

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

COMMISSION DE RECOURS APPEALS BOARD

Appeals Nos. 100/1984 (Johan VAN LAMOEN and others v. Secretary General)

The Appeals Board, composed of:

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

after deliberating in private in Strasbourg on 25-29 November 1984 with the assistance of:

Mr Michele DE SALVIA, Secretary, and
Mrs Margaret KILLERBY, Deputy Secretary,

delivered the following decision in public.

PROCEEDINGS

1. The appellant lodged his appeal on 15 May 1984, and it was registered the same day under file 100/1984.
2. The supplementary pleadings were communicated to the Secretary General of the Council of Europe on 16 May 1984.
3. By letter of 16 May 1984, the Secretary General was asked to submit his observations on the appeal by 18 June 1984. These arrived on 18 June 1984 and were communicated to the appellant for a reply by 23 July 1984.
4. On 5 July 1984, the appellant's representative, Mr Vandersanden, a barrister at the Brussels Bar (Belgium), asked for the time allowed by the Chairman to be extended to 24 September 1984.

In a letter of 19 July 1984, the Chairman granted an extension until 23 August 1984.

5. On 7 August 1984, the appellant's representative forwarded his reply.
6. On 18 September 1984, the Board decided to call MM. Leuprecht and Marquardt and Mrs Dinsdale as witnesses.

7. By letter of 20 September 1984, the parties were informed that the hearing had been set down for 6 November 1984.

8. The public hearing took place at the Council of Europe on 6 November 1984, in the presence of Mr Van Lamoen, represented by Mr Vandersanden of the Brussels Bar and Mr G. Buquicchio, Head of Central Section of the Directorate of Legal Affairs, representing the Secretary General, and Miss G. Podestà, Principal Administrative Officer in the Secretary General's Private Office, assisted by Mr. Paul Dewaguet, Administrative assistant of the Directorate of Legal Affairs. The Board heard evidence from the forementioned witnesses.

FACTS

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

9. Mr Johan Van Lamoen, a Netherlands national, entered the Council of Europe's service on 1 March 1973 as a temporary assimilated A1 official, for the period from 1 March to 31 December 1973, which time he was assigned to the Directorate of Legal Affairs.

10. After passing a competitive examination, the appellant was appointed on 1 January 1974 to the Secretariat of the European Commission of Human Rights as an A2 administrative officer and was promoted to grade A3 on 1 July 1977.

11. On 11 October 1982, Mr Van Lamoen submitted his resignation, which took effect on 31 December 1982.

12. When subsequently he was not appointed to the position he had applied for in another international organisation, the appellant was recruited by the Council of Europe as a temporary official on the basis of seven monthly contracts, the first of which ran from 6 June 1983, and assigned to the Directorate of Human Rights just as Mrs Dinsdale was departing on maternity leave.

13. Mr Van Lamoen maintains that during preliminary discussions the Administration had promised him a temporary appointment at grade B6.

The Secretary General, however, states that the remuneration due to the appellant corresponded to grade B5, step 1, and that there was no question of giving him grade B6.

14. During the performance of the contracts, it emerged, according to the appellant, that his duties in the Directorate of Human Rights in fact amounted to replacing Mrs Dinsdale, an A3 administrative officer. Mr Van Lamoen accordingly asked for an increase in his remuneration, which according to him, should have corresponded to that of an assimilated A grade.

15. In a letter of 28 December 1983, the appellant made a complaint to the Secretary General asking him to arrange for the Administration to review the monthly contracts he had been offered.

16. The Secretary General rejected the complaint in a letter of 13 March 1984.

17. The present appeal is against the Administration's refusal to review the terms on which the organisation recruited the appellant.

SUBMISSIONS OF THE PARTIES

18. The appellant seeks to have the Secretary General's decisions set aside on the ground that these decisions had continuous damaging consequences. He is seeking compensation for the damage suffered, and he considers that expatriation and cost-of-living allowances are also due to him.

I The *appellant*'s submissions may be summarised as follows:

a. As to a violation of the principle of correspondence between grade and post

19. The appellant submits that there has been a breach of this general principle prevailing both in national civil services and in the international civil service. The principle entails that a given grade must attach to certain jobs on account of their nature, content and level, and that the duties and powers given to an official must consequently be those of the post corresponding to his grade in the hierarchy.

20. The principle is stated in Article 4, paragraph 1, of the Staff Regulations, which provides: "Each post shall carry a grade", and Article 5, paragraph 1, of the Regulations on appointments, which provides: "Any staff member may inform the Secretary General that he wishes to be assigned to another post in the same grade".

21. The appellant observes that the same rule of equivalence applies to temporary officials, in accordance with the provisions of Article 10 of the "Conditions of employment of other servants of the European Communities": "Article 5, paragraph 1, 2, 4 and Article 7 of the Staff Regulations, concerning the classification of posts in categories, services and grades and the assignment of officials to posts, shall apply by analogy. The grade and step at which temporary staff are engaged shall be stated in their contract (...)" (cf. EEC/Euratom/ECSC Council Regulation No. 259/68 of 29.2.1968).

22. In the performance of the contracts in issue, the violation of the principle of correspondence between grade and post consisted in a mismatch between the remuneration offered in the contracts of employment, which corresponded to grade B5 and both the grade allocated to the temporary occupied post and the duties the appellant carried out during this period which, far from being able to be regarded merely as extra work, in reality amounted to replacing an A3 official.

In the appellant's view, the Administration should therefore have given him a remuneration equivalent to that of the official being replaced.

23. In this context the appellant notes that in the European Communities the salaries of temporary A and B grade staff are identical with the salaries of permanent staff (Article 66 of the Staff Regulations of officials of the European Communities and Article 20 of the "Conditions of employment of other servants").

24. Moreover, the appellant considers that likewise no account was taken of his previous position and grade or of the professional experience he had acquired in the organisation.

b. As to a violation of the principle of non-discrimination

25. The appellant argues that the Administration disregarded the principle of non-discrimination by making in this regard an unjustified difference in treatment between permanent staff and temporary staff assigned to the same post.

26. While recognising that temporary staff are subject to a contractual system, he submits that there is discrimination between temporary staff carrying out duties attaching to grades B and C, whose remuneration is equivalent to that paid to permanent staff of the same grade, and temporary staff taking in the responsibilities of a permanent A-grade official but with remuneration corresponding to grade B5.

27. He also considers there is discrimination between a temporary B-grade official carrying out the duties of a permanent A-grade official on sick leave or maternity leave and a temporary assimilated A-grade official carrying out the same duties as a replacement for a permanent A-grade official on leave for personal reasons.

28. He thus considers that in the contractual field the Administration exercises its discretion in a discriminatory and arbitrary fashion.

29. In this connection the appellant refers to the European Social Charter, which provides in Article 4, paragraph 3: "... [the Contracting Parties undertake] to recognise the right of men and women workers equal pay for work of equal value".

c. Other grounds of appeal

30. The appellant mentions the inequality between the parties to the contract, which may render it unfair. When signing the contract, he was not really able to discuss remuneration, since, according to him, he was in a weaker position than the Administration. In this context he mentions case-law prohibiting unconscionable clauses in standard contracts.

31. As regards expatriation and cost-of-living allowances, the appellant considers that Article 6, paragraph 1, of the Regulations governing staff salaries and allowances, whereby no account is taken of previous service in other international organisations when determining whether an expatriation allowance is payable or not, also applies to the period during which he was employed by the Council of Europe as permanent official.

II. The *Secretary General*'s submission may be summarised as follows:

a. As to the jurisdiction of the Appeals Board

32. While stating that he does not dispute the Board's jurisdiction, the Secretary General nevertheless maintains that under Article 59, paragraph 1 and 60, paragraph 2, of the Staff Regulations the Board cannot review the validity of a regulation made by the Committee of Ministers. Such is the situation in present case, since the salary scale applicable to temporary staff is at issue. As it was approved by the Committee of Ministers, this scale has the status of a regulation.

b. As to the appellant's remuneration

33. The Secretary General points out that the appellant was recruited as a temporary official. His position was consequently governed by the provisions of his contract of employment and by the regulations covering this category of staff. Article 1, paragraphs 1 and 2, of the Staff Regulations provide: "These Regulations shall apply to any person who has been appointed in accordance with the conditions laid down in them to a permanent post in the Council of Europe (...) but shall not apply to temporary staff. The conditions of employment of temporary staff shall be laid down by the Secretary General in standard contracts, which may stipulate that certain provisions of these Regulations shall be applicable".

34. The appellant's remuneration is laid down in a scale drawn up within the Co-ordinated Organisations and approved by the Committee of Ministers. Hence the Secretary General is under an obligation to choose one of the rates provided for in the scale and cannot either change them or create new ones. He is thereby conforming to international case-law (see *Doranzo* case, OECE Decision No. 35 of 24.7.63). Given that the highest level of remuneration provided for in the scale corresponds to grade B5, the Secretary General could not give more adequate recognition to the appellant's professional abilities. The Secretary General accordingly considers that the argument that the Administration exploited the inequality between the contracting parties in this regard is unfounded.

c. As to a violation of the principle of correspondence between grade and post

35. The Secretary General submits that this is an ill-founded complaint since the appellant is subject only to the rules governing temporary staff, to the exclusion of those applicable to the permanent staff.

This applies notably to Article 4, paragraph 1, of the Staff Regulations and Article 5, paragraph 1, of the Regulations on appointments.

36. The Secretary General also observes, as regards the reference to the European Communities, that in the *Deshormes* case of 1.2.79 the Court of Justice defined a temporary official as an official whose post is provided for in the list of posts.

37. The Secretary General states that the category of temporary official in the European Communities corresponds to an official recruited to a specific temporary post at the Council of Europe; an "assimilated" contract can be offered him on condition that he has passed a competitive examination for recruitment as an administrative officer and that his duties are likely to last for at least 6 months. Remuneration will then be identical with that of a permanent official.

38. The principle of correspondence between grade and post does not apply in the case of staff on contract, since they do not occupy a post. They are recruited to assist and relieve a department temporarily experiencing difficulty. It is impossible that there should be any accurate pre-established list of duties from which grades analogous to those of permanent staff could be inferred.

39. The Secretary General further observes that the appellant did not fulfill the requirements of the internal regulations governing the recruitment of former officials of the

organisation. In the instant case, therefore, the appellant is not justified in claiming remuneration corresponding to the duties carried out by a permanent official.

40. The Secretary General points out that the appellant's position is not comparable to Mrs Dinsdale's either in fact or in law.

d. As to the claim for expatriation and "cost-of-living" allowance

41. The Secretary General points out that as a temporary official, the appellant cannot avail himself of the provisions of the Staff Regulations, including the expatriation or residence allowance.

42. Moreover, even if the Staff Regulations were applicable to the appellant, the Secretary General stresses that after his resignation the appellant continued to reside in Strasbourg at his former address. He was accordingly recruited locally by the Administration and could not qualify for this allowance.

43. As regards the "cost-of-living" allowance, the Secretary General points out that no such allowance exists in the regulations governing the Council of Europe's staff. However, the Administration does periodically adjust salaries to keep pace with the cost of living, such adjustment taking the form of back pay which the appellant received.

THE LAW

44. The appellant is appealing against the Secretary General's successive identical decisions to offer him temporary appointments as an administrative assistant on seven occasions.

45. Following all these decisions, the appellant is alleging two grounds of appeal:

a. that there has been a violation both of the general principle of correspondence between grade and post and of the principle of correspondence between grade and salary;

b. that there has been a violation of the principle of non-discrimination in that the decisions gave rise to unjustified difference in treatment between a permanent official and a temporary official to the same post.

46. Additionally, the appellant claims he is entitled to the expatriation and cost-of-living allowances provided for in respect of permanent staff.

He also seeks to be awarded fair compensation for the damage he has suffered.

a. As to the first disputed ground of appeal

47. It is not disputed that the impugned decisions were taken in accordance, formally speaking, with regulations and with Article 1, paragraph 2, of the Staff Regulations, which provides: "The conditions of employment of temporary staff shall be laid down by the Secretary General in standard contracts, which may stipulate that certain provisions of these Regulations shall be applicable".

48. It is the Appeals Board's duty to review any administrative acts which, in substance, adversely affect the appellant and to determine whether the decisions concerned were taken in accordance with the regulations and with the general principles of law binding on the legal order of international organizations (cf. ABCE 76/81 Pagani v. Secretary General, Decision of 21.4.82, paragraph 25).

49. The Board notes that one of the main differences between permanent staff and temporary staff lies in the fact that a permanent official carries out clearly defined duties which correspond to the description of the post he occupies, whereas a temporary official is, by definition, part of relief staff, whose qualifications and responsibilities are not necessarily the same as those of permanent officials.

50. No doubt the principles of correspondence between grade and post and of correspondence between grade and salary apply to all the permanent staff of the organisation (cf. Article 4, paragraph 1 and Article 41 of the Staff Regulations and Article 5, paragraph 1, of the Regulations of appointments and the Regulations governing staff salaries and allowances), but the question here is whether, as the appellant maintains, these principles apply also to temporary staff.

51. The appellant considers that it can be inferred from the Rules applicable to temporary staff of the European Communities that such principles exist in the international civil service, and he relies on Article 10 of the "Conditions of employment of other servants of the European Communities" (cf. EEC/Euratom/ECSC Council Regulation, No. 259/68 of 29.2.68), which provides: "Article 5, paragraphs 1, 2, 4 and article 7 of the Staff Regulations, concerning the classification of posts in categories, services and grades and the assignment of officials to posts, shall apply by analogy. The grade and step at which temporary staff are engaged shall be stated in their contract (...)".

52. These principles cannot be inferred, as regards temporary staff, from the rules contained in the Council of Europe's Staff Regulations, as these Regulations apply only to permanent staff, without prejudice to the provisions made applicable to temporary staff pursuant to Article 1, paragraph 2, of the Staff Regulations.

Nor can it be concluded from the rules governing the staff of the European Communities, where there are three categories of staff- permanent, staff, temporary staff and auxiliaries-, that these are general principles of the law of the international civil service and hence applicable to the Council of Europe.

53. As regards the Council of Europe's Staff Regulations, the Secretary General enjoys wide discretion whenever he considers it necessary to enlist the services of staff other than permanent staff – i. e. temporary staff or occasional staff – in order to achieve the organisation's objectives and more particularly to cope with extra work caused by the temporary absence of a member of the administrative staff, although he must avoid any misuse of power such that it becomes arbitrary. This would be the case, for example, if, when availing himself of the opportunity to offer temporary appointments, the Secretary General filled a vacant permanent post by continuously assigning one or more temporary officials to it for longer than was reasonable. In this connection, the Appeals Board cannot take into consideration retrospectively any regulations concerning the Staff Regulations which may have come into force after the date on which the appeal was lodged with the Board.

54. The fact that before his resignation, the appellant had satisfactorily occupied a permanent post of a given grade corresponding to a given level of remuneration does not *ipso facto* entitle him to be appointed as a temporary official at the same grade and salary to a department which the Secretary General deems it advisable to reinforce for a limited period in order to meet a specific need.

55. It follows from the foregoing that the appellant cannot, in support of his claim, rely on a breach by the Secretary General of the general principles of law prayed in aid in the first ground of appeal.

a. As to the second ground of appeal

56. The appellant alleges that the impugned decisions amounted to discrimination.

57. No doubt the rule of non-discrimination is one of the general principles of law binding on the Council of Europe's legal order (Article 14 of the European Convention on Human Rights).

58. As the European Court of Human Rights pointed out in the case relating to certain aspects of the laws on the use of languages in education in Belgium, Article 14 of the European Convention on Human Rights does not forbid all differences in treatment (ECHR, Belgian language cases, judgment of 23.7.68, Series A, Vol. 6, p. 34, paragraph 10).

59. The Commission also notes that, in the Van der Mussele case, the Court held that "Article 14 safeguards individuals placed in analogous situations" (ECHR, Van der Mussele case, judgment of 23.11.83, Series A, Vol. 70, paragraph 46). Where this is the case, the principle of equal treatment is violated if there is no objective, reasonable justification for the difference and if it is clearly shown that the means employed bear no reasonable proportion to the objective (Belgian language case, loc. cit.).

60. In the instant case, however, there are fundamental differences between permanent and temporary officials of the Council of Europe: differences with regard to status, eligibility for appointment, nature of duties and manner of their performance.

61. The Board observes that where it is called upon to determine whether, in a given case, there has been an unjustified difference in treatment, account has to be taken of the special nature of the international civil service and of the special needs of the organisation concerned (cf. ABCE 76/81, Pagani v. Secretary General, Decision of 21.4.82, paragraph 33).

62. Moreover, any extension of the principle of prohibiting discrimination such as would put permanent and temporary officials on an equal footing in the matters under consideration would be likely, in an international organisation like the Council of Europe, to impede the entire running of the organisation (*mutatis mutandis* ABCE 76/81 Pagani v. Secretary General, Decision of 21.4.82, paragraph 33).

63. It follows from the foregoing that the positions of permanent officials on the one hand and of temporary officials on the other are not analogous (Van der Mussele judgment, loc. cit.) and may give rise to differences in treatment which do not, however, amount to discriminatory treatment.

64. Such differences may legitimately be reflected in the remuneration of temporary staff.

65. The Board accordingly holds that the contracts offered by the Secretary General and accepted by the appellant did not violate the principle of non-discrimination.

66. As regards the appellant's claim that the inequality between the parties to the contract made it unfair, nothing justifies the claim that in accepting the contracts offered him the appellant was at a disadvantage compared with any candidate applying for a job in an international organisation in ordinary circumstances or that the Secretary General exerted pressure on him such as might affect the validity of the contracts or would have vitiated the appellant's consent.

67. The Board holds that the considerations set out above are equally valid as regards the appellant's subsidiary claim for compensation and allowances.

68. It follows from the foregoing that the decisions concerning the appellant disclose no breach either of the Staff Regulations or of the general principles of the international civil service.

For these reasons,

the Appeals Board:

Declares the appeal unfounded;

Dismisses it; and

Orders that each party shall bear its own costs.

Given in public in Strasbourg on 20 December 1984, the French text of the decision being authoritative.

The Secretary to the
Appeals Board

M. de SALVIA

The Chairman of the
Appeals Board

W.J. GANSHOF VAN DER MEERSCH