

Decision of the Appeals Board of 19 June 1990
Appeal No. 156/1989 (BARTON v. Secretary General)

The Appeals Board, consisting of:

Mr Gunnar LAGERGREN, Chairman
Sir Donald TEBBIT,
Mr Emanuel DIEZ, members

assisted by:

Mr Michele de SALVIA, Secretary
Ms Margaret KILLERBY, Deputy Secretary,

has delivered the following decision after due deliberation.

PROCEDURE

1. The appellant lodged her appeal on 30 August 1989. It was entered in the Appeals Board's register on 31 August 1989 under No. 156/1989.
2. The observations of the Secretary General were submitted to the Board on 30 October 1989.
3. The appellant's reply was submitted on 4 December 1989.
4. The public hearing took place at the Council of Europe on 29 January 1990, with the following appearing: the appellant, Ms C Barton, assisted by Ms M Nadal of the Strasbourg Bar and Mr M Weston, translator; and Mr G Buquicchio, Head of the Central Section of the Directorate of Legal Affairs, representing the Secretary General, assisted by Mr P Dewaguet, Administrative Officer, Directorate of Legal Affairs.

THE FACTS

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

5. The appellant, an official of the Council of Europe, currently holds a LT2 translator post in the English Translation Division.
6. On 6 December 1988 the Secretary General published Vacancy No. 124/88 LT3 translator post (No. 24217) in the English Translation Division, for which the appellant and three other officials applied.
7. On 7 February 1989 Ms Barton was informed by the Director of Administration and Finance that her application had been rejected, the Transfers and Promotions Panel having been unable to make a recommendation to promote her. None of the other three candidates were

appointed.

8. On 9 February 1989 the post in question was transferred to the French Translation Division and filled on 1 July 1989.

9. On 23 February 1989 Ms Barton asked to be informed of the reasons for this decision. The Head of Establishment Division replied by memorandum on 20 March 1989 as follows: "The Transfers and Promotions Panel examined the applications for the LT3 post, taking into account all relevant information, such as the professional qualifications and aptitude required for the post, together with the way the candidate performs her duties, which refers to both the quality and the quantity of work done. Having carried out this examination, the Panel took the view that the quantity of your work is not sufficient to warrant recommending your promotion to the grade corresponding to the vacancy".

10. On 3 April 1989 Ms Barton submitted an administrative complaint asking the Secretary General to set aside both the Panel's recommendation, and the decisions not to promote her and to transfer the post. She also asked that her complaint be referred to the Advisory Committee on Disputes.

11. On 7 April 1989 Ms Barton lodged an application with the Chairman of the Appeals Board for a stay of execution of the decision to transfer the post.

12. On 24 April 1989 the application for a stay of execution lodged by Ms Barton was refused on the ground of the Secretary General's clear undertaking to transfer the post back to the English Translation Division and to annul any appointment to the post, if the Appeals Board decided in favour of Ms Barton.

13. In its Opinion of 12 June 1989 (4/1989) the Advisory Committee on Disputes considered that the promotion procedure was unlawful, whereas the Secretary General's decision to transfer the post was not taken on irregular grounds and no manifest errors occurred in this regard.

14. On 3 July 1989 the Secretary General rejected Ms Barton's administrative complaint.

SUBMISSIONS OF THE PARTIES

The appellant's submissions may be summarised as follows:

15. The appellant is seeking the annulment of the decisions by the Secretary General not to promote her and to transfer the post to another division. She also asks the Board to declare that the procedure followed by the Panel is null and void and to state that she satisfies the conditions required for the post, to which she would therefore be appointed as of 7 February 1989.

As to a discrepancy between the requirements for the post and the vacancy notice

16. The appellant argues that insofar as the vacancy notice did not refer either explicitly or implicitly to any requirement of a minimum number of pages to be translated per year, that requirement could not be relied on after the event as a reason for not promoting her.

17. She added that in Opinion No. 4/1989 the Advisory Committee on Disputes considered that if the requirement concerning quantity of work was essential for promotion, it should have

appeared in the vacancy notice. This qualification was indeed essential in this case since “quantity of work was raised by the Panel to the status of a separate requirement for promotion”.

As to the use of the disputed criterion in the procedure followed

18. The appellant states that the concept of quantity of work could not be used as a criterion for promotion, since it has no official existence and is not generally applied in other international organisations, as is shown by a questionnaire to which the Council of the European Communities, the Office of the United Nations and the Court of Auditors of the European Communities replied.

19. The criterion of the amount of work done, in other words the number of pages translated per year, is a solely statistical indication and as such varies, since it was set for budgetary purposes; consequently, its vague nature means it cannot be used as a decisive factor in promotion.

20. The appellant considers that if this criterion were to be decisive it would be inappropriate for translators, whose work involves thought and is not purely executive. The quality of the work done, in particular, is essential since the meaning of individual words and whole texts must be reflected; page-count is only one factor among others, to be taken into consideration, as explained in Translation Staff Notice No. 282 of 24 March 1988 signed by Mr Ledur and Mr Oakley.

21. The appellant emphasises that the Advisory Committee on Disputes was able to examine the minutes of the Panel meeting. It emerges from this examination that, while her work was satisfactory from the point of view of quality, it did not meet the implicit requirements of quantity, compliance with which was assessed by reference to the unofficial approximate criterion, which appears to have varied, according to the persons interviewed, between 1,800 and 2,000 pages a year.

22. The appellant estimates that her page-count, taking account of specific circumstances (Greek text involving translation difficulties - post-natal fatigue - administrative duty), was, over a three-year period, in the region of 1,700 pages per year, very close to the average indicated.

As to discrimination

23. The appellant considers that the application in her case of a quantitative criterion constitutes a discriminatory measure since this was the first time it had been applied to a translator. In any case, translators had in the past been promoted with a page-count lower than her own.

As to the transfer of post No. 24217

24. Because the reasons why the post was not filled in the English translation Division were unlawful, it follows that the subsequent decision to transfer it to the French Translation Division was also unlawful; the transfer was moreover unreasonable and constituted a misuse of powers.

The Secretary General's submissions may be summarised as follows:

As to a discrepancy between the requirements for the post and the vacancy notice

25. The Secretary General considers that the requirement regarding quantity of work is implicit and did not therefore need to appear in the vacancy notice. She maintains that the requirements characterising the post which appear in the vacancy notice should be taken in conjunction with specific conditions pertaining to the candidate, coming within the category of “the way in which an official performs his duties”, which is assessed by the Secretary General.

26. The meaning of this concept is not standard, since requirements vary according to the post to be filled. This means that translators’ work is assessed from a qualitative and a quantitative point of view. There has therefore been no irregularity in the procedure, since the vacancy notice did not need to state this condition.

As to the use of the disputed criterion in the procedure followed

27. The Secretary General does not deny that the quantitative criterion was originally laid down, around 1965, for budgetary purposes. However, she claims that this figure is now used as a reference norm to assess the suitability of translators for promotion.

28. This practice is moreover applied by certain international organisations, including OECD, NATO, the Commission of the European Communities and the European Parliament.

29. The criterion of the quantity of work done is combined with that of the quality of work done in assessing the way a translator performs his duties.

30. The average used for the quantitative criterion, ie currently 2,000 pages per year, taking account of exceptional circumstances, is not a compulsory figure, but simply represents a reference norm enabling an objective assessment to be made of a translator’s work.

31. Ms Barton produced 1,551 pages in 1986, 1,698 in 1987 and 1,416 in 1988. These figures take account of periods of leave, etc, but take no account of translation difficulties. It can therefore only be concluded that the quantity of her work is not entirely satisfactory.

32. Lastly, with regard to the request that the appellant should be appointed to the post with effect from 7 February 1989, the Secretary General considers that the Board has no such power, which would involve it making a comparative assessment of the merits of all the candidates.

As to discrimination

33. Assessment of efficiency, based on the Staff Regulations, includes both qualitative and quantitative aspects, and this is indeed the way in which the procedure was applied with regard to the appellant.

34. The Secretary General emphasises that the quantitative criterion has always been taken into account for translators in all promotion procedures, as stated in a letter dated 5 June 1989, sent by the Head of Establishment Division to the Advisory Committee on Disputes, concerning the 13 promotions of translators between 1980 and 1988. In all cases this criterion was taken into account.

35. Moreover, the existence of two reports concerning quantity of work, dated 1966 and 1968, emanating from the Council of Europe, proves that said criterion was already in use by the Organisation at that time.

THE LAW

36. The appellant's appeal is directed against the Panel's recommendation and the subsequent decisions by the Secretary General not to promote her and to transfer the said post to another division.

37. The appellant put forward three submissions:

a. The procedures followed by the Panel and the Secretary General are null and void because of the imposition of a criterion not appearing in the vacancy notice.

b. The criterion of quantity of work taken into consideration is unofficial, vague and inappropriate.

c. There has been a breach of the principle of non-discrimination because of the different treatment of the appellant and of other translators promoted in the past.

The appellant asks the Board to hold that she satisfies the conditions for the post and that she be appointed to the post with effect from 7 February 1989.

The Secretary General maintains that no unlawfulness can be made out in this case.

With regard to the subject matter of the appeal

38. The Secretary General has a wide-ranging discretionary power in matters of staff management. Within the scope of this power, he is qualified to know and assess the operational needs of the Organisation.

39. The existence of the discretionary power of the authority is borne out by the case-law of international administrative bodies, which recognises that the authority has a wide measure of discretion to assess the operational needs of the Organisation (see, lastly, Bartsch and Peukert decision, 30 March 1987, para. 51 with references).

40. This discretionary power is, however, subject to the rules in force in the Organisation. It is exercised without prejudice to the rights which servants enjoy under their Staff Regulations. This is an essential rule which safeguards the rights and interests of the persons who form the administrative staff of the Organisation.

41. In the event of a dispute, the international adjudicating body clearly cannot substitute its own judgment for that of the Administration. Nevertheless, it has the duty to ascertain whether the disputed decision was taken in accordance with the regulations and with the general principles of law which must prevail in the legal system of international organisations (ABCE n°8/1972, G.ARTZET v. Secretary General, Digest, p. 47).

42. Indeed, even the broad discretionary authority of the Administration must always be exercised lawfully. This is why it is for the court hearing an appeal against a decision taken by virtue of this discretionary power to determine not only whether that decision has been taken by a competent authority and whether it is in regular form, but also whether the correct procedure has been followed, and with regard to the legality of the decision under the Organisation's own rules, whether the Administration's decision took account of all the essential facts, whether conclusions which are manifestly wrong have been drawn from the documents in the file, or finally, whether there has been a misuse of authority (Bartsch and Peukert decision, para. 53).

The first and second submissions taken together

43. The Board notes that Vacancy Notice No. 124/88 contains no requirement relating to quantity of work among the lists of conditions and qualifications required.
44. According the Advisory Committee on Disputes (Opinion 4/1989), an examination of the minutes of the Panel, to which the Board has had access, shows that the requirement concerning quantity of work was raised by the Panel to the status of a separate requirement for promotion, and that it should therefore have appeared in the vacancy notice.
45. The Secretary General argues that the criterion of quantity of work done did not need to appear in the vacancy notice since it enters into her assessment of the way in which an official performs his duties, which where translators are concerned includes examination of their page count.
46. It emerges both from the memorandum of 20 March 1989 from the Head of Establishment Division and from the minutes of the Panel meeting that the decision not to recommend that the appellant be promoted was based on the judgment that the amount of her work was insufficient (Opinion 4/1989).
47. The Advisory Committee on Disputes has declared, in this context, that, as part of a promotion procedure, the Administration was certainly entitled to take other factors, such as quantity of work, into consideration in addition to the qualifications listed in the vacancy notice, so as to assess the way in which the official performed his duties and also in order to decide on whether promotion was appropriate.
48. The Board shares this opinion. There is therefore no reason not to attach to this opinion the same value recognised by the Advisory Committee on Disputes, even if the requirement concerning quantity of work becomes, in the final analysis, decisive with regard to promotion.
49. Under the terms of the Staff Regulations, the Secretary General is already required to ensure that “recruitment should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity” (Article 12, para. 1). The requirement concerning quantity of work is therefore implicitly included along with the specific conditions laid down in the vacancy notice.
50. Moreover, the Court of Justice of the European Communities holds that, where promotion is concerned, factors other than those listed in the vacancy notice, and in particular the general quality of the work performed, may be taken into account (CJEC, Case 280/81 Hoffmann, ECR 889). The quantity of work done is a factor of precisely this type.
51. The Board also notes the existence of Council of Europe minutes dating from 1966 and 1968, concerning the quantity of translators’ work, the Translation Staff Notice of 24 March 1988 signed by Mr Ledur and Mr Oakley, and the document prepared by the Head of Establishment Division on 5 June 1989 for the Advisory Committee on Disputes, referring to the 13 promotions of translators occurring between 1980 and 1988.

These documents clearly show that the quantitative criterion is not new. The appellant must have been aware that it was normal practice in the Council of Europe to take into account a figure representing page-count, and that this element entered into the Secretary General’s assessment.

52. In the light of these considerations, the Board is of the opinion that it would have been preferable, or even useful, to refer to the requirement of an adequate quantity of work in the vacancy notice. Nevertheless, the failure to refer to this requirement did not render either unreasonable or unlawful the importance accorded in this case to quantitative performance, as a normal element which the Secretary General may reasonably take into account in assessing candidates.

53. As to the vague nature of the reference criterion, it is not a strict condition, but an average page-count which the appellant failed to reach.

This average is in the region of 1,800 to 2,000 pages per year; the appellant's average is 1,700.

54. The Board consequently considers that as the Secretary General did not exceed the reasonable limits of her discretionary power, it is not for the Board to check upon the appropriateness of her decision, substituting its judgment for that of the Secretary General.

The third submission

55. With regard to the appellant's allegation that other translators had been promoted in the past with a lower average than hers, the Board notes that the check dated 5 June 1989 carried out by the Head of Establishment Division concerning the 13 promotions of translators occurring between 1980 and 1988, shows that: "... in all cases it is expressly confirmed by the Head of Division in question that the person concerned fulfilled all the conditions for promotion. Moreover, in a number of cases, emphasis is laid on the 'highly satisfactory quantity of work' ('très bon rendement'), 'outstanding quantity of work' ('excellent rendement') or 'quantity of work warranting promotion' ('rendement qui mérite la promotion'). Sometimes the term 'very efficient' is used, as is the expression 'fully satisfactory from all points of view'."

56. Under these conditions and having examined all aspects of the case, the Board considers that there are no grounds to conclude that the Secretary General's decisions of 7 February and 3 July 1989 breached the principle of non-discrimination. Moreover, promotion criteria may vary from one year to another. Consequently, the appellant cannot establish that she was discriminated against in this respect.

57. The Board nevertheless considers that the appellant should have been warned more clearly of the possible repercussions of an insufficient quantity of work. This information should have been given in the interests of both the service and the appellant.

58. With regard to the appellant's request for the Board to state that she satisfied the recruitment conditions and that she be appointed to the post with effect from 7 February 1989, the Board considers that the above comments render unnecessary a separate decision on this question.

59. The appellant has also failed to convince the Board that the procedure followed by the Panel was irregular, and therefore null and void, or that the transfer of the post in question was unreasonable or ultra-vires.

60. The Board therefore considers that the procedure followed is not defective and that the Secretary General's decisions of 7 and 9 February and 3 July 1989 are not unlawful.

For these reasons,

The Appeals Board:

Declares the appeal ill-founded

Rejects it,

Decides that each party shall bear its own costs;

Done and decided at Strasbourg, the French text being authentic.

The Secretary of the
Appeals Board

The Chairman of the
Appeals Board

M. de SALVIA

G. LAGERGREN

Read by Mr. Emmanuel DIEZ at a public hearing on 19 June 1990

E. DIEZ