on erroneous grounds and constitutes an improper exercise of authority. As recognised by case law, improper exercise of authority cannot be presumed: it must be proved by the official<sup>4</sup>.
79. The lending of the Applicant's services was initiated by mutual agreement between the Applicant and the Organisation.
80. The Applicant knew that his functions would be reassigned during his absence.
81. In addition, it should be noted that from the Applicant's retroactive reinstatement from 1 January 2013 until the end of his appointment in March 2017 – a little over four (4) years – his salary of approximately €600,000 (including training at the College of Europe) was financed from the budget of GOV/SIGMA, whereas the 55 days of special training were financed from the general budget of the Organisation (€56,050). It should also be noted that under Regulation 10bis iv) of the Staff Regulations, the institution that receives the official on loan must reimburse the Organisation for all costs incurred in the course of the loan. In fact, the Organisation has not received any reimbursement from the College of Europe. This does not bear the characteristics of unfair treatment.
82. It follows that it was not with the aim to avoid the costs of reinstatement that the Applicant's services were provided on loan, in accordance with his expressed agreement (Annex 22), as GOV/SIGMA continued to pay the Applicant's salary, agreeing, moreover, not to benefit from his services over the duration of the loan, also taking into account the postponed return, the dispensation from the provision of services during the notice period and various other periods of leave. It is noted that during four years, from 1 January 2013 to 1 March 2017, SIGMA only benefited from the Applicant's actual services for eight months. It is therefore not unreasonable that in the exercise of its discretion the Organisation had to reassign the Applicant's functions.
83. The evidence shows that on the Applicant's return after the loan period, his functions had become redundant<sup>5</sup>. Initially reassigned temporarily, these functions were permanently integrated into the duties of other officials, or were no longer required due to increased collaboration with other regional partners.
84. Finally, although it is true that, according to Instruction 110bis 1/15, "*Upon expiry of the loan period, the official shall return to the functions previously assigned to him/her or be assigned to other functions corresponding to official's qualifications and experience and to his/her category and grade*", this does not alter the fact that under Regulation 11 a) iii) of the Staff Regulations, the Secretary-General who assigned the Applicant to functions corresponding to his qualifications and experience, category and grade, still had the right to terminate his appointment when his functions were no longer necessary or had become redundant<sup>6</sup>.

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<sup>4</sup> ILOAT, 30-1-2002; UNAT, 30-9-2003.

<sup>5</sup> Regulation 11 a) iii) of the Staff Regulations, Rules and Instructions.

<sup>6</sup> UNAT 25-8-1951.

85. The complaint on the grounds of improper exercise of authority is therefore rejected.

#### **Contradictory nature of motivation**

86. The decision to terminate the appointment is based on Regulation 11 a) iii) of the Staff Regulations: *“the functions assigned to the official have become unnecessary or redundant.”*

87. The assessment of the Applicant’s performance is not the reason for the termination of the appointment. That assessment is primarily referred to as part of the account of the Applicant’s reinstatement within the position at SIGMA, his integration difficulties and his wish for his services to be provided on loan. Regulation 11 a) i) is not cited in the statutory end-of-appointment documents (Annexes 65 and 77).

88. This third complaint is therefore rejected.

#### **Conclusion**

89. Consequently, the three complaints are dismissed.

#### **FOR THESE REASONS, THE TRIBUNAL**

90. **DECIDES** that the Applicant’s application is admissible

91. **DISMISSES** the application without costs