

Decision of the Appeals Board of 26 June 1992
Appeal No. 166/1990 - T. BEYGO (I) v. Secretary General

The Appeals Board, composed of:

Mr Carlo RUSSO, Chairman,
Sir Donald TEBBIT, member and,
Mr Michael MELLETT, substitute member

assisted by:

Ms Margaret KILLERBY, Deputy Secretary and,
Mr Christos GIAKOUMOPOULOS, Deputy to the Secretary

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant lodged his appeal on 21 November 1990. It was registered on the same day in the register of the Appeals Board under number 166/1990.
2. The observations of the Secretary General were submitted to the Board on 30 August 1991.
3. The appellant's reply was submitted to the Secretary General on 2 January 1992.
4. The public hearing took place in the courtroom of the European Court of Human Rights in Strasbourg on 24 April 1992 in the presence of the appellant, Mr T. BEYGO, who was represented by Professor K. VASAK. The Secretary General was represented by Mr E. HARREMOES, Director of Legal Affairs, assisted by Mr P. DEWAGUET, Administrative Officer in the Directorate of Legal Affairs.

THE FACTS

5. The appellant was recruited as a permanent official of the Council of Europe on 1 January 1972 in grade A2 and worked in the Directorate of Human Rights. He was transferred to the Directorate of Social and Economic Affairs on 1 May 1983. He was transferred to the Secretariat of the European Commission of Human Rights on 1 January 1988.
6. Following four unfavourable reports concerning the work of the appellant by the Secretary of the European Commission of Human Rights (dated 20 July 1988, 18 November 1988, 1 March 1989, and 26 October 1989), the Secretary General decided on 21 May 1990, in

accordance with Article 23 paragraph 3 (b)(iii) of the Staff Regulations, to ask the appellant to remedy his shortcomings during a six-month probationary period (memorandum by the Head of Establishment Division dated 21 May 1990). Failure by the appellant to do so could lead to the termination of the contract of the appellant. For this purpose he was assigned on 22 May 1990 to the Directorate of Communication, Division of publications and documents, Central Section (Decision no. 1655 of 23 May 1990).

7. On 20 July 1990 the appellant submitted to the Secretary General an administrative complaint against the decision requiring him to undergo a probationary period under Article 23 and against Decision no. 1655.

8. In absence of a reply from the Secretary General the appellant lodged the present appeal against the implied decision rejecting his complaint.

9. On 25 February 1991, in view of the satisfactory reports made during the probationary period of the appellant in his new post, the Secretary General decided not to continue the procedure under Article 23.

10. In a memorandum dated 19 March 1991 the appellant asked whether the administration had decided to terminate the procedure as it had recognised that the decision requiring him to undergo a probationary period under Article 23 was ill-founded.

11. In a memorandum dated 28 March 1991, the Head of Establishment Division indicated that the decision not to continue the procedure did not cast doubts on the merits of the decision to subject the appellant to a probationary period under Article 23.

THE SUBMISSIONS OF THE PARTIES

Submissions of the appellant

12. In his appeal the appellant requested the Board to annul the decisions of 21 and 23 May 1990 to transfer him and place him on a six-month probationary period under Article 23 of the Staff Regulations. He considered that these decisions amounted to a disguised disciplinary sanction. He submitted that the decisions were illegal on factual grounds and legally defective.

13. He also requested the Board to rule whether the Secretary General's decision of 25 February 1991 not to continue the procedure initiated in respect of him under Article 23 is to be interpreted as meaning "the suspension" or "the termination" of the procedure to end his contract on the grounds of his manifest unsuitability or unsatisfactory work.

(i) illegality on factual grounds

14. The appellant contested the assessment of his work and the decisions of the Secretary General of 21 and 23 May 1990 which he claimed were not factually founded as they were biased and based on incorrect grounds.

15. He informed the Board that his national and international training and his career before

entering the Council had equipped him well for working in the Council and made him suitable for performing legal duties in the Secretariat of the Commission of Human Rights.

16. In addition he also informed the Board that he had been appointed to a permanent post grade A2 in the Council on 1 January 1972 after having worked as an A2 grade official on a temporary basis from 10 September 1971. Later he had been promoted to A3 in 1974. He submitted that he had, until his transfer to the Secretariat of the Commission, given 16 years of satisfactory service to the Council of Europe. Furthermore after leaving the Commission and throughout his six-month probationary period in the Directorate of Information he had performed the tasks assigned to him to the satisfaction of his superiors.

17. He submitted that the assessments made on his work had not taken account of his justified absences and of the different type of work he had carried out for the Commission. While working there he had responsibilities for individual petitions lodged against his country, Turkey. In this capacity he had carried out numerous and important tasks.

18. He considered that the unfavourable reports made on his work in the Commission were prompted by biased motives arising from political considerations.

19. The appellant also said that the Secretary General should not have taken a decision to subject him to so serious a procedure as that under Article 23 which could lead to the termination of his contract on the basis of reasons formulated more than a year prior to her decision.

(ii) legal defect

20. The appellant submitted that the decisions to transfer him and place him on a six-month probationary period were legally defective as they were based on information which had been withheld from him. He said that, where a measure of such gravity for an official as his possible dismissal at the end of an already pending procedure is concerned, he should have been informed of all details of the case against him. However he had been deprived of his right to be informed, to be heard and to contest effectively and opportunely the information against him before the procedure relating to probation had been initiated.

21. In particular the appellant told the Board that he had not been informed of the following matters:

- two of the four reports made on his work by the Secretary of the European Commission of Human Rights: it was only owing to the decision of 21 May 1990 submitting him to a probationary period under Article 23 that he had learn of the existence of two additional reports (1 March 1989 and 26 October 1989). He considered that the failure to give him in particular the last of the four reports (ie: the report dated 26 October 1989) deprived him of the right to contest in a proper manner the decisions concerning him,
- the “arrangement” according to which his situation in the Secretariat of the Commission would be reviewed at the end of September 1988,

- that the provisions of Article 23 of the Staff Regulations relating to probationary periods were liable to be applied to him.

22. Furthermore the appellant also considered that most of the international organisations to which the Council of Europe's member States belong almost invariably afford much more protection of the interests of an official holding a permanent contract than Article 23 of the Staff Regulations of the Council of Europe.

Submissions of the Secretary General

23. The Secretary General submitted that the decisions had been based on factual grounds and contained no legal defect.

24. The Secretary General also submitted that the suspension of the procedure initiated under Article 23 did not invalidate the unfavourable assessments made in respect of the appellant nor the merits of the decision to submit him to a termination procedure which included under Article 23 a probationary period. The suspension of the termination procedure was motivated solely by the fact that the services rendered by the appellant during the probationary period in another service were satisfactory, so that one of the conditions laid down in this Article as a justification for termination of his appointment was not met.

(i) illegality on factual grounds

25. The Secretary General indicated that, although she did not contest the value of the training and career of the appellant before his recruitment to the Council, he had, on several occasions in the past before his transfer to the Secretariat of the Commission, shown shortcomings in other tasks he had been assigned in the Directorate of Human Rights and in the Directorate of Social and Economic Affairs. Indeed the appellant had already on a previous occasion in 1984 been subjected to a probationary period of six months.

26. The Secretary General submitted that, from the very first months following his assignment to the Secretariat of the European Commission of Human Rights, the appellant had proved incapable of discharging the tasks entrusted to him. Both the quality of his work and the quantitative output were markedly insufficient and had led to negative appraisals by the Secretary of the Commission.

27. The appellant's different superiors had, on many occasions, drawn his attention to the unsatisfactory nature of his work and the need to improve it as rapidly as possible. However the explanations and assurances provided by the appellant led to nothing. The appellant's absences did not account for the inadequacy of his output when assessed in proportion to the total of his periods of work.

28. The Secretary General further denied that the reports made on his work were prompted by biased motives arising from political considerations. These allegations were no more than pure conjecture and gratuitous insinuations, without foundation and entirely unsupported by any evidence.

29. As regards the delay between the time of the unfavourable reports concerning the appellant and the decision submitting him to a probationary period, the Secretary General indicated that she had not wished to begin this procedure until he had returned from sick leave. Owing to the appellant's lengthy absence on sick leave it had not been possible to start the probationary period at an earlier date.

(ii) legal defect

30. The Secretary General indicated that the appellant had been kept fully informed of his position and had been given numerous opportunities to state his views on the assessments made concerning him. He had been heard on many occasions, both by his immediate superiors and by representatives of the administration. As regards the reports made on the appellant's work, the Secretary General admitted that a copy of one report had not been sent to the appellant. However the Secretary General considered that this report contained no new elements as it was merely an overall recapitulation of the situation and referred essentially to the earlier assessments which it merely confirmed. Information had not been concealed from the appellant.

31. The Secretary General indicated that it was in view of shortcomings in the course of his previous work that the appellant had been transferred to the Secretariat of the Commission on the understanding that the situation would be reviewed towards the end of September 1988 in the light of his work.

32. The Secretary General submitted that the decision to initiate the probationary period under Article 23 had been taken after she had received full information and after the appellant had been given the opportunity to be heard.

33. Furthermore the Secretary General considered that, as the appellant had already on 24 September 1984 been submitted to a probationary period, he was fully aware that the provisions of the Staff Regulations relating to probationary periods could be applied to him.

34. The Secretary General submitted that Article 23 guaranteed the rights of staff members subjected to a termination of contract procedure, since it precluded any risk of arbitrary conduct on the part of the administrative authority. This Article conferred the benefit of a probationary period which must precede any decision to effect termination. The procedure gave officials an opportunity to state their case and also protected their rights and interests.

THE LAW

35. The appellant requests the Appeals Board to declare that the Secretary General's decisions of 21 and 23 May 1990 asking him to remedy his shortcomings during a six-month probationary period and transferring him to another post are null and void as being factually unfounded and legally defective and requests that the damage sustained by him should be repaired in an equitable manner.

36. He also requests the Board to rule whether the decision of the Secretary General not to continue the probation procedure is to be interpreted as meaning "the suspension" or "the

termination” of that procedure under Article 23 of the Staff Regulations.

37. The Secretary General submits that the appeal lodged by the appellant is ill founded as he has not established any breach of the provisions of the Staff Regulations in his case and consequently has no valid claim to have suffered damage of any kind.

38. The Secretary General submits that this decision terminated the procedure. However she considers that the decision does not cast doubt on the merits of the decision to submit the appellant to a probationary procedure.

39. The Board has in previous cases stated that “the Secretary General has a wide-ranging discretionary power in matters of staff management ...this discretionary power is, however, subject to the rules in force in the Organisation”. (ABCE cases nos. 115, 116 and 117/1985, Peukert and others v. Secretary General, paragraphs 97 and 98). “In performing its function as a judicial body, the Board is obliged also to take account of the general principles of law which must prevail in the legal systems of international organisations”. (ABCE case no. 8/1972, Artzet v. Secretary General, paragraph 23).

40. The Board must also determine whether a 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. (see ABCE Appeal no. 76/1981, Pagani v. Secretary General, paragraph 26).

41. Paragraph 3 (b)(iii) of Article 23 of the Staff Regulations provides:

“3. A contract for either a fixed or an indefinite period may be terminated at the end of a calendar month by:

...

b. the Secretary General, on one of the following grounds:

...

iii. - manifest unsuitability or unsatisfactory work on the part of the staff member;

- termination for either of these reasons may not occur unless the staff member has been formally asked to remedy his shortcomings during a six-month probationary period and the probationary period has not had any positive results;

- the decision concerning termination may be taken only after examination of the case by an **ad hoc** group comprising the Chairman of the Disciplinary Board and two staff members chosen by the procedure laid down for the Disciplinary Board; the staff member shall be given a hearing and may be assisted by a person of his choice; the ad hoc group shall formulate a reasoned opinion for the Secretary General;

- the decision to terminate the contract shall carry prior notice of at least three months.”

i) as regards the alleged illegality on factual grounds

42. The Board considers that it is incumbent on the administrative authorities of the Council of Europe to ensure the proper operation of the Organisation’s services and make the necessary

arrangements for that purpose.

43. In the present case serious shortcomings were repeatedly noted by the appellant's different superiors in the European Commission of Human Rights over a long period of time. The appellant, although informed of these shortcomings, did not improve his work.

44. The Board does not accept the allegations made by the appellant that the unfavourable reports on his work in the Commission were prompted by biased motives arising from political considerations. It recalls that where such allegations are made in an appeal it is for the appellant to present supporting evidence that the challenged decision was based upon prejudice (UNAT, judgment No. 312, Roberts v. Secretary General of the United Nations; ABCE, decision of 10 November 1986, Fuchs v. Secretary General). In the present case, the Board notes that the appellant's allegations do not rely on any evidence what so ever and that the appellant was the subject of many unfavourable reports during a number of years of his career at the Council and in different services. Furthermore the appellant had already been placed on a six-month probationary period in 1984.

ii) as regards the alleged legal defect

45. The Board recognises that staff members subjected to a termination procedure should be protected against any risk of arbitrary conduct on the part of the administrative authority.

46. The Board considers that staff members are given this protection as an appointment can be terminated under Article 23 of the Staff Regulations only if:

- a six-month probationary period has been served during which the work performed by the official concerned has been unsatisfactory,
- there has been a formulation of a reasoned opinion by an ad hoc group,
- at least three months' notice has been given.

47. Therefore a probationary period, which must precede any decision to effect termination, gives the official the possibility to improve his professional performance and ensure the continuance of his employment.

48. The complaints of the appellant relate to the period preceding the decision to place him on a probationary period. Before taking such a decision the Secretary General must 1) consider all the facts, 2) inform the staff member that his work is unsatisfactory, and 3) give him a reasonable opportunity to improve his performance. However the Secretary General should not allow unsatisfactory work to continue for too long a period before placing a staff member on probation.

49. In this case the Board considers that the Secretary General had very carefully carried out these steps before placing the appellant on a probationary period for a second time. The appellant had been given numerous opportunities, not only to be informed about the criticisms made about his work but also to state his views on these assessments.

50. As regards the request of the appellant to the Board to rule whether the Secretary General's decision of 25 February 1991 not to continue the procedure initiated in respect of him is to be interpreted as meaning the "suspension" of the procedure or the "termination" of the procedure, the Board considers that this particular procedure has come to an end. Indeed, such procedure ends after a staff member has completed satisfactorily a six-month probationary period or from the date the Secretary General decides not to continue it. However nothing would prevent the Secretary General from starting a new procedure in respect of a staff member whose work at a later stage once again became unsatisfactory.

For these reasons, The Appeals Board;

Declares the appeal to be unfounded;

Dismisses it; and

Orders that each party shall bear its own costs.

Delivered in Strasbourg, on 26 June 1992, the English text of the decision being authentic.

The Deputy Secretary of the
Appeals Board

M. KILLERBY

The Chairman of the
Appeals Board

C. RUSSO

Read out in public hearing by Sir Donald TEBBIT on 26 June 1992

Sir Donald TEBBIT