

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 179/1994 (J. FUCHS v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chairman,
Mr Kåre HAUGE,
Mr Alan H GREY, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Ms Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant lodged his appeal on 24 May 1994 and it was registered the same day under no. 179/1994.
2. The Secretary General submitted his observations on 13 July 1994.
3. The appellant submitted his reply on 31 August 1994.
4. The Secretary General submitted a rejoinder on 26 September 1994.
5. The public hearing took place in the courtroom of the European Court of Human Rights in Strasbourg on 28 October 1994. The appellant, Mr J. FUCHS, was assisted by Ms L. LANG; the Secretary General was represented by Mr G. BUQUICCHIO, Head of Central Division, Directorate of Legal Affairs, assisted by Mr T. MARKERT, Administrative Officer in the Directorate of Legal Affairs.

THE FACTS

6. While working as a technician in the Secretariat of the European Pharmacopoeia Commission (Directorate of Social and Economic Affairs), the appellant applied for a new grade B6 post of senior technician (PH-38). The vacancy notice set out the relevant duties.

The appellant was appointed to the post with effect from 1 August 1993. He actually took up his duties on 6 September 1993.

7. Following reorganisation of the Pharmacopoeia secretariat by the new Director delegate, job profiles were introduced for each post. Under the appellant's job profile, dated 1 September 1993, his main work was to be in the laboratory with some auxiliary, mainly administrative work.

On 19 September the appellant applied to the Council of Europe's Head of Personnel for a transfer to some other part of the Council.

8. On 23 September 1994 the administrative officer in charge of a recent introduction of new procedures carried out an audit (the appellant was absent on sick leave at the time) to check that at the pilot stage the procedures were being properly implemented.

On 28 September the Director of the European Pharmacopoeia sent the appellant a memorandum which noted that little of the new procedures was being implemented. The memorandum concluded by asking him to implement the procedures in full and notify her in writing of anything which he thought posed problems.

9. On 1 October the appellant asked the Director of the Pharmacopoeia to institute disciplinary proceedings in view of the serious allegations in the memorandum of 28 September.

On 13 October he submitted his observations to her on the memorandum of 28 September. The document likewise contained his comments on the audit of 23 September.

10. On 29 October a further audit report was produced.

On 16 November the Director of the Pharmacopoeia sent the appellant a memorandum in which she noted a marked improvement in implementation of the procedures and thanked Mr Fuchs for his efforts. She also said that there were further points to be discussed and that this would be done at a forthcoming evaluation meeting.

11. On 29 November the Head of Personnel sent the appellant a memorandum confirming the content of an interview which they had had on 2 November. In particular he confirmed that neither he nor the Director of the Pharmacopoeia wished to institute disciplinary proceedings against him. He also pointed out that directors and heads of department had a duty to inform their staff if they thought their work was not wholly satisfactory. He further pointed out that the object of this was to help far more than punish.

It was, he said, in that spirit that the director had signed the memorandum discussed.

12. On 2 December 1993 a new job profile replaced the profile of 1 September 1993. The new profile detailed routine duties and occasional duties. The former consisted essentially in laboratory work and the latter in answering technical queries.

In a memorandum dated 2 December 1993 the Director of the Pharmacopoeia told the appellant that priority duties had been singled out which could all be performed on the same floor of the building and that his job profile had been changed accordingly.

13. On 21 December 1993 the appellant lodged an administrative complaint. The complaint was rejected on 24 March 1994.

At the appellant's request his complaint was referred to the Advisory Committee on Disputes, whose finding, in an opinion delivered on 11 March 1994, was that in what was a difficult situation the Director of the Pharmacopoeia had not exceeded her discretionary powers, which were acceptable in scope.

THE LAW

14. The appeal is directed against the Secretary General's decision of 24 March 1994 to dismiss the administrative appeal of 21 December 1993.

Mr Fuchs asks the Tribunal to find that the duties which he is currently performing bear no relation to those which he was appointed to post PH-38 to perform. He likewise requests a finding that this **de facto** downgrading constitutes an unjustified punishment since he has at no time performed unsatisfactorily. Lastly he requests 10,000 francs to cover his legal costs.

15. In his written observations the Secretary General expresses the view that the appeal is inadmissible in that the Tribunal is not empowered to deliver the findings requested of it. On the merits the Secretary General argues that the appeal is unfounded in that the decision complained of is perfectly in accordance with the provisions of the Staff Regulations and is not vitiated by any defect.

16. In his memorial in reply the appellant maintains that it is perfectly within the Tribunal's powers to deliver a finding that a particular situation is unlawful or unacceptable without necessarily ordering a return to the status quo. On the merits he takes issue with the Secretary General.

17. In his rejoinder the Secretary General contends that there is no provision in the Staff Regulations for an appeal which seeks a mere finding. He reiterates that he used his power to assign staff, in the interests of the service, to posts matching their grades for the purpose, among others, of meeting the appellant's repeated requests that he be given less work.

18. At the hearing the parties maintained their arguments.

19. The Tribunal must first of all examine the Secretary General's objection that the

appeal is inadmissible. The arguments of the parties may be summarised as follows.

20. In the Secretary General's view Article 60 para. 2 of the Staff Regulations precludes an appeal seeking a mere finding. Relying on the case-law of the Council of Europe Appeals Board/Administrative Tribunal (ABCE n° 79-93/1983, BUHLER and others, decision of 1 March 1985, paragraph 79), he maintains that, except in disputes concerning financial matters (and the present dispute undoubtedly does not concern a financial matter), the only penalty available is annulment, accompanied, where appropriate, by other measures.

21. The appellant argues, on the basis of the wording of Article 60 para. 2 of the Staff Regulations, that the Tribunal is empowered to deliver a declaratory judgment.

This provision empowers the Tribunal to annul a challenged measure and allows it to award the appellant compensation for damage resulting from that measure.

The appellant points out that the two penalties may be combined, and that the annulment may be accompanied by an order that the Council of Europe pay compensation to the appellant. He argues that the provision must be understood as empowering the Administrative Tribunal either to annul the measure complained of or, if annulment is impossible or inappropriate, order the Council to pay compensation.

He accordingly submits that if the Tribunal is empowered to annul a measure complained of, it is doubly empowered to impose milder coercive measures.

Lastly he notes that it is in his interest to obtain a finding rather than the annulment of the job profile of 2 December 1993 since if the latter were annulled the profile of 1 September 1993, which was less favourable to him, would resume effect.

22. The Tribunal firstly notes that the appellant is not seeking annulment of a measure. Nor is the application for a finding accompanied by a compensation request.

The question therefore arises whether, under its powers of review, the Tribunal can deliver a finding such as the appellant requests.

This amounts to delivering an interpretation of the scope of Article 60 para. 2. However the Tribunal does not consider it necessary to deliver such an interpretation in the present case.

23. The Tribunal firstly notes that the provision is similar to those which govern the powers of other international administrative tribunals, and none of those provisions expressly recognises the possibility of delivering a declaratory judgment. Nor is such a possibility contemplated by writers on the law. The appellant does not in fact cite any legal theory or any case-law in support of his contentions.

The Tribunal does not consider itself able to consider the appellant's request since, unlike the appellant, it is not convinced that a declaratory decision would not amount to a purely theoretical finding against the Secretary General: the Tribunal does not see how such a finding can enable the appellant to have eventually restored to him all the duties set out in the

original job description attaching to the post to which he was assigned. Nor would the Secretary General be required to make any alteration to Mr Fuchs's duties.

As observed above, the appellant does not request any compensation.

His appeal is accordingly inadmissible.

For these reasons the Administrative Tribunal:

Declares the appeal inadmissible;

dismisses it; and

since the appeal does not constitute an abuse of procedure (Article 11 para. 1 of the Statute of the Administrative Tribunal) orders that each party shall bear its own costs.

Delivered in Strasbourg on 12 December 1994, the French text of the decision being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. RUSSO

Read by Mr Kåre HAUGE
at a public hearing on 12 December 1994

K. HAUGE