

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 173/1993 (H. LERVIK v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Mr. Carlo RUSSO, President
Mr. Kåre HAUGE, and
Mr. Alan H. GREY, judges,

assisted by:

Mr. Sergio SANSOTTA, Registrar, and
Mrs. Claudia WESTERDIEK, Deputy Registrar,

has given the following decision after due deliberation.

THE PROCEEDINGS

1. The appellant submitted his appeal on 28 October 1993, and it was registered on that day under No. 173/1993. He submitted a supplementary memorial on 17 November 1993.
2. The Secretary General submitted her observations on 10 december 1993.
3. The appellant replied on 11 January 1994.
4. The public hearing was held in the courtroom of the European Court of Human Rights in Strasbourg on 24 March 1994. The appellant, Mr. H. LERVIK, was assisted by Professor D. RUZIE; the Secretary General was represented by Mr. E. HARREMOES, Director of Legal Affairs, assisted by Mr. J. POLAKIEWICZ, Administrative officer in the Directorate of Legal Affairs.
5. In Resolution (94) 11 of 5 April 1994, the Committee of Ministers decided that the Appeals Board would henceforth be known as the Administrative Tribunal of the Council of Europe.

THE FACTS

6. The appellant joined the Council of Europe in 1978. He is a permanent staff member in grade A4, to which he was promoted in 1992.

7. On 4 May 1993 the appellant, then serving in the Office of the Clerk of the Parliamentary Assembly of the Council of Europe, applied for the post (grade A5) of Head of Higher Education and Research Division in the Directorate of Education, Culture and Sport (DECS).

Vacancy Notice No. 63/93 of 16 April 1993 gave 10 May 1993 as the last date for applications.

8. On 11 May 1993 the Head of Human Resources Division acknowledged receipt of the appellant's application. In his memorandum he stated, *inter alia*:

“Before the meeting of the Transfers and Promotions Panel responsible for considering the applications, the Director or Head of the Department to which the appointment is to be made will interview the candidates. He may also delegate this task to the head of division concerned.

The purpose of this interview is to give candidates the opportunity to obtain further information about the duties attaching to the post, and to enable the director or head of department to assess the candidates' qualifications with more precision. Clearly, the director or head of department must refrain on this occasion from indicating preferences, making promises or indeed proffering any discouraging comments.

To facilitate this procedure, you are asked to be available to the director/head of department responsible for the post in question and to inform him of any periods during which you will be absent in the weeks following the date for submission of applications specified in the vacancy notice.

I would ask you to note that, if you decide to withdraw your application at a later date, you must inform us as soon as possible. Once the Transfers and Promotions Panel has met, candidates for posts may no longer withdraw their applications.”

This interview is in fact provided for in Article 19 para. 4 of Rule No. 620 of 29 November 1982, establishing the Rules of Procedure of the Appointments Board.

9. Office commitments prevented the Director of the DECS from seeing the candidates before 2 June 1993, when his secretary contacted all of them, except the appellant, to arrange a meeting that afternoon. The appellant had in fact indicated, a few days after the deadline for applications, that he would be absent until 3 June, and again from 7 June, on official mission in Warsaw.

10. The Director of the DECS was himself absent on official mission on 3 and 4 June, and accordingly instructed his secretary to contact the appellant's secretary in order to suggest him an interview by telephone. The person who answered informed the secretary that the appellant would

be in Strasbourg on 7 June.

This information proved incorrect, and the appellant's secretary, who was to join him on the mission, undertook to contact him in Warsaw and ask him to get in touch with the Director of the DECS on that day, or on the morning of 8 June.

11. On the morning of 8 June, the appellant sent to the Director of the DECS the following fax:

“I learnt on my way to Poland that you would like to hold an interview [...] before 9 June 1993, since a meeting of the Promotion Jury is scheduled for this date. I informed your secretary on my availability in Strasbourg on the same day I was notified of the forthcoming interview by the Head of Personnel. I regret that a date could not be found when I was in Strasbourg, but I do hope that an interview can be arranged after the 10th of June and that the Jury may defer its final decision until a later date.”

12. On the afternoon of that day, at about 4.30, the appellant rang the Director of the DECS, who had been trying to contact him. The Deputy Director of the DECS was in the Director's office during the conversation, which lasted approximately five minutes.

The Director of the DECS told the appellant that he intended to use this telephone conversation to interview him, as provided for in Article 19 of Rule No. 620.

13. The appellant objected to the conversation's being treated as an interview and pointed out, firstly, that he was involved in a meeting and had only a few minutes to spare, and, secondly, that he had left behind in Strasbourg the personal notes and documents which he had prepared for the interview.

14. The Director of the DECS accepts what the appellant says, but states that the latter eventually agreed to the interview.

15. The Promotions Panel met on 9 June. In a memorandum dated 25 June 1993, the Secretary of the Transfers and Promotions Panel informed the appellant that the Secretary General had decided to appoint Mrs. B.

16. On 29 June 1993 the appellant lodged an administrative complaint. This was rejected on 24 September 1993.

At the appellant's request, his complaint had been referred to the Advisory Committee on Disputes which decided, in the opinion which it gave on 9 September 1993, that the telephone interview could not satisfy Article 10 para. 4 and that the irregularity which had occurred in this case justified cancelling the procedure.

THE LAW

17. The appellant has appealed against the Secretary General's decision to appoint Mrs. B. to the

post of Head of Division advertised in Vacancy Notice No. 63/93.

He considers that the procedure followed in making the appointment was unlawful, and produces three arguments in support of this claim.

18. Firstly, the procedure complained of contravened Article 19 para. 4 of Rule No. 620, establishing the Rules of Procedure of the Appointments Board, since the appellant did not have the interview, provided for in that Article, with the Director of the DECS before the Promotions Panel's meeting.

The appellant does not deny speaking to the Director by telephone, but denies that he agreed to the conversation's being regarded as the interview provided for in Article 19: he states that at the outset the Director informed him that he intended to conduct the interview by telephone, and that he himself expressed his reservations. He also informed the Director of the reasons for his position and continued the conversation, lasting not more than five minutes, for reasons of courtesy only.

19. Secondly, the appellant maintains that the procedure complained of violated general principles of law. The brevity of the communication violated the right to a hearing, and the fact that he was the only candidate "interviewed" by telephone made him the victim of discrimination.

20. Thirdly, the appellant complains that no one informed the Promotions Panel that he had been the only candidate interviewed by telephone, and that he had expressed serious reservations in this respect. Moreover, the Panel itself was never told of his request that its meeting be postponed.

21. The Secretary General argues that the appeal is unfounded. She considers that recourse to a telephone interview was fully justified by the practical difficulties involved in arranging a direct meeting between the appellant and the Director of the DECS, and that thus a conversation fully satisfying the requirements of Article 19 para. 4 actually took place. She adds that the appellant agreed, at least implicitly, to this procedure.

The Secretary General further argues that, even if the Administrative Tribunal/Appeals Board were to find that there had been a procedural irregularity, this would not justify rescinding Mrs. B.'s appointment. In fact, any such irregularity would be merely technical, and would not cause the appellant any real damage. Repeating the promotions procedure would be a disproportionate and inappropriate response. Finally, the appellant's chances of promotion were in no way diminished by his not having had an interview face to face with the Director of the DECS.

22. As regards the claim that the procedure violated general principles of law and was therefore unlawful, the Secretary General considers that there can be no question of discrimination, since the exceptional circumstances which led the Director of the DECS to interview the appellant by telephone, rather than face to face, fully justified his being the only candidate interviewed in this way.

The Secretary General also doubts whether the right to a hearing exists as a general principle of law otherwise than in cases where the decisions of the Administration are in danger of harming the legitimate rights or interests of staff.

23. With regard to the appellant's third argument, the Secretary General believes that his allegations are based on an erroneous interpretation of the facts.

24. The Tribunal notes, first of all, that both the parties agree that their telephone conversation lasted approximately five minutes and that, at the start of this conversation, the Director of the DECS expressed his wish to hold the interview provided for in Article 19 para. 4 while the appellant expressed reservations.

Their account of the events differ, however, as to the question whether the appellant finally agreed, in spite of these reservations, to be interviewed by telephone.

Without formally requesting the Tribunal to interview the Director and Deputy Director of the DECS, the Secretary General indicates that it may, if it wishes, take evidence from them on the content of the telephone conversation.

The appellant has indicated that, should the Tribunal decide to order this measure, he would ask it also to hear Mrs. I.L. GJØRV, former Chairwoman of the Committee on Agriculture of the Parliamentary Assembly of the Council of Europe, who was beside him during the telephone conversation.

25. The Tribunal also notes that, referring to practice at the Council of Europe concerning the interviews provided for in Article 19 para. 4 the Secretary General states that such interviews are conducted by telephone when exceptional circumstances make this necessary; she gives the example of staff serving in cities other than Strasbourg or absent on prolonged leave, sick leave or official business, when they consent to this arrangement.

26. The Tribunal notes that the principal point it must decide is whether the telephone conversation conducted on 8 June 1993 can be regarded as an interview within the meaning of Article 19 para. 4. In this connection, it makes the following points.

First of all, the Tribunal notes that the question it has to decide is not whether telephone conversations may generally be substituted for the interview provided for in Article 19, but whether the procedure followed in this case was in any sense irregular.

27. This being so, it finds that the Secretary General has failed to show that there were exceptional circumstances justifying recourse to this exceptional procedure of an interview by telephone. In her memorial to the Tribunal of 10 December 1993, she refers, in a general sense, to service reasons during the period prior to 3 June 1993. At the hearing on 24 March 1994, she said that the fact that other candidates were absent, and that there were several long weekends in May - particularly the holidays from 20 to 23 May and from 29 to 31 May - made it difficult to organise interviews during the second half of that month. As for the early days of June, she refers to the absences on official mission of either the Director of the DECS or the appellant.

In the Tribunal's view, none of these circumstances referred to by the Secretary General was unforeseeable to an extent as to create a situation which could be described as exceptional. Nor can

the absences from Strasbourg of the Director of the DECS and the appellant be described as prolonged. Moreover, the appellant had immediately informed the Director of the dates on which he would be absent on official mission. It was up to the Secretary General to organise the interview procedure in a way which served the interests of the Organisation without harming the interests of individual candidates.

28. The Secretary General has also failed to show that Mr. Lervik agreed to forego an interview face to face. She says indeed that he did so implicitly.

The Tribunal notes that the Secretary General has said that the Director and Deputy Director of the DECS can, if it so wishes, give evidence on this point. However, the Tribunal does not regard the taking of such evidence necessary, since it is of the opinion that a genuine misunderstanding may have arisen between the interlocutors, without there being bad faith or any intention of violating the regulations on either side. Moreover, it notes that, even if the appellant had forgone an interview face to face, the second condition required by Council practice for any departure from the normal procedure - the existence of exceptional circumstances - would still not have been satisfied.

It must also be remembered that the appellant was abroad on mission for the Council of Europe, and thus not in a state of mind which would have allowed him to discuss the matter in a manner useful to the Organisation and to himself.

29. Finally, the Tribunal points out that the interview between a director and candidates for a vacant post is of special importance in assessing the qualifications of each candidate and his or her ability to discharge the duties of that post. In the Tribunal's view, a telephone interview lasting a total of five minutes cannot fulfil the function which it is intended to serve. This indeed was the conclusion reached by the Advisory Committee on Disputes.

30. The appointment procedure complained of was therefore unlawful.

31. The Secretary General argues that, if the Administrative Tribunal were to find that the procedure had been irregular, this would not justify setting Mrs. B.'s appointment aside, since this irregularity would be merely technical and would not cause the appellant any real damage. In support of this argument, she refers to decisions given by other international administrative tribunals (ABNATO, 2/2/1979, Decision No. 99; UNAT, judgment No. 248, Thorgevsky v. United Nations Secretary General; CJEC, B. Küster v. European Parliament, 12 March 1975, Coll. 1975, pp. 353 et seq.).

32. The Tribunal notes that, under Article 19 para. 4 the interview serves a double purpose: it is intended to allow the director to assess the candidates' qualifications more precisely, and it is also intended to allow candidates to obtain more information on the duties attaching to the post.

In the Tribunal's view, this procedure is intended to make it possible for the Director or Head of Department concerned to tell the Panel which candidate he considers most suitable for the post in question. The Tribunal also points out that every promotion procedure must permit the choice which is best in the Organisation's interest. It must therefore decide whether this aim has been achieved in this case.

33. The Tribunal notes that the appellant told the Director of the DECS, during the conversation on 8 June 1993, that he wished to have more information on the vacant post, and to provide more information on his own professional experience since leaving the DECS. It thus takes the view that he lost an opportunity to have his abilities assessed by the Director of the DECS and later the Promotions Panel, and thus an opportunity to highlight his present qualifications.

The irregularity which occurred cannot therefore be regarded as merely technical; since the appellant's present qualifications were not assessed in full knowledge of the facts, he did indeed suffer real damage, and this must be remedied.

34. Having reached this conclusion, the Tribunal does not consider itself obliged to examine the other arguments used by the appellant against the decision complained of.

For these reasons, the Administrative Tribunal:

Declares the appeal founded;

Sets aside the decision appointing Mrs. B. to the post of Head of Division;

Decides that the Council of Europe is to refund to the appellant the costs incurred by him, amounting to the sum of 11,000 French francs.

Delivered in Strasbourg on 21 April 1994, the French text of the decision being authentic.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. RUSSO