

Appeal 20/59

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COMPLAINTS BOARD OF THE EUROPEAN SCHOOLS

(2nd section)

Decision of 04 December 2020

In the case registered with the Registry of the Complaints Board under No **20/59**, the subject of which is an appeal lodged on 28 July 2020 by Mr ■■■■■, residing at ■■■■■, against the decision of 30 April 2020 whereby the Secretary-General of the European Schools rejected his application seeking annulment of his dismissal,

the Complaints Board of the European Schools, composed of:

- Mr Andreas Kalogeropoulos, section Chairman,
- Mr Aindrias Ó Caoimh, member,
- Mr Michel Aubert, member and rapporteur,

assisted by Ms Natalie Peigneur, registrar, and by Mr Thomas van de Werve d'Immerseel, legal assistant,

in the light of the written observations submitted on the one hand, by the applicant and on the other, on behalf of the European Schools, by Ms Muriel Gillet, barrister at the Brussels Bar,

after having decided, as allowed by Article 19 of the Rules of Procedure, that the case would not be heard at a public hearing, because of the health restrictions imposed by the Covid-19 pandemic, the parties having been duly informed thereof,

delivered, on 04 December 2020, the following decision, the grounds for and the operative part of which appear below.

Facts of the dispute and arguments of the parties

1.

In support of this appeal, Mr [REDACTED] puts forward, in substance, the following line of argument:

- He was taken on by the European School, Brussels I firstly, as a supervisor, with effect from 1 October 2010, under a fixed-term contract, subject to Belgian law, renewed several times up to 2020, and secondly, as a locally recruited teacher to perform duties as a physical education teacher, since 6 March 2019.
- Because of a late arrival, albeit justified, at his workplace on 28 November 2019, he was called to a meeting on 2 December 2019 with the school's Deputy Director and the principal [educational] adviser, at which he was criticised for absences during supervision and repeated late arrivals.
- By a decision of 4 December 2019, the school's Director dismissed him.

The inadequacy of the period of notice, the unfair dismissal and the vexatious nature of the severance of the employment relationship led the applicant to lodge an administrative appeal against the dismissal decision with the Secretary-General of the European Schools, who rejected that appeal on 30 April 2020.

- The applicant having lodged an appeal in parallel with the Brussels Francophone *Tribunal du travail* (Labour Court) (hereinafter referred to as the 'Labour Court'), he brought the matter before the Complaints Board on a precautionary basis and requested it to order the European School, Brussels I to make provisional payments to him of €1 as compensation in lieu of notice, €1 for patently unreasonable dismissal and €1 as damages for abuse of the right to dismiss an employee.

2.

In their response, the European Schools request the Complaints Board to dismiss the appeal and to order the applicant to pay the legal costs of the proceedings, estimated to amount to the sum of €800. They contend that:

- The applicant was absent several times without notifying his line manager and leaving, in particular on 28 November 2019, the children without supervision, who then fought and one of whom was injured. It is in that context that the trust placed by the school in the applicant's competences was undermined and his dismissal was consequently proceeded with by the Director on 4 December 2019.
- The dispute pertaining to termination of the locally recruited teacher contract, subject to the provisions of the new Service Regulations for

Locally Recruited Teachers in the European Schools (hereinafter referred to as the 'Service Regulations for Locally Recruited Teachers'), which entered into force on 1 September 2016, comes under the sole jurisdiction of the Complaints Board. On the other hand, the dispute pertaining to the supervisor contract comes under the jurisdiction of the national courts.

- However, the two disputes are related actions since termination of the two contracts was enacted by means of a single dismissal decision. Should the two disputes be brought before two separate courts, there would be a risk of divergent and irreconcilable solutions. Because of the relatedness of the dispute, a single court should, therefore, rule on the decision to break the two contracts. The dispute brought in this case before two different courts involves the same parties and relates to the same applications: it is therefore a question of a *lis pendis* situation.
- In such a situation, it is the first court seised that has jurisdiction to rule on the case, namely the Complaints Board, since this appeal was lodged with the latter on 28 July 2020, whereas the Labour Court was seised only on 10 August 2020.
- Principally, the Complaints Board must claim jurisdiction to hear all the applications. Should it consider that they are not related actions, it ought to claim jurisdiction solely to rule on the legality of the termination of the locally recruited teacher contract.
- Substantively, the application must be rejected.

- As regards termination of the supervisor contract, which is governed by Belgian law, none of the compensation claimed is justified. This contract was a fixed-term one, contrary to what the applicant contends, and justified a one-week notice period, which was applied in this case, in accordance with Article 37-2 of the Law of 3 July 1978 on employment contracts. The applicant cannot request payment of compensation for patently unreasonable dismissal on the basis of Collective Agreement No 109, which is not applicable to the European Schools in their capacity as a public institution. As the applicant has not demonstrated the "vexatious and nasty" nature of the dismissal, the abuse of right that he invokes is not justified.
- As regards termination of the locally recruited teacher contract, it is governed by the power granted to the European Schools by Article 16 of the Service Regulations for Locally Recruited Teachers and which is not accompanied by any obligation to provide justification. In any event, as pupils always have to be accompanied by adults on the premises of the school, which is responsible for their safety, a supervisor being absent without notifying his line manager, as the applicant did on 28 November 2019, is something which cannot be tolerated and which constitutes a genuine reason for dismissal.

3.

In his reply, the applicant maintains, principally, his initial claims and requests that the Complaints Board stay its proceedings until the Labour Court has ruled on its own jurisdiction.

In the alternative, he requests the Complaints Board to claim jurisdiction solely to hear the case of his dismissal from the post of locally recruited teacher and to order the European School, Brussels I to pay him, principally, €5861.09 as compensation for patently unreasonable dismissal and €1500 as compensation for abuse of the right to dismiss an employee and, in the alternative, €5361.09 as compensation for abuse of the right to dismiss an employee.

In the further alternative, he requests the Complaints Board to claim jurisdiction for everything and to order the European School, Brussels I to pay him the following sums:

- For the supervision contract, principally, €13697.99 as pay in lieu of notice, €7762,20 as compensation for patently unreasonable dismissal, €5000 as damages for abuse of the right to dismiss an employee and, in the alternative, €13697.99 as pay in lieu of notice and €12762.20 as damages for abuse of the right to dismiss an employee.
- For the locally recruited teacher contract, €5861.09 € as compensation for patently unreasonable dismissal and €1500 as compensation for abuse of the right to dismiss an employee and, in the alternative, €7361.09 as compensation for abuse of the right to dismiss an employee.

The applicant, who further requests that those sums be paid "together with interest, in accordance with Article 10 of the Law of 12 April 1965", emphasises in substance the following:

- Only the Belgian judge has jurisdiction to rule on the conditions under which the applicant was dismissed as a locally recruited teacher, since the

Complaints Board's jurisdiction is strictly limited and since the Service Regulations for Locally Recruited Teachers do not contain any provision allowing for compensation in the event of patently unreasonable dismissal or of abuse of right.

- This appeal was lodged only on a precautionary basis, in order to safeguard the applicant's rights should the Labour Court decline jurisdiction.
- No legal basis deals with the related actions or the *lis pendis* between the Belgian judge and the Complaints Board. Moreover, in this particular case, neither the facts nor the applications are identical, since in the one case, the supervision contract is concerned and in the other, the locally recruited teacher contract, and each of the two contracts, legally separate acts, was terminated differently.
- Should, contrary to all probability, the Complaints Board accept jurisdiction to hear the case relating to the dispute about the supervisor contract, only Belgian law would be applicable, and the applicant develops the grounds on which, under that law, he must qualify for the compensation claimed.
- As regards dismissal from the post of locally recruited teacher, it can result only from exercise of a purely discretionary power of the European Schools, which would be contrary to the principles of Article 30 of the Charter of Fundamental Rights of the European Union and of Article 24 of the European Social Charter. The reason is that he was dismissed without any legitimate ground, since none of the complaints raised relates to his duties as a locally recruited teacher. In any event, the complaints associated with his supervisor duties have not been established. Furthermore, the

applicant received no warning. Finally, the arrangements for termination of the contract were vexatious.

4.

As the Complaints Board decided that this appeal would not be heard at a public hearing because of the particular circumstances associated with the health crisis, it gave the European Schools the opportunity to produce a rejoinder, as allowed by Article 17.1 of its Rules of Procedure. In their additional observations, the European Schools, which raise to €1200 the sum that they are applying for as legal and other costs, argue the following in substance:

- If a locally recruited teacher deems the termination of his contract to be illegal, only the Complaints Board has jurisdiction to rule on the question, in accordance with Article 51 of the Service Regulations for Locally Recruited Teachers, and that is clearly the case for the dispute about termination of the applicant's locally recruited teacher contract, which comes under the sole jurisdiction of the said Board.
- Even assuming that the applicant's applications relating to the locally recruited teacher contract were made "with respect to anything for which there is no provision in these Service Regulations", as referred to in Article 3.2 thereof - *quod non* – they would remain within the jurisdiction of the Complaints Board, which would then have to apply Belgian law to them.
- Whilst the dispute relating to the supervisor contract comes, for its part, under the jurisdiction of the national courts, the fact remains that the two applications must be dealt with as related actions, since the two contracts

were terminated by a single dismissal decision, and there is a risk of irreconcilable solutions between the two courts seised in this particular case. In accordance with the principles established by the case law of the Court of Justice of the European Union, it is the first court seised – here, the Complaints Board – that must hear the case.

- The fact that the applicant seised the Board as a precautionary measure has no impact. As the circumstances in which the two contracts were terminated are identical and as the applicant's applications to the two courts involve compensation associated with those circumstances, the Complaints Board must claim jurisdiction to decide on all the applications, because they are connected and hence related actions .
- In the alternative, if, contrary to all probability, the Complaints Board did not accept that they are related actions, it should claim jurisdiction solely to rule on the legality of termination of the applicant's locally recruited teacher contract.
- Essentially, none of the claims for compensation are justified.

Findings of the Complaints Board

Introductory remarks

5.

It is undisputed that by a single decision of 4 December 2019, the Director of the European School, Brussels I terminated the duties performed by Mr ■■■■■ in the school, under on the one hand, a supervisor contract and on

the other, a locally recruited teacher contract. By a decision of 30 April 2020, the Secretary-General of the European Schools rejected the administrative appeal whereby Mr [REDACTED] contested the legality of the decision of 4 December 2019. The latter (hereinafter referred to as 'the applicant') first referred to the Complaints Board, on 28 July 2020, an application requesting that the European School, Brussels I be ordered to make provisional payments to him of €1 as compensation in lieu of notice, €1 for patently unreasonable dismissal and €1 as damages for abuse of the right to dismiss an employee. He submitted that application *"on a precautionary basis"* in order to conserve his rights should the Labour Court – to which he was to refer his case simultaneously – decline jurisdiction. The applicant brought proceedings before the Labour Court on 10 August 2020.

6.

After the European Schools had submitted comments in their defence to the Complaints Board, the applicant, in his reply, maintained, principally, his submissions seeking the provisional payments referred to above. He requested, however, that the Complaints Board should stay its proceedings until the Labour Court had ruled on its own jurisdiction.

7.

For the considerations which follow and which result from the rules that are imposed on the Complaints Board with respect to determination of its jurisdiction, and when, moreover, the case is before it, in a state to be ruled upon, in so far as the parties have exchanged their response, reply and rejoinder, there is no reason for the Board to stay its proceedings.

The Complaints Board's jurisdiction

8.

Article 27 of the Convention defining the Statute of the European Schools states: " ...2. *The Complaints Board shall have sole jurisdiction in the first and final instance, once all administrative channels have been exhausted, in any dispute concerning the application of this Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it, adversely affecting such persons on the part of the Board of Governors or the Administrative Board of a school in the exercise of their powers as specified by this Convention. When such disputes are of a financial character, the Complaints Board shall have unlimited jurisdiction. The conditions and the detailed rules relative to these proceedings shall be laid down, as appropriate, by the Service Regulations for the teaching staff or by the conditions of employment for part-time teachers, or by the General Rules of the Schools. ...7. Other disputes to which the Schools are party shall fall within national jurisdiction.*"

9.

According to Article 51 of the Service Regulations for Locally Recruited Teachers: " *The Complaints Board shall have sole jurisdiction in any dispute between the School and locally recruited teachers regarding the legality of an act implementing these Service Regulations adversely affecting them.*"

10.

It must be *noted*, firstly, that by requesting provisional payments as an advance on different forms of compensation that he is claiming as a consequence of the decision of the Director of the European School, Brussels I to terminate his employment, the applicant must be regarded as bringing before the Complaints Board a dispute about the legality of the said decision, the dispute being of a financial character.

11.

Secondly, it clearly results from the aforementioned provisions that the Complaints Board has jurisdiction to hear such a case of dispute, provided, however, that it *relates* to the duties performed by the applicant as a locally recruited teacher. On the other hand, the dispute relating to the duties performed as a supervisor is not amongst those over which the Complaints Board is assigned jurisdiction by Article 27.2 of the Statute of the European Schools.

12.

As regards the *dual* fact that the contested decision terminated the applicant's employment as both a supervisor and a locally recruited teacher and that proceedings were brought simultaneously before the Labour Court, thus creating a situation involving related actions and *lis pendens*, it invites the following considerations.

13.

It must be pointed out first of all that neither the Convention defining the Statute

of the European Schools, nor the Rules of Procedure for the Complaints Board contain provisions governing related actions and *lis pendens* situations.

14.

Whilst it is true that such situations have been the subject of provisions such as the convention, the so-called Brussels Convention, of 27 September 1968, on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972, L 299, p. 32), then Council Regulation (EC) No 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, p. 1, hereinafter referred to as 'Regulation 44-2001'), those provisions were adopted in the context of the treaties that became those of the European Union. It must be remembered in this connection that the European Schools' legal system is formally distinguished from that of the European Union (see, to that effect, the decision of the Complaints Board of 25 January 2017, case 16/58, point 16). Hence, those provisions, referring, moreover, to situations involving related actions and *lis pendens* situations between courts of the Member States, are not directly applicable to the Complaints Board. However, the Board draws, as far as possible, on the case law of European courts and on the general principles of the Union's law on which they are based.

15.

In this connection, it is clear, particularly from the 15th recital of Regulation 44-2001, that to adopt measures governing related actions and *lis pendens* situations, the Union legislator considered that in the interests of the harmonious administration of justice, it was necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable

judgments would not be given in two Member States. It is also clearly incumbent upon the Complaints Board to pursue this objective of harmonious administration of justice to prevent judgments being irreconcilable with those of national courts in situations such as those that emerge in particular from Article 27-7 of the Convention defining the Statute of the European Schools or from Article 3-2 of the Service Regulations for Locally Recruited Teachers.

16.

Consequently, there is a need on the one hand, to implement a *lis pendens* mechanism, such as the one that emerges from Article 27 of Regulation 44-2001, provided that as foreseen by that article, the proceedings involve the same cause of action and are between the same parties. On the other, it is important to refer to the case law of European courts to determine whether the situation submitted to the Complaints Board fulfils the conditions relating to this triple identity of parties, object and cause.

17.

In this particular case, the proceedings brought by the applicant against the European School, Brussels I before the Labour Court and before the Complaints Board involve the same parties. Even assuming that they can be regarded as having the same object, in the sense that they seek to obtain compensation for the consequences of the single decision of 4 December 2019 terminating the applicant's employment, the actions are not, however, based on the same cause.

18.

As the Court of Justice of the European Union has considered, the cause of the action comprises the facts and the rule of law relied on as the basis of the application (see in particular the judgment of 22 October 2015, C-523/14, point 43). Now, although the same facts underlie the decision of 4 December 2019, and hence the applicant's applications, their respective basis is to be found in rules of law that are quite separate and of a different nature. It is a question on the one hand, in the case of brought by the applicant before the Labour Court, of the provisions of labour law applicable in the Kingdom of Belgium and on the other, in the case of the application made to the Complaints Board, of the provisions, under Service Regulations, applicable to locally recruited teachers, adopted by the Board of Governors of the European Schools pursuant to the (international) Convention defining the Statute of the European Schools. Thus, having regard to the particular nature of the employment relationship governed by a set of Service Regulations, the two applications are not based on an identical cause of action.

19.

Since these applications must be examined on the basis of two quite separate legal systems, it does not appear, moreover, to the Complaints Board that separate judgment of the two legal disputes would risk leading to irreconcilable solutions, within the meaning of the provisions applicable to related actions in European Union law, such as those referred to in Article 28.3 of Regulation 44-2001. Furthermore, and since, on the one hand, the Complaints Board does not have jurisdiction to hear the case relating to the supervisor contract and, on the other, since it is *"a court other than the court first seised"* by the applicant, it does not appear either that this case would come within the scope

of the mechanism for resolving cases of related actions, such as the one that follows from Article 28.1 and 2 of the same Regulation.

20.

Consequently, in the absence of an established *lis pendens* and related actions situation, the Complaints Board has jurisdiction to deal with the submissions made to it by the applicant and hence to hear the case, but only to the extent that the applications seek compensation for the consequences of the alleged illegality of the decision of 4 December 2019, in so far as it terminates his employment as a locally recruited teacher.

Substance

21.

It should be pointed out that the Service Regulations for Locally Recruited Teachers applicable in this particular case entered into force on 1 September 2016 and that they were adopted – having regard to Articles 12.1 and 27.2 of the Convention defining the Statute of the European Schools, by the Board of Governors of the European Schools, whose intention was *"to ensure that the rules applicable to locally recruited teachers are in line with fundamental rights as laid down in the Charter of Fundamental Rights of the European Union."*

22.

Article 3 of the Service Regulations for Locally Recruited Teachers, entitled '*Legal status applicable*'; states: *"1. These Service Regulations shall take precedence over the legal provisions of the legislation of the host country. 2.*

The national legislation of the host countries of the European Schools shall only apply in case there is an explicit reference in these Service Regulations or residually to the conditions of the conclusion and execution of the contracts concluded with locally recruited teachers with respect to anything for which there is no provision in these Service Regulations."

23.

Pursuant to Article 9 of the said Service Regulations for Locally Recruited Teachers, their recruitment involves the signing of a written contract, whereby the teacher undertakes to adhere to the provisions of these Service Regulations.

24.

According to Article 16.1. of the same Service Regulations: *"Without prejudice to Articles 14 and 15 of these Staff Regulations and where a locally recruited teacher is recruited for a fixed-term period, each of the parties may terminate the contract within four weeks."*

25.

The second paragraph of Article 7 of the locally recruited teacher contract concluded on 26 August 2019 between the applicant and the European School, Brussels I for a fixed-term period states: *"Furthermore, each of the parties shall be entitled to terminate the contract early, subject to a four-week period of notice."*

26.

It is clear from all those provisions that in the case of the applicant, who, until the date of the contested decision, was bound to the European School, Brussels I by a fixed-term locally recruited teacher contract, the conditions for termination of the said contract were determined in full by the provisions of the Service Regulations, which he expressly accepted by signing the aforementioned contract. The fact that, in parallel with his locally recruited teacher duties he performed other duties coming under another legal system, has no impact on the conditions in which the legality of the decision of 4 December 2019, in so far as it terminates the locally recruited teacher contract, must be assessed by the Complaints Board.

27.

Now the European School, Brussels I could legally actually terminate the fixed-term employment relationship by giving a four-week period of notice, as mentioned in Article 16.1 of the Service Regulations for Locally Recruited Teachers and in the second paragraph of Article 7 of the contract. It is not disputed that it respected that period of notice by paying compensation equivalent to four weeks' remuneration. Moreover, neither Article 16 nor any other provision of the Service Regulations requires the parties to justify the grounds on which they intend to exercise their right to terminate the contract, subject to compliance with the period of notice (see, to that effect, the decision of the Complaints Board of 16 January 2020, case 19/33, point 23).

28.

Consequently, the decision of the Director of the of the European School,

Brussels I of 4 December 2019, in so far as it terminates the locally recruited teacher contract, was adopted in compliance with the provisions of the Service Regulations applicable to that contract. And the pleas put forward by the applicant that do not seek to establish an infringement of those provisions of the Service Regulations are inoperative.

29.

This conclusion is, nevertheless, without prejudice to assessment of the merits of the grounds that are, however, contained in that decision of 4 December 2019 but which relate to the duties performed by the applicant under his supervisor contract, the dispute about which does not come within the jurisdiction of the Complaints Board, as stated in point (11) of this decision.

30.

It follows from all the foregoing that this appeal must be dismissed.

Legal and other costs

31.

Article 27 of the Rules of Procedure provides that: *“The unsuccessful party shall be ordered to pay the legal and other costs of the case if they have been applied for by the other party. However, if the particular circumstances of the case so warrant, the Complaints Board may order the latter party to pay the legal and other costs, or may order that they be shared between the parties. [...] If costs are not claimed, the parties shall bear their own costs.”*

32.

It is clear from those provisions, which, incidentally, are fully comparable with those in force in most national and *international* courts, that the unsuccessful party must, in principle, bear the legal and other costs of the proceedings. However, the said provisions allow the Complaints Board to assess on a case by case basis the conditions in which this should be applied.

33.

As the European Schools are not the unsuccessful party in this case and as they applied for the applicant to be ordered to pay the legal and other costs, the form of order sought by them ought normally to be granted. However, in the particular circumstances of the case, characterised notably by the fact that the applicant's appeal presented for judgment certain points of law that have not yet been settled, the Complaints Board considers that it should be decided that each party will bear its own costs.

ON THESE GROUNDS, the Complaints Board of the European Schools

H A S D E C I D E D A S F O L L O W S :

Article 1: Appeal No 20/59 lodged by Mr [REDACTED] is hereby dismissed.

Article 2: Each party will bear its own costs.

Article 3: Notification of this decision will be given as provided for in Articles 26 and 28 of the Rules of Procedure.

A. Kalogeropoulos

A. Ó Caoimh

M. Aubert

Brussels, 04 December 2020

pp. The Registry,
Nathalie Peigneur