

# CONSEIL DE L'EUROPE—— ——COUNCIL OF EUROPE

## COMMISSION DE RECOURS APPEALS BOARD

### **Appeal No. 76/1981 (Anna-Nadia PAGANI (I) v. Secretary General)**

The Appeals Board, composed of:

Mr Walter GANSHOF VAN DER MEERSCH, Chairman,  
Mr Raul VENTURA and  
Sir Donald TEBBIT, Members

meeting in private in Strasbourg on 19 April 1982, assisted by:

Mr Michel DE SALVIA, Secretary, and  
Miss Margaret KILLERBY, Deputy Secretary,

having deliberated, has given the following decision:

### **PROCEDURE**

1. The appellant lodged her appeal on 17 July 1981. The appeal was registered on the same day as case number 76/1981.

2. In a letter of 6 August 1981, the Secretary General of the Council of Europe was invited to submit his observations on the appeal no later than 1 October 1981. These observations, dated 1 October 1981, were communicated to the appellant for a reply.

On 30 October 1981, the appellant's representative asked for the time-limit fixed by the Chairman to be extended to 30 November 1981. He submitted his reply on 23 November 1981.

3. In a letter of 10 December 1981, the parties were informed that the hearing was fixed for 29 January 1982. They were also informed that they were allowed to present short written observations. The Secretary General made use of this option in a Note Verbale of 8 January 1982.

4. The public hearing took place on 29 January 1982 at the Council of Europe in the presence of the appellant, represented by Mr G. Napoletano, professor of the University of Sassari (Italy), and of Mrs M.-O. Wiederkehr, Head of Public Law Division in the Directorate of Legal Affairs, representing the Secretary General, assisted by Mr K.H. Marquardt, Head of Establishment Division.

## THE FACTS

The facts set out by the parties can be summarised as follows:

5. Miss Anna-Nadia PAGANI, born on 24 July 1948 in Milan, of Italian nationality, entered the service of the Council of Europe on 13 September 1976 as a shorthand typist of grade B2, step 1, assigned to the Directorate of Administration, Language Services, Documents and Conference Division (“English typing pool”). Her conditions of employment stipulated that she would occasionally be called upon to work in Italian for the Deputy Secretary General and other Italian officials.

6. By Decision A.P. No. 2417 of 15 December 1976 the appellant was placed in step 2 of her grade from 13 September 1976, in view of “the special duties frequently required of her—duties demanding language skills which cannot normally be required for her post”.

7. From 5 February 1979 on, the appellant was seconded from the “English typing pool” to Division IV of the Directorate of Legal Affairs, to occupy a specific temporary post which had fallen vacant. In her new post, the vacancy notice for which had stated that it was to be filled by an English speaking shorthand typist with good knowledge of French, the appellant occasionally carried out work in Italian, notably at the request of the former Head of Division IV, an Italian national.

8. During 1980, various changes took place in Division IV: the temporary post to which the appellant was seconded was changed to a permanent post, and a new Head of Division, a Greek national, was appointed. The appellant’s new hierarchical superior considered that the needs of the service required him to appoint a person whose working language was French to the post occupied by the appellant.

9. On 8 May 1981, at the request of the Director of Legal Affairs, the appellant was given an urgent forty-page text to type in Italian.

On 25 May 1981 the appellant informed the Director of Legal Affairs that she had been able to type only half a page of this text, because of the amount of work she had to do in Division IV.

The Director of Legal Affairs, who considered this attitude incorrect, then told the appellant that her secondment would no longer be extended and that he would ask for her to return to the “English typing pool” immediately.

This was the purpose of his memorandum of 25 May 1981 to the Head of Establishment Division, in which he emphasised that the incorrect behavior displayed by the appellant made her presence in the Directorate impossible.

On 27 May 1981, without any further reference to the reasons given by the appellant for her refusal, the Head of Establishment Division informed her in a memorandum that he had terminated her secondment “because the needs of the department oblige the Director of Legal Affairs to appoint a staff member of French mother tongue to the post in question”.

On 4 June 1981, the appellant asked the Secretary General to quash the decision terminating her secondment or to find an alternative solution. The Secretary General did not feel obliged to take action on this request.

In a memorandum of 15 July 1981 the Secretary General informed the appellant of the various ways in which a suitable solution to her problem could be found. She did not consider herself obliged to accept them.

10. The present appeal is brought against the decision of 27 May 1981 terminating the appellant's secondment.

## **ARGUMENTS ADVANCED BY THE PARTIES**

I The appellant invokes four arguments in support of her request for annulment of the decision of 27 May 1981 terminating her secondment and returning her to the department in which she had originally worked. She considers that the said decision:

- a. is discriminatory,
- b. contains a formal defect,
- c. lacks any legal basis ,
- d. constitutes misuse of powers.

The appellant's arguments may be summed up as follows.

### **A. Regarding the discriminatory nature of the decision**

11. Even if it were shown that the decision to assign the appellant to a different post had been based on the need to appoint an official of French mother tongue to the post in question, such a necessity would entail discrimination on grounds of nationality, regardless of any concern for the needs of the service, and would be contrary to Article 10, paragraph 2 of the Staff Regulations under which "No post may be reserved for nationals of any specific member state".

Such a measure would amount to reserving the permanent post in question exclusively for persons of French mother tongue, and thus for the nationals of certain determined member states.

### **B. Regarding the formal defect**

12. The appellant considers that the decision terminating her secondment has a formal defect in that it was motivated by her supposed incorrect behavior and it therefore rests on an erroneous interpretation of her conditions of employment.

Although in her previous assignment to the "English typing pool" her conditions of employment had stipulated that she would occasionally be called upon to work in Italian for various officials of Italian nationality, this was in no way a part of the duties of the temporary post which she occupied in the Directorate of Legal Affairs. Furthermore, the Director of Legal Affairs, not being of Italian nationality, did not belong to the category of officials entitled to ask the appellant to do such work. Consequently she was not

obliged to work in Italian, even though she had in the past agreed to do so at the request of various officials in the Directorate of Legal Affairs. Her refusal to type a text in Italian was therefore legitimate and could not be construed as incorrect behavior on her part. The refusal to relieve the appellant of some of her normal work would have compelled her to do the work requested outside her normal working hours, which she was not in this case prepared to do.

**C. Regarding the inadequate legal basis for the decision**

13. The appellant considers that the decision in dispute, which does not take account of her past service and jeopardises her future career, lacks any legal basis. The decision was taken solely because of her supposed incorrect behavior, contrary to the provisions governing disciplinary measures against staff members, since no disciplinary proceedings were instituted against her; furthermore transfer to another post is not one of the disciplinary measures which may be taken.

**D. Regarding misuse of powers**

14. The appellant holds that her transfer constitutes misuse of powers, in that it was not decided in accordance with considerations of the needs of the service, but solely because of her supposed incorrect behaviour.

The decision of 27 May 1981 was taken immediately after the request for a transfer made on 25 May 1981 by the Director of Legal Affairs, who justified his request essentially by referring to the fact that "such incorrect behavior makes her presence in the Directorate impossible".

It follows that the measure in dispute was taken in violation of Article 6, paragraph 3 of the Staff Regulations which stipulates that "The Secretary General shall, acting in the interests of the service and having regard to the provisions of the Regulations on Appointments, assign each official to a post in his category which corresponds to his grade".

The decision in question should thus be considered as a disguised disciplinary measure. Here the appellant cites a judgment of the Court of Justice of the European Communities (judgment of 5 May 1966, joined cases 18 and 35/65, Max Gutmann v. Euratom Commission, (1966) E.C.R., p. 103 et seq.) which states that "the transfer decision falls within the discretionary powers of the administration, which may arrange its departments and move its staff as required for the performance of the tasks assigned to it. On the other hand, such a decision may amount to a misuse of powers if it appears, on the basis of objective, relevant and consistent facts, to have been taken for purposes other than those stated."

II. The Secretary General's arguments may be summed up as follows.

**A. Regarding the extent of the supervisory authority exercised by the Appeals Board**

15. The Secretary General comments that the contested decision falls within the powers conferred on him by Article 6, paragraph 3 of the Staff Regulations.

It follows that the decision in question falls within his discretionary powers and that therefore the Board is required to do no more than exercise a “minimum” control, in ascertaining its conformity with the law.

**B. Regarding the allegation that the decision is discriminatory**

16. The Secretary General also comments that the appellant, an Italian national, had been appointed to work in English because of her exceptional knowledge of this language which enabled her to perform work analogous to that which would have been performed by a shorthand typist of English mother tongue.

On the other hand, she was not able to provide the new head of Division IV with the same assistance in French as a secretary of French mother tongue or having perfect command of French.

The appellant’s nationality played no part in the disputed decision and thus no violation of the Staff Regulations may be considered to have occurred.

**C. Regarding the allegation of a formal defect**

17. It is for the Secretary General to judge whether an official’s behavior constitutes failure to fulfil his or her professional duties and whether it should be treated as a disciplinary fault. In the case in question, the Secretary General did not consider the appellant’s behavior to constitute such a fault.

In reply to the appellant’s allegation that her conditions of employment were erroneously interpreted, the Secretary General emphasises that while it does indeed follow from the job description of the post to which the appellant had been seconded that the services which might be asked of her were those of an English shorthand typist with good knowledge of French, it is just as clearly shown that “special duties demanding language skills which cannot normally be required for her post” might be required of her under Decision A.P. No. 2417.

Furthermore, as the appellant had never been transferred permanently outside the Language Services, Documents and Conferences Division, she had continued to enjoy the additional step conferred on her by this decision.

In addition, as regards work outside normal hours, an official of the Council of Europe might be required to work overtime under the conditions laid down in office circular no. 490 on working hours.

The decision to terminate the appellant’s secondment did not therefore suffer from any formal defect.

**D. Regarding the allegation of lack of a legal basis for the decision**

18. The Secretary General points out (cf. paragraph 17) that in the case in question he did not consider the appellant’s behavior to constitute a failure to comply with her obligations

punishable by a disciplinary measure. Under these conditions, there was nothing to justify the institution of disciplinary proceedings against the appellant.

The appellant also claimed that there was a sanction in that the decision seriously jeopardises her future career. However, her secondment was only temporary and the new Head of Division IV had informed her orally on 18 December 1980 that the post to which she was seconded would be advertised as vacant for persons whose working language was French, though he was prepared to postpone this measure until May of the following year to allow the appellant time to find another post outside the "typing pool", as she wished. The appellant could therefore reasonably expect to return to the department to which she had originally been assigned from the time when the reasons for her secondment no longer applied. It follows that this return cannot be considered to harm her career and it cannot reasonably be maintained that the measure taken amounted to a disciplinary measure.

Consequently the allegation of a lack of legal basis for the decision could not be upheld.

#### **E. Regarding the allegation of misuse of powers**

19. Account being taken of the foregoing, the Secretary General considers that the disputed measure cannot be construed as a disciplinary measure.

On the contrary, the decision in question was motivated solely by the needs of the service. It was precisely because of the change of Head of Division IV of the Directorate of Legal Affairs that it became necessary to replace the English-speaking secretary by a French-speaking secretary, as the appellant's command of French, though very good, was not perfect.

Furthermore, the appellant's behavior having had the effect of altering her working relations with the Director of Legal Affairs, it is clear that the interests of the service necessitated such a measure in order to preserve a good working atmosphere within the service.

The allegation of misuse of powers should thus be rejected.

#### **THE LAW**

20. The appellant appealed against the decision by which the Secretary General on 27 May 1981 terminated her secondment to Division IV of the Directorate of Legal Affairs, the consequence of which was that she returned to the section in which she had originally worked, the "English typing pool".

21. She argues that this decision was taken not, as the Secretary General claims, in the interests of the service, but following the disagreement between herself and the Director of the Service to which she was seconded. She asks for the disputed decision to be annulled and advances four grounds for this, claiming that:

- the decision is discriminatory in character;

- it suffers from a formal defect in that the appellant did not fail in her professional duties;

- it lacks a legal basis in that the Secretary General would not have been able, even if the appellant had failed in her duties, to assign her to a different post as a disciplinary measure;

- lastly, there was a misuse of powers in that the said decision was in fact a disciplinary measure and thus taken in order to achieve aims other than those cited.

22. The Secretary General on the other hand claims that the decision in dispute falls within the powers conferred on him by Article 6, paragraph 3 of the Staff Regulations in force at the time when the events took place (Article 11 of the new Staff Regulations) which stipulated that “The Secretary General shall, acting in the interests of the service and having regard to the provisions of the Regulations on Appointments, assign each official to a post in his category which corresponds to his grade”.

In this respect he claims that the Board is required to exercise no more than a minimum control of legality.

As for the validity of the appellant’s allegations, he notes that the measure affecting her was indeed taken in the interests of the service, and that this was the real reason for the decision. He argues that no discrimination took place in this case and that the appellant has brought no proof of her allegation that the decision to return her to her original department amounts to a disciplinary measure.

He therefore concludes that the disputed measure, which falls within the discretionary powers conferred by the Staff Regulations on the Secretary General, is neither “illegal”, nor suffering from a formal defect, nor lacking in legal basis, nor tantamount to a misuse of powers.

### **Regarding the extent of the Board’s supervisory authority**

23. Previous decisions have established that it is for the administration in each organisation to assign the officials under its authority in the interest of the service and that the powers vested in the administration are wide discretionary powers, the exercise of which may be supervised by international courts only in limited cases (see in particular: I.L.O.A.T., decisions Nos. 132, *Tarrab v. I.L.O.* and 151, *Silow v. F.A.O.*). In this way, “The higher authority alone is responsible for the organization of the departments which it must be able to determine and modify according to the exigences of the service” (E.C.C.J., case 61/70, *G. Vistosi v. Commission of the European Communities*, 16 June 1971, (1971) *E.C.R.* p. 535 s.).

24. But this applies only “without prejudice to the rights which servants enjoy under their Staff Regulations and which they can ask the court to enforce” (*ibid.*).

25. While it is true that in the event of a dispute, an international court cannot substitute its own judgment for that of the administration, it has the duty to ascertain whether the disputed decision was taken in accordance with the regulations and with

general principles of law, as must be observed in the legal systems of international organisations (Appeals Board, Council of Europe, 8/1972, G Artzet v. the Secretary General, *Decisions*, p. 78 s.).

26. As has justly been noted by the I.L.O. Administrative Tribunal: “Discretionary authority must not, however, be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which has before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the Organisation’s own rules, whether the Administration’s decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority.” (I.L.O.A.T. decision No. 191, Ballo v. U.N.E.S.C.O.).

These are the conditions under which the Board **exercises** its supervisory authority.

### **On the merits of the appeal**

27. The Board observes that the appellant was seconded from her original service to a specific temporary post in the Directorate of Legal Affairs, a post which subsequently became permanent.

This change in assignment is not covered by the regulations of the institution, since no provision in the Staff Regulations or other regulations concerning the staff deals with “secondment” or “termination of secondment”. Change of assignment “on secondment”, the measure in question in this case, is governed only, as appeared from information provided in reply to the Board’s questioning at the hearing, by administrative practice in the Council of Europe. The Appeals Board interprets the measure as a change of assignment decided by the administrative authority in the interests of the service and which may be terminated when the interests of the service justify so doing. It has a precarious character.

28. The Board is of the opinion that in the circumstances under examination, the appellant could reasonably believe in bringing her appeal that the measure adopted concerning her was of a nature to affect her adversely.

29. Lastly the Board considers that, within the context of the supervisory powers which it is for the Board to exercise, the latitude of discretion allowed to the administration must be considered wider than in the case of definitive transfer.

### **- Regarding the first allegation**

30. The appellant alleges discrimination on grounds of nationality in that her change of assignment took place because she was not of French mother tongue, in violation of Article 10, paragraph 2 of the Staff Regulations under which “No post may be reserved for nationals of any specific member state”.



31. The Board observes that the principle of non-discrimination is one of the general principles of law which must be respected in the Council of Europe (Article 14 of the European Convention on Human Rights).

32. It is however of the opinion that account should be taken of the special nature of the international civil service and of the particular needs of the organisation concerned. Thus, the fact that the Staff Regulations prohibit the reservation of any post for nationals of a particular member state (Article 12, paragraph 4) does not prevent the administrative authority when assigning staff, from taking particular linguistic skills into account in the interests of the service (cf. *mutatis mutandis*: E.C.C.J., case 22/75, B. Küster v. European Parliament, 29 October 1975, 119751 E.C.R., p. 1267 s.).

33. To extend further the principle of forbidding discrimination would, in an international organisation like the Council of Europe, be likely to impede the good operation of the organisation. In an area of this kind there is a place for distinctions based on the criterion of perfect command of a language, even if the use of this criterion has repercussions on the assignment and work of staff members in relation to their nationality. However, to prevent such a distinction giving rise to discrimination, it is essential on the one hand for it to be based on objective and reasonable justification to be assessed in relation to the aim and effects of the disputed measure (European Court of Human Rights, Belgian language cases, paragraph 10) and on the other that there should be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (ibid. see also Marckx case, paragraph 33).

The Board considers that for the Head of Division IV to request that a secretary of French mother tongue be assigned to his Division does not constitute discrimination, in view of the specific circumstances of the case.

**- Regarding the second allegation**

34. The appellant also holds that the disputed measure has a formal defect.

35. The decision to terminate the appellant's secondment was, she believes, based on the behavior which the administration ascribed to her, namely refusal to type an urgent text in Italian under the conditions set out above (cf. "The facts", paragraph 9).

36. In the circumstances which the Board considers to have been established, it is for the Board to determine what professional duties were incumbent on the appellant in the factual circumstances of the case in question.

In order to assess these duties, the Board considers it must take three things into account.

37. Firstly, it is clear from the appellant's conditions of employment, and in particular from the letter sent to her on 2 July 1976, that work in Italian could be asked of her. Although it is stated that this work may be asked of her by certain specified officials, the Board considers that this is not a general restriction, but an eventuality allowed for because of the linguistic needs of the Council of Europe where its typing staff are concerned.

38. It has been established that a text to be typed was given to the appellant on 8 May 1981. According to information given to the Board, this work should have been finished by 15 May or at least very soon after, since the text in question was an urgent document intended for the Committee of Ministers.

39. It is also noted that work given to a member of staff of the Council of Europe within a particular service is generally requested by the head of the service on behalf of the organisation.

40. The Board considers that a member of the staff of the Council of Europe must be prepared, in exceptional circumstances determined by the head of the service, to perform duties which may exceed normal working hours.

It does not consider itself obliged to examine to what extent this situation arose in the case in question, since the parties agree that there was no failure to observe this obligation.

41. Under these conditions, the disputed decision shows no formal defect.

**- Regarding the third allegation**

42. Where the lack of legal basis is concerned, the appellant claims that, even if she had failed in her duties – which she disputes –, the Secretary General should have decided to institute disciplinary proceedings.

The Board considers that in such cases the Secretary General has discretionary powers. Article 1 of Appendix III to the Staff Regulations (in force at the time when the events took place; Article 54 of the present Staff Regulations) in fact lays down that “any failure ... may lead to the institution of disciplinary proceedings ...”

It is also noted that Article 2, second sentence of the same appendix (Article 56, paragraph 1 of the present Staff Regulations) says of disciplinary proceedings that “These proceedings shall be instituted by the Secretary General ...”. In the case in question there were no disciplinary proceedings.

43. Under these conditions, and in view of the precarious nature of the appellant’s secondment to the Directorate of Legal Affairs, the Board considers that termination of secondment cannot in itself be considered a disciplinary measure, and that it did not adversely affect the appellant.

**- Regarding the fourth allegation**

44. Finally the appellant holds that the disputed measure amounts to a misuse of powers.

45. On this question the Board considers that a secondment may be terminated in the interests of the service without any disciplinary proceedings being instituted by the Secretary General, whether or not the latter has found a failure to comply with obligations of such a kind as to warrant him to institute such proceedings.

46. On the other hand it is for the administration to ensure that good working relations obtain within its services, and to take all necessary measures to restore calm (cf. E.C.C.J., case 124/78, H. List v. Commission of the European Communities, 12 July 1979, (1979) *E.C.R.*, p. 2499 s.).

The importance of ensuring full understanding between officials is a motive which, because of difficulty of apprehending causes and effects, has no disciplinary character, and constitutes one of the reasons which may require and justify assignment to another post (cf. I.L.O.A.T. decision No. 132, Tarrab v. I.L.O.).

47. It follows that the simple fact that disciplinary proceedings were not instituted does not prevent the Secretary General taking, in the interests of the service, a measure which he felt to be necessary.

48. The explanations given by the parties provide nothing from which the Board might conclude that the disputed measure was taken with any other *view* than to satisfy exclusively the interests of the service.

49. At the same time, and from the considerations set out above, it follows that the measure against which the appeal has been brought is not a disguised disciplinary measure.

50. Consequently no misuse of powers has been shown in the case in question.

For these reasons, the Appeals Board:

Declares the appeal unfounded;

That it should therefore be dismissed;

Decides that each party shall bear the costs incurred by it.

Done at Strasbourg at a public hearing on 21 April 1982, the French text of the decision being authentic.

The Secretary to the  
Appeals Board

The Chairman of the  
Appeals Board

M. de SALVIA

W.J. GANSHOF VAN DER MEERSCH