

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 466/2010 (Natalia KRAVCHENKO v. Secretary General)

The Administrative Tribunal, composed of:

Mr Luzius WILDHABER, Chair,
Mr Angelo CLARIZIA and
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Natalia Kravchenko, lodged her appeal on 16 March 2010. It was registered the same day as case No. 466/2010.

2. On 24 March 2010 the Secretary General wrote to the Tribunal asking whether “this appeal can be placed on the Tribunal’s case list when the appellant does not know what the Secretary General has said in response to her administrative complaint”.

The Secretary General commented as follows:

“The lodging of this appeal poses a problem of principle for the Secretary General in that Ms Kravchenko has not yet received the reply to her administrative complaint on which she is basing her appeal.

On 10 February 2010 the Secretary General sent Ms Kravchenko a registered letter in reply to her administrative complaint of 18 January 2010. That letter was delivered by the postal services on 12 February 2010 and was returned to us marked ‘not collected - return to sender’. In an email of 4 March 2010 the Legal Advice Department told

Ms Kravchenko that as she had not received the letter she could collect it in person from our offices. She was offered the alternative of having it sent again by registered post. On 5 March 2010 Ms Kravchenko replied that she had moved house – but did not give her new address – and that she would come to our offices to collect the reply to her administrative complaint in person.

Ms Kravchenko did not do so, despite several reminders on our part which produced no result, namely emails dated 11 and 18 March 2010. As the Directorate of Human Resources had confirmed that Ms Kravchenko had not notified them of any change of address (a requirement under the Staff Regulations), we assumed that she had not moved house and it was decided to send the letter again by registered post on 19 March 2010 to Ms Kravchenko's only known address. We only learned of her new address from the form of appeal which we received on 22 March 2010. We are thus sending her, today, a copy of the reply to her administrative complaint by registered post to the address shown on her form of appeal. From these facts it is apparent that Ms Kravchenko cannot claim to object to the Secretary General's reply to her administrative complaint since she does not know what that reply says.

Consequently the Secretary General wishes to ask the Administrative Tribunal whether this appeal can be placed on the Tribunal's case list when the appellant does not know what the Secretary General has said in response to her administrative complaint. The Secretary General wonders if this is admissible given the principle that all legal remedies must be exhausted, and wonders if he can give a reply on the merits in a dispute between himself and a staff member before the case has been referred to the Administrative Tribunal".

3. On 26 March 2010 the Chair of the Tribunal pointed out to the Secretary General that it was not for the Tribunal to reply to procedural questions which one party wished to put to it, for example whether an appeal could be placed on the Tribunal's case list. He said that the role of the Tribunal was to rule on applications and pleas submitted to it during the appeal proceedings. On that same date the appellant received copies of the Secretary General's letter and the reply.
4. The appellant submitted further pleadings on 5 May 2010.
5. On 17 June 2010 the Secretary General forwarded his observations on the appeal.
6. On 29 July 2010 the Secretary General sent the Tribunal a letter which was copied to the appellant.
7. The appellant replied on 6 August 2010.
8. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 22 October 2010. The appellant was represented by Maître Jean-Pierre Cuny, advocate at the Versailles Bar, and the Secretary General by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, assisted by Ms Maija Junker-Schreckenber, assistant in the same department.

9. On 28 October 2010 the Secretary General provided certain information to the Tribunal in writing, the Chair having authorised this at the hearing.

10. The appellant made no comments in reply.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The appellant is a Ukrainian national born in 1977. At the time of lodging her appeal, the appellant was a temporary member of the Council of Europe's staff.

12. The appellant was first appointed in 2002 at grade B2, and at the time of the facts at issue she held a grade B5 post in the Economic Crime Division of the Directorate-General of Human Rights and Legal Affairs (DGHL). Since then she has been assigned to the Directorate of Monitoring within the same Directorate-General.

13. At the time of the impugned facts the appellant was in charge of a project concerned with measures against corruption and money-laundering in the Republic of Moldova.

14. In late 2008 / early 2009 the central division of DGHL, which, under the contract concluded with the European Commission, is responsible for financial management of the project, sent the appellant a budget report which showed significant overruns in several areas of the budget for the project. The implications for the project's management were dire, especially as it would now be impossible to purchase equipment specifically envisaged in the project and promised to the beneficiaries. Other activities already planned were likewise abandoned.

15. As head of the project the appellant had to visit Moldova on 26 January 2009 to explain to our partners all the ramifications of a financial situation which had suddenly become critical. The appellant went on her own because her request to be accompanied by a member of DGHL's central division, who, according to her, would have been better qualified to explain the budgetary details, was refused.

16. The appellant states that when she arrived in Chisinau the discussions and negotiations with the project donors (European Commission) and beneficiaries (Moldovan authorities) proved extremely difficult. The appellant was taken to task aggressively by some of her interlocutors and was subjected to abuse. She says that these discussions caused her major psychological trauma (only when she returned to France did she learn that she had suffered a severe panic attack) and on 26 January 2009 she was admitted to the psychiatric clinic in Chisinau, on the initiative of a doctor called in by Council of Europe staff members present in the city. The appellant adds that for three days she lived a nightmare: other patients were aggressive towards her, pulled her hair, prevented her from sleeping. Nursing staff too were aggressive, pulled off her trousers, refused to feed her. The appellant believes that her treatment in the Chisinau psychiatric hospital was inhuman and degrading.

17. The Council of Europe staff members called her family, who live in Ukraine. Her mother went to Chisinau and helped to get her out of the psychiatric clinic and then out of the country.

18. On her return to Strasbourg the appellant was again admitted for a week to a psychiatric hospital in the Strasbourg area, where she received treatment she describes as appropriate.

19. Following this accident and these two spells in hospital the appellant was off work for six months (from February to July 2009). She was monitored by a number of medical practitioners in Strasbourg, notably neurologists and psychiatrists. She was able to return to work in August 2009.

20. On 23 December 2009 the appellant received an email from her Director.

21. On 18 January 2010 the appellant lodged an administrative complaint under Article 59, paragraph 1, of (the then current version of) the Staff Regulations.

22. On the same date she requested a stay of execution of the impugned act under Article 59, paragraph 7, of (the then current version of) the Staff Regulations. She asked for a stay of execution of the decision not to renew her temporary contract in Strasbourg and to offer her a three-month contract in Kiev from January to March 2010.

23. On 29 January 2010 the Chair of the Tribunal rejected that request, noting that the Secretary General had in the meantime decided to offer the appellant a six-month temporary contract in Strasbourg.

24. On 10 October 2010 the Secretary General replied to the administrative complaint as follows:

“You are asking for annulment of the decision ‘to end [your] employment in Strasbourg as of January 2010’ and to offer you a three-month contract in Kiev, and you ask to ‘be allowed to stay on in Strasbourg’.

Wishing to be fair, and by way of an exception given the medical reasons advanced, the Secretary General has decided to grant your request, albeit without any admission as to whether or not it is justified. Consequently the Directorate of Human Resources has contacted you to offer you a six-month temporary contract.

Nevertheless, as you are a temporary staff member subject to Rule No. 1232, the contract offered to you cannot in any event and in any circumstances be extended beyond the expiry date of your six-month contract, in accordance with the relevant provisions. Indeed, Rule No. 1232, which applies to you as of 1 July 2009, clearly stipulates that type M temporary contracts are concluded for ‘periods of one or more months, up to a maximum of 6 months in any calendar year’.

In view of the favourable response to your administrative complaint, it has become devoid of purpose.”

25. On 16 March 2010 the appellant lodged the present appeal.
26. On 15 June 2010 the appellant lodged a second application for a stay of execution of the impugned act.
27. On 30 June 2010 the Chair of the Tribunal rejected this new application.

THE LAW

28. In her form of appeal the appellant states that the object of her appeal is a challenge to the decision not to offer her a contract of employment beyond 30 June 2010.

She asks the Tribunal to rule that the decision not to offer her a contract of employment beyond 30 June 2010 is unlawful and to annul the implicit decision in question. She also asks for the sum of 6 500 euros to cover her costs in this appeal.

29. The Secretary General, for his part, asks the Tribunal to declare the appeal inadmissible and/or ill-founded and to dismiss it.

I. THE PARTIES' SUBMISSIONS

A) Admissibility of the appeal

30. The Secretary General enters several pleas of inadmissibility: the administrative complaint was lodged too late, the appellant had no interest in bringing proceedings, internal remedies had not been exhausted because the appellant had not waited to learn the response to her administrative complaint before lodging her appeal, the appeal was premature and, lastly, more allegations were made in the appeal than were made in the administrative complaint.

31. Regarding the first plea, the Secretary General points out that, according to the appellant, the act adversely affecting her is the email of 23 December 2009; this, she says, is the administrative act adversely affecting her. He adds that the appellant does not deny having been informed in early November by her line superiors that her contract would expire on 31 December 2009. In his view, she could or should have challenged that decision within the next thirty days and not based herself on an email – of 23 December 2009 – which shows that she was fully aware in early November that her contract would expire on 31 December 2009. The Secretary General takes the view that by not acting until 18 January 2010 the appellant failed to respect the time limit of thirty days stipulated in Article 59 of the Staff Regulations.

Her administrative complaint is inadmissible and so is her appeal, because they were lodged too late.

32. The Secretary General contends, assuming the email of 23 December 2009 is the act adversely affecting the appellant – which he does not concede – that obviously a complainant can appeal against a decision which explicitly or implicitly rejects his or her complaint. But the complaint must have been rejected first. Firstly, this is not the case here since the appellant's

complaint was upheld and, secondly, she has to have acquainted herself with the substance of the reply to her complaint before lodging an appeal.

33. Regarding the second plea, the Secretary General notes that the appellant, in her administrative complaint, asked that her proposed assignment to Kiev be cancelled and that she be allowed to continue working in Strasbourg. He adds that this is exactly what happened: the appellant was not assigned to Kiev but was given a contract in Strasbourg. As a result, in the Secretary General's view, the appellant ceased to have an interest in challenging a decision which gave her what she had asked for.

Her appeal is thus inadmissible on the further ground that she has no interest in bringing proceedings.

34. Regarding the third plea, the Secretary General claims that the appellant is trying to avoid placing herself in the wrong by arguing that she knew the reply to her complaint once she learned the Secretary General's observations concerning her application for a stay of execution (under paragraph 7, now paragraph 9, of Article 59 of the Staff Regulations). In the Secretary General's view, that is a separate procedure which is not to be confused with the procedure for dealing with administrative complaints. Whatever the appellant says, she cannot deny that she only learned the reply to her complaint on 19 April 2010, that is to say more than a month after lodging her appeal. So prior to that date she could not have known what the response to her complaint was.

The Secretary General concludes that by lodging an appeal well before then the appellant failed to follow the procedure laid down in the Staff Regulations and her appeal should be declared inadmissible on the further ground that internal remedies were not exhausted.

35. Regarding the fourth plea, the Secretary General maintains that, contrary to the appellant's assertions, she cannot claim to have known, on 22 January 2010, the "Secretary General's precise and final position on her complaint".

He adds that the appellant was fully aware that a reply to her administrative complaint had been sent to her because she was told so in an email of 4 March, to which she replied on 5 March that she would come and collect it. At the time of lodging her appeal, on 16 March 2010, she could not know whether her complaint had been rejected or not. She did know, however, that the Secretary General had replied to it and she cannot now claim to have been justified in thinking that there had been an implicit decision to reject it.

Nor does the Secretary General see how the appellant allegedly made every effort to resolve the dispute. All she did was lodge an administrative complaint and, despite every effort on the Council's part, she did not go to collect the reply to her complaint. And then, before even knowing whether her complaint had been rejected or not, she lodged an appeal.

In the Secretary General's view, the appeal is thus inadmissible on the further ground that it was premature.

36. Lastly, regarding the fifth plea, the Secretary General contends that the allegations made by the appellant in her appeal are inadmissible because she makes more allegations in the appeal than she made to the Secretary General in her administrative complaint.

He points out that the appellant asked in her administrative complaint for annulment of the decision to end her contract of employment in Strasbourg as of January 2010 and to offer her a three-month contract in Kiev. Her administrative complaint was upheld. In this appeal the appellant objects to the decision not to award her a temporary contract beyond 30 June 2010 because of the occupational accident she allegedly suffered and for the first time she claims a breach of the duty of protection and assistance incumbent upon the Council of Europe and a breach of the European Social Charter. The objects of the administrative complaint and the appeal are clearly different and the appellant's claims are not the same.

The Secretary General maintains that, routinely in international case-law on the matter, "the purpose of the requirement that internal means of redress be exhausted is not only to ensure that staff members do actually avail themselves of any opportunities they may have within an organisation for obtaining redress before filing a complaint with the Tribunal, but also to enable the Tribunal, in the event that a staff member lodges a complaint, to have at its disposal a file supplemented by information from the records of the internal appeal procedure" (see, *inter alia*, ILOAT judgment of 4 February 2009, No. 2811). In the present case the appellant cannot be deemed to have exhausted all internal remedies.

37. According to the appellant the Secretary General claims that the appeal is inadmissible on three grounds: firstly, it was lodged after the required deadline; secondly, it was premature; thirdly, the allegations made go beyond those made in the administrative complaint. She answers these pleas as follows:

38. Concerning the supposed late lodging of the administrative complaint, the appellant contends that her email dated 24 December 2009 shows that she was aware of the fact that the issue was simply the intention not to renew her contract, but that she had not been notified of any firm and final decision. The appellant particularly notes that the Secretary General cannot prove that the decision not to renew had been communicated to her – in writing or even orally – by her line superiors or by the Directorate of Human Resources.

39. This being so, the appellant asserts that the allegation of lateness in lodging the administrative complaint stems from a misrepresentation by the Secretary General of the object of the actual complaint by – whether deliberately or involuntarily.

40. As for the supposed premature nature of the appeal, the appellant contends that the Secretary General is seeking to enter a plea of inadmissibility which is supported neither by the relevant provisions of the Staff Regulations nor by international case-law.

41. In basing herself on the wording of Article 60, paragraph 1 of the Staff Regulations, which allows a complainant to appeal to the Tribunal "In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59", the appellant says she was convinced, when she lodged her appeal, that her administrative complaint had been implicitly rejected. She argues that the notion of "implicit rejection" has two sides to it: it can

mean cases of tacit refusal, or it may describe cases where the Secretary General pretends to uphold the complaint but in reality takes a (covert) decision to reject it.

42. The appellant adds that when she lodged her appeal she thought she was up against a case of tacit refusal and thus implicit rejection. When later, after the postal to-ings and fro-ings referred to during consideration of the appeal, she finally received the Secretary General's reply to her administrative complaint she concluded that this was in any event an implicit rejection, namely a decision – in every way identical to that previously communicated to her during consideration of her first application for a stay of execution of the impugned act – in which the Secretary General had pretended to grant her application but was in reality rejecting it.

43. The appellant states that in these circumstances she took an informed decision not to lodge a second appeal, which she could have done for any appropriate purpose, but it was in no way substantively justifiable. Indeed, the Secretary General's letter – sent on 10 February 2010 – is identical in form and substance to the decision which the Secretary General himself had given in his observations of 22 January 2010 in connection with the first procedure for a stay of execution. It is also apparent from international case-law that the purpose of the requirement to exhaust internal remedies is chiefly to ensure that disputes can be resolved internally and, if they cannot, that the Tribunal has at its disposal a file put together during the dispute's administrative phase (cf. case-law quoted in paragraph 28 of the further pleadings).

44. In the appellant's view the attitude of the Secretary General indicated that the dispute could not be resolved internally, for the simple reason that the Secretary General was not prepared to depart from the so-called "six-months" rule for temporary staff. Moreover, the defendant cannot deny that the Tribunal already has a file on the case at its disposal.

45. For all these reasons the Secretary General's plea arises from a rigid adherence to the rules, the sole and unacknowledged purpose of which is to bar the appellant from having access to the Tribunal. The failure to respect "formal requirements" which the Secretary General alleges is not only not "substantial" but also non-existent since the appellant simply availed herself of the option under the Staff Regulations to appeal against an implicit decision of rejection. The Secretary General's letter of 10 February 2010 contains nothing new compared with the decision communicated to her earlier (on 22 January 2010) and amounts to an implicit rejection of her administrative complaint.

46. Regarding the allegation of inadmissibility due to a mismatch between the object of the administrative complaint and the object of the appeal, the appellant states that the Secretary General claims to have given a favourable response to her administrative complaint and he considers that she was for the first time making allegations that did not feature in her administrative complaint.

47. Concerning the first assertion, in the appellant's view one only needs to re-read the administrative complaint to realise that she made a very clear link between the need to continue her course of medical treatment and the need to have a contract in Strasbourg to enable her to earn her living. For this reason she described the impugned decision as likely to cause "grave and irreparable prejudice to [her health], following years of experience and above all after the occupational accident [she] had suffered".

48. To the appellant, there is nothing in the administrative complaint to suggest that a six-month extension of her contract would be a satisfactory answer to her allegations.

49. The appellant adds that the Secretary General's assertion that no reference was made in the administrative complaint to a breach of the European Social Charter beggars belief. Her administrative complaint includes the following wording: "in particular, I contend that the decision, which is tantamount to dismissal of a staff member following an occupational accident recognised as such by the Council of Europe, goes against the principles of the European Social Charter which the Secretary General has a duty to uphold in the management of Council of Europe staff".

50. Concerning the allegation that her first mention of the duties of protection and assistance was at the appeal stage, the appellant says that she stated in her administrative complaint that the impugned decision was "contrary to the principle of the rule of law". She reserved the right, moreover, "to pursue during the proceedings all legal means and arguments [she might deem] necessary in support of her case".

51. The appellant is thus convinced that she formulated very broadly based reservations concerning the legality of the impugned decision, that in referring to the rule of law she was referring to "higher law" and thus to general legal principles, and that she reserved the right to say which of those principles the Council of Europe had breached to her detriment.

52. In other words, the appellant is convinced that her situation is identical to that already familiar to the Tribunal from the Marchenkov appeal where it dismissed the Secretary General's plea of inadmissibility (ATCE, appeal No. 294/2002, decision of 28 March 2003, paragraph 20).

53. For all these reasons the appellant is convinced that the three pleas of inadmissibility take no account of the exact terms of her administrative complaint, its substance, the case-law of this Tribunal, or the relevant provisions of the Staff Regulations. As the three pleas of inadmissibility are manifestly ill-founded, the appellant asks the Tribunal to reject them.

B) Merits of the appeal

54. The appellant alleges two grounds: breach of the duty of protection and assistance and breach of the European Social Charter.

55. In support of her first ground the appellant states firstly that, in line with international case-law, international organisations have a duty to protect and assist their staff members in the performance of their official duties. And international organisations must discharge their duty of assistance not only at the time international civil servants are under attack in their official capacity, but also by providing every assistance needed to remedy the effects of prejudice sustained during their exercise of that official capacity and by reason of it.

56. In the appellant's view she unquestionably suffered an occupational accident, was subjected to suffering and psychological trauma which continues to affect her professionally in discussions with the Council's Moldovan partners on some financial aspects of the project for

which she had responsibility. Her confinement in the Chisinau psychiatric clinic exacerbated and aggravated immeasurably the psychological trauma she had sustained.

57. The appellant adds that after sustaining extremely serious psychological damage she was placed in the care of a team of hospital doctors in Strasbourg. Adherence to her current course of medical treatment offers her the only hope that the effects of the panic attack which traumatised her so severely may one day be repaired. In order to achieve this the appellant needs to live in France. She is able to work and performs her current job to the satisfaction of her superiors, despite periods of illness which are a direct result of the serious psychiatric problems she continues to experience. If the Administration makes her leave Strasbourg, and thus return to her home country, her chances of a cure will diminish and become uncertain, to the point where her condition is likely to become chronic instead of being cured.

58. In the appellant's view, the only position of the Administration consistent with its duties of assistance and protection would be a declaration of willingness to employ her up to the end of her current course of medical treatment. Any time limit, such as that of 30 June 2010, will compromise her chances of a cure and are tantamount to a clear breach of the Administration's duty to remedy prejudice sustained by staff members in their official capacity.

59. Consequently the appellant is confident that the Tribunal will annul the implicit decision to reject her request, reflecting this paramount duty incumbent on the Council of Europe.

60. The appellant's second ground alleges a breach of the European Social Charter.

61. She states that as early as 1973 the Tribunal said that both the European Convention on Human Rights and the European Social Charter "were drawn up with a view to achieving the aim set forth in Article 1 (b) of the Statute of the Council of Europe, one of the means of so doing being precisely the protection and development of human rights and fundamental freedoms. Again, under Article 3 of the Statute, every Member of the Council of Europe 'accepts the principles of the rule of law' and of the 'enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'" (Appeals Board of the Council of Europe, appeal No. 8/1972, Artzet, decision of 10 April 1973, paragraph 24).

62. The appellant infers from this that the Tribunal regards the said Convention and Charter as applying to the internal system of the Council of Europe. She adds that the Tribunal (then still called the Appeals Board) ruled that the principles enshrined in these texts carry greater authority than acts of the Committee of Ministers. In the context of the Artzet appeal referred to above, the Secretary General stated that he was applying Resolution (69)38 of the Committee of Ministers, without verifying its conformity with the general principles of law, "whose legal weight is greater than that of the resolution in question" (cf. decision previously quoted, paragraph 25).

63. The appellant then said that the Tribunal, in its decision of 23 February 1983 on Appeals Nos. 52-75/1981 (Farcot and others), ruled that the general principle of welfare law contained in the Social Charter "is binding on the legal system of the Council of Europe" and "applies to all the Organisation's staff". The Appeals Board sought to emphasise that these principles applied equally to temporary staff such as the appellants in Appeals Nos. 52-75/1981 and consequently to the appellant in this present appeal.

64. The appellant adds that Article 24 of the European Social Charter prohibits the termination of employment without a valid reason. She states that reasons for dismissal which might be regarded as acceptable clearly do not include a person's state of health following an occupational accident.

65. To the appellant it makes no sense for the Secretary General to object that in her case this is not termination of employment as such but the non-renewal of a contract. She says that "the Appendix, Article 24 (1), stipulates that the authors of the European Social Charter regard the concept of 'termination of employment' as covering any scenario in which the employment relationship ceases and thus also the scenario in this case (Appendix, Article 24 (1): 'It is understood that for the purposes of this article the terms "termination of employment" and "terminated" mean termination of employment at the initiative of the employer')".

66. The appellant adds that the only reason given by the Secretary General for her "termination of employment" is the requirement to comply with his own Rule No. 1232. But this is a measure of secondary legislation which, by its nature, must necessarily rank below higher principles such as those contained in the European Social Charter.

67. To the appellant it is clear that Council of Europe staff are inadequately protected against the consequences of an occupational accident. This inadequacy stems, firstly, from the lack of written provisions drawn up for that purpose and, secondly, from a particularly rigid and restrictive attitude on the part of the Secretary General (as shown in his handling of the appellant's case). According to her, things are very different under the laws of states that are parties to the European Social Charter. Under French law, for example, victims of an occupational accident cannot be dismissed at any time during a period when they are unable to work because of their state of health. The prohibition lasts up to the check-up where the occupational physician certifies the patient as fit to resume work.

68. The appellant stresses that she is able to work, subject to a number of adjustments (for example, no official journeys comparable to the ones she was previously expected to make and which she did make prior to the accident). So she is not yet fully able to resume her duties. The course of medical treatment prescribed by her doctors, which she is following at the moment, needs to be continued and will, in principle, take 18 to 24 months.

69. The appellant thus asks the Tribunal to rule that, on the basis of the need to adhere to the principles enshrined in the European Social Charter, the Council of Europe has a duty not to terminate her employment until such time as her state of health allows her to work without restriction or constraint (as she was able to before the accident).

70. In conclusion, the appellant asks the Tribunal to annul the implicit decision not to award her further contracts in 2010 beyond the date of 30 June.

71. The Secretary General, for his part, argues that a distinction must be made between the issue of not renewing the appellant's contract after 30 June 2010 and the matter of her accident.

72. Regarding the former, he says that the appellant was given monthly temporary contracts, renewable in line with the requirements and resources of the department to which she was assigned. All monthly temporary contracts signed by the staff members concerned (thus by the appellant too) state that these contracts expire on the date stipulated, without prior notice. So she cannot claim to have suffered any kind of prejudice, since she was always made aware that temporary contracts are by definition precarious, not necessarily renewed and that they end without prior notice. By signing these contracts she agreed to all their terms, including the provision that contracts may end once and for all on the date set, and without any reason being given.

Referring to the Tribunal's case-law (ATCE, Appeal No. 256/1999, Grassi v. Secretary General, decision of 7 June 2000, paragraph 27, Appeal No. 308/2002, Lévy v. Secretary General, decision of 28 March 2003, and Appeal No. 309/2002, Belyaev v. Secretary General, decision of 4 July 2003), which confirms that there is no right to renewal of a temporary contract, the Secretary General points out that the essential status of a temporary staff member is that he or she has no indefinite relationship with the Council of Europe. The appellant is governed by the rules on the status of temporary staff members who under the clear terms of Rule No. 1232, Article 7 may not be employed for more than six months in any one calendar year, regardless of whether their contracts are for half- or full-time working.

73. Concerning the accident and the Council of Europe's alleged breach of its duty of protection and assistance, the Secretary General states firstly, and in contradiction of the appellant's claim, that the Council of Europe has never formally acknowledged that the events of 26 January 2009 qualify as an occupational accident. In any case, even if the Council of Europe wished to do that it could not, because it is not for the employer to decide that an event counts as an occupational accident. The Council of Europe has no authority to decide whether one of its staff members is ill, or whether that illness is occupationally caused. In his view, only the *Sécurité sociale* (in France) is empowered to say whether a person has suffered an occupational accident. The only obligation the employer has is to report an accident. Thus on 3 November 2009 the Council of Europe completed an occupational accident report at the request of the appellant, who did not indicate that she wished to have the events of January 2009 recognised as an occupational accident until more than six months later.

74. If the primary health insurance fund (CPAM) ultimately recognised the events of 26 January 2009 as an occupational accident, the appellant's medical costs could be met by the insurer and she would receive the benefits provided for occupational accidents, namely payment of daily allowances at the end of her employment with the Council of Europe.

75. In any event, all temporary staff members are subject to the rules which say that the period of their contract may not exceed six months in any one calendar year. There are no exceptions to this rule. Even supposing the events of 26 January 2009 are recognised by the CPAM as an occupational accident, offering the appellant contracts of employment with the Council of Europe would not be the proper remedial action.

76. When the appellant's contract of employment ends on 30 June 2010, she will receive daily allowances direct from the CPAM, whether or not the occupational accident is recognised as such, provided she is off work for health reasons and provided she follows the proper

procedures. She will thus receive enough to live on when her contract expires, contrary to her assertions, if her state of health makes it necessary. Furthermore, the appellant offers no proof that she would be forced to leave Strasbourg if she were no longer employed by the Council of Europe. She is still married to a Frenchman and could not, therefore, be forced to leave the country. And if she is able to work she can, like any other temporary staff member in the same position, seek employment in France outside the Council of Europe and earn her living that way. It must also be pointed out that, regardless of the circumstances (whether or not the appellant has a job), her medical costs are met – even after her contract with the Council expires and/or as her husband's dependant – so she is perfectly well able to continue the medical treatment she is undergoing at present. Given these facts it is surprising that the appellant should claim that the Administration is forcing her to leave Strasbourg and return to her home country (see paragraph 41 of her further pleadings).

77. It is apparent from all these facts that, contrary to the appellant's assertions, the continuance of her medical care does not depend on whether her temporary contract is renewed, something which cannot be done without breaching the applicable rules. Likewise, the Administration can in no way be accused of any breach of its duty of protection and assistance.

78. The Secretary General looks next at the allegation of a breach of the European Social Charter on the ground that this text is applicable to the internal system of the Council of Europe and that the general principles of welfare law contained in the said Charter are binding on the Council's legal system and on all its staff and that Article 24 of the Charter prohibits termination of employment without valid reason.

79. In the Secretary General's view it should be pointed out that the Tribunal has already pronounced on the general principles of European welfare law and the European Social Charter, admittedly in the area of unemployment insurance, but the Tribunal's reasoning is equally apposite in the case of an alleged wrongful dismissal (ATCE, Appeal No 308/2002 – Levy, decision of 28 March 2003, paragraph 45 ff). The Tribunal dismissed Mr Levy's appeal seeking unemployment benefit, saying that non-payment of such benefit did not breach either the Council of Europe's Staff Regulations or the general principles of law.

80. The Secretary General contends that, since the Tribunal's case-law routinely rules that there is no right to renewal of a temporary contract, the appellant cannot demand that her contract be renewed on the ground that she suffered an occupational accident. The Council of Europe decided not to create a new "category of permanent staff". Article 4.bis of Rule No. 821 (as amended by Rule No. 1233 of 15 December 2005, effective from 1 January 2006), reads as follows: "Any temporary staff-member who held a long-term, monthly or daily contract with the Organisation in 2005 may continue to be offered temporary contracts for a period of three years and six months as from 1 January 2006".

81. As the appellant fell into this category, she was offered temporary contracts, but knew that the final cut-off date was 30 June 2010. Furthermore, it is not legally possible, under the Council of Europe's internal legal system, to rule that an occupational accident (whether acknowledged or not) will trigger the automatic renewal of a temporary contract (and, moreover, potentially up to the temporary staff member's retirement age).

82. The Secretary General has no wish to analyse at length the appellant's argument that she was dismissed by the Council of Europe and that this was a breach of Article 24 of the European Social Charter. To him it is clear (and the relevant case-law is consistent in this regard) that when a temporary (or fixed-term) contract expires this is not a dismissal, and certainly not when the rules and the timetable are fixed and known. The Secretary General quotes the Appendix to the European Social Charter, Article 24.2.a), which says: "It is understood that this article covers all workers but that a Party may exclude from some or all of its protection the following categories of employed persons: a) workers engaged under a contract of employment for a specified period of time or a specified task; (...)".

83. Since the appellant referred to relevant French law, the Secretary General points to the express stipulation of French law that, in the case of a fixed-term contract of employment, periods during which the contract is suspended following an occupational accident do not have the effect of extending the contract beyond its expiry date. The position in this case in the Council of Europe is exactly the same: the appellant holds a temporary contract which runs only until 30 June 2010 and the fact that she suffered – or did not suffer – an occupational accident cannot stop her contract from expiring.

84. The Secretary General concludes from all the above considerations that he has not breached the Staff Regulations or any related texts, or the practice or general rules of law. Neither has there been any incorrect interpretation of the relevant facts, any conclusions wrongly drawn, or any abuse of power. In the light of all these considerations the Secretary General asks the Tribunal to declare the appeal without merit and to dismiss it.

85. The Secretary General considers that the appellant's application for costs should also be rejected because the Council of Europe has, he claims, been "very transparent" and has followed all the procedures most meticulously; it has shown constant goodwill towards the appellant and she cannot claim to have been misled.

II. THE TRIBUNAL'S ASSESSMENT

A) Admissibility of the appeal

86. The Tribunal must first consider the Secretary General's pleas of inadmissibility. Before doing so, however, the Tribunal must first identify the act likely to adversely affect the appellant and, then, the allegation which the appellant has referred to the Tribunal.

87. Regarding the first question, the Tribunal notes that the email of 29 December 2009 from the appellant's line manager was a reply to an email the appellant had sent her on 24 December. In that email the appellant said she had asked on 18 December to be allowed to work part-time in Strasbourg up to 30 June 2010; her request had been turned down, so she was asking for the decision to be reconsidered. Her line manager refused this request. Moreover, from earlier correspondence it is apparent that the discussion prior to that point had been more about extending the appellant's contract in January 2010, something that was no longer an issue at the end of December 2009 because she had been offered a contract in Ukraine. From this it is clear that the appellant is challenging the decision of 29 December 2009 not to give her a contract in Strasbourg up to June 2010.

88. Regarding the second question, the Tribunal notes that in the “Object of the appeal” section of the form of appeal, the appellant writes: “appeal against the decision not to award [her] a temporary contract beyond 30 June 2010 even though the consequences of the occupational accident [she] suffered on 27 January 2009 still persist”.

In her grounds of appeal, appended to the form of appeal, the appellant asks the Tribunal “to rule that the implicit partial rejection of [her] administrative complaint is unlawful, given that the Secretary General has already decided not to offer [her] a contract of employment beyond 30 June 2010”. The appellant adds that “this decision, if implemented, would prevent [her] from being able to complete the medical treatment [she is] currently undergoing in Strasbourg to remedy the effects of the occupational accident on [her] health”.

In the conclusions of her further pleadings the appellant asks the Tribunal “to annul the Secretary General’s implicit decision not to award her further contracts in 2010 beyond the date of 30 June”.

The Tribunal infers from this that the appellant is, from the outset, challenging the decision not to extend her contract after 30 June 2010, independently of the allegations made at the stage of the administrative complaint and consideration of the first application for a stay of execution of the impugned act.

89. Since the Tribunal has arrived at these conclusions, it finds that the plea that the administrative complaint was lodged too late is without foundation and must be rejected.

90. This email exchange also reveals that the appellant’s main objective was not to persuade the Council to rethink its intention to assign her to Kiev but rather to secure a contract in Strasbourg. At no time, therefore, has the appellant been without an interest here and, in proceedings before the Tribunal, she has not made more allegations than those which she laid before the Secretary General.

Consequently the Secretary General’s pleas in this regard must be rejected.

91. Lastly, the Tribunal thinks that the Secretary General’s pleas regarding failure to exhaust internal remedies and the premature nature of the appeal must be considered together since they are two parts of his same argument, namely that an appellant cannot lodge an appeal without first knowing the reply – assuming there is one, of course – to his or her administrative complaint.

92. The Tribunal notes that under the terms of Article 60, paragraphs 1 and 3 of the Staff Regulations:

“1. In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers.

(..)

3. An appeal shall be lodged in writing within sixty days from the date of notification of the Secretary General's decision on the complaint or from the expiry of the time-limit referred to in Article 59, paragraph 3. Nevertheless, in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods."

93. An examination of the documents submitted by the parties clearly shows that, in the event, the appellant's administrative complaint was not implicitly rejected, because the Secretary General took an explicit decision within the set period of 30 days allowed him by Article 59 of the Staff Regulations. So the Tribunal cannot see how the appellant can claim that there was an implicit decision here, especially since, at the time she lodged her appeal, the period of thirty days within which the Secretary General had to reach his decision had not yet expired (the appeal was lodged on 16 March 2010, that is to say earlier than 19 March 2010, when the period available to the Secretary General expired, the administrative complaint having been lodged on 18 January 2010). There were, admittedly, some to-ings and fro-ings over the notification of the Secretary General's decision. However, from the Staff Regulations and related texts it is quite clear that the earliest date for lodging an appeal is the date on which a staff member is informed that his or her administrative complaint has been wholly or partially rejected. Consequently it would not have been detrimental to the appellant to have waited to receive the relevant communication and to have followed the rules which exist to safeguard the interests not only of the parties to the proceedings – whether they be the Secretary General or the appellant – but also and above all of all persons who might potentially lodge an appeal. Compliance with those rules is designed to safeguard the principle of legal certainty inherent in the system of the Council of Europe, in the interests both of the Organisation and of its staff members. In order for this principle of legal certainty to be respected it is essential to know on what date it will no longer be possible for the Tribunal to review the legality of an administrative act, but also the date from which the case may be referred to the Tribunal (see *mutatis mutandis*, ATCE, Appeal No. 309/2002, Belyaev v. Secretary General, decision of 4 July 2003, paragraph 27).

94. Since, moreover, the appellant raised the issue of an implicit rejection of her administrative complaint, it should be noted that the period of sixty days which, under the rule on implicit rejection, had already started to run, was not in the process of expiring at the time the appeal was actually lodged. Consequently no concerns on the appellant's part warranted the lodging of an appeal, especially as "in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods" (Article 60, paragraph 3, final sentence, of the Staff Regulations).

95. The appellant said that she knew why the Secretary General had not upheld her complaint from the arguments he adduced in connection with the first application for a stay of execution, but the Tribunal notes that this in no way absolves the appellant from her duty to abide by the rules of litigation. Moreover, she gave incorrect information in her form in saying that her complaint had been rejected on 22 January 2010 and that there was an issue about contracts after 30 June 2010, whereas in reality the issue concerned contracts after 31 January 2010.

96. Alerted by the Secretary General's letter of 24 March 2010 to the possibility that her appeal might be inadmissible, and by the reply dated 26 March 2010, the appellant chose not to lodge a fresh appeal even though she had time to do so. Consequently she must bear the

consequences of her choice (see, *mutatis mutandis*, ATCE, Appeal No. 416/2008 – Švarca, decision of 24 June 2009).

97. The Tribunal thus finds that these pleas of the Secretary General are well-founded and the appeal must be declared inadmissible.

B) Merits

98. Having found the appeal to be inadmissible, the Tribunal is not required to rule on the merits of the appeal.

99. The Tribunal thinks it helpful to state, however, that in its view the two grounds should be dismissed.

100. The Tribunal does not believe that the Secretary General breached any duty of protection and assistance because it is inconceivable that, in order to uphold that duty, the Secretary General would offer the appellant new contracts which, under the Council of Europe's Staff regulations and related texts, could not be awarded. This matter is different from – and does not overlap with – that concerning the preservation, after the end of a contract, of rights arising from the contractual relationship that existed at the time of the accident.

101. And then, quite apart from any other consideration, it cannot be said that the Council of Europe has failed to take account in this case of the principles set forth in the European Social Charter. The Council has not terminated the appellant's employment; it has simply declined to award new contracts. And notwithstanding the appellant's complaint about this in her email of 24 December 2009, this decision not to award new contracts seems to the Tribunal to be unrelated to the accident and, moreover, reasonable enough in the light of the arguments concerning the department's workload and the fact that a recruitment procedure was under way at the time.

102. Lastly, the Tribunal notes that the appellant has continued to receive the medical assistance she needs, under the applicable Council of Europe rules, beyond the end of her contract.

103. In conclusion, the appeal must be declared inadmissible, but also dismissed.

On these grounds, the Administrative Tribunal:

Declares the appeal inadmissible and dismisses it;

Orders that each party shall bear his/her own costs.

Delivered by the Tribunal in Strasbourg on 27 March 2011 and recorded as a written judgment, pursuant to Article 35, paragraph 1 of the Tribunal's Rules of Procedure, on 28 January 2011, the French text being authentic.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

L. WILDHABER