CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 215/1996 (STAFF COMMITTEE (II) v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Kåre HAUGE,
Mr Alan GREY, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The Staff Committee of the Council of Europe lodged its appeal on 12 February 1996. The appeal was registered on the same day under file No. 215/1996.

2. The appellant filed a supplementary memorial on 21 February 1996.

3. On 22 March 1996, the Secretary General submitted his observations on the appeal. The appellant lodged a memorial in reply on 9 April 1996.

4. The public hearing took place in the courtroom of the European Court of Human Rights in Strasbourg on 21 May 1996. The appellant was represented by Professor D. RUZIE and the Secretary General by Mr R. LAMPONI, Principal Administrative Officer in the Directorate of Legal Affairs.

THE FACTS

5. The appeal concerns the renewal of the contract of Mr G, an official seconded to the Council of Europe. The official is on grade A7 in the Organization and occupies the post of Director of Administration.

6. At its 535th meeting (18-20 April 1995), the Council of Europe's Committee of Ministers took the following decision:

> "The deputies authorised the Secretary General, exceptionally and by derogation from the provisions of Article 20 of the Staff Regulations, to renew the contract of [Mr G.], Director of Administration, for a period expiring on 31 December 1999."

7. On 25 April 1995, the Deputy Secretary General informed the Council of Europe's Staff Committee of the Secretary General's intention to extend Mr G.'s contract. The Deputy Secretary General was careful to point out that the Secretary General had sought and secured the Committee of Ministers' authorization for this course of action.

8. In a memorandum dated 24 May 1995, the Staff Committee informed the Secretary General that it was extremely concerned about the proposed procedure, which seemed to have no legal justification.

After making a number of points on the applicability to this case of Article 20 of the Staff Regulations or Article 25 of the Regulations on Appointments (Appendix II of the Staff Regulations) in conjunction with Article 19 of the Staff Regulations, the Staff Committee expressed its concern that "the use of an appointments procedure that appears to show little regard for the existing regulations directly interferes with the statutory powers expressly and unreservedly vested in it by these regulations, particularly the right to be consulted on Vacancy Notices for Secretariat posts".

The Staff Committee ended its memorandum by reserving the right to study the Secretary General's reply and, if necessary, make use of the appeals remedies provided for in the Staff Regulations.

9. In his reply of 25 July 1995, the Secretary General maintained that the basic rules governing the appointment were contained in Article 19 of the Staff Regulations. He also thought that, in the case of the appointment of seconded A6 or A7 officials, the last sentence of Article 20 of the regulations was in apparent contradiction to Article 19.

He added that, in his view, the special provision in Article 19 took precedence over the more general provision in Article 20. He continued:

> "However, since this view might be open to question, I decided to ask for a special derogation to Article 20 in this particular case. Such a derogation was granted by the Committee Deputies at their 535th meeting.
>
> In this context I note that while the recruitment of seconded officials in grades A2 to A5 may follow a simplified and privileged procedure as compared with that foreseen for all other potential candidates, thereby fully justifying the limited duration of appointment, this is not the case for appointments in grades A6 and A7. All candidatures are considered by the Secretary General on an equal footing, whether coming from the private sector, from national administrations ready to formally second them or from administrations which would not be prepared to extend such a facility. I therefore do not see much point in subsequently imposing specific limits to the term of appointment of employees of one of those categories.

To eliminate the apparent contradiction between the above-mentioned rules I would propose amending Article 20 by replacing its final sentence by the following:

'The duration of the appointment may not exceed six years, except in cases covered by Article 19' ".

10. On 8 August 1995, the Staff Committee asked the Secretary General whether or not the formal administrative decision on the renewal of the contract had been taken. It indicated that the information forthcoming could have a bearing on the committee's reaction under the terms of Article 59 of the Staff Regulations.

On 15 September, the Secretary General informed the Staff Committee that, following the Committee of Ministers' decision authorizing him to renew Mr G.'s contract, no other formalities were necessary. He concluded by stating that he intended to offer to renew the Director of Administration's contract for a further fixed period; such an offer would be made in the near future and at all events before 31 October 1995, the date on which the current contract expired.

11. On 13 October 1995, the Staff Committee lodged an initial administrative complaint ("the first complaint") under Article 59 of the Staff Regulations.

The Staff Committee considered that the Committee of Ministers' decision and the Secretary General's administrative decision were illegal since they interfered with the powers vested in the Staff Committee by the Staff Regulations.

The Committee stated that, according to its interpretation, Article 20 of the Staff Regulations was perfectly consistent with Article 19 and that in accordance with the Staff Regulations the post of Director of Administration was vacant and the Secretary General could not defer the publication of a Vacancy Notice. It concluded that the non-publication of the Vacancy Notice directly interfered with its powers under the Staff Regulations, preventing it from exercising its rights.

The Staff Committee therefore asked for the administrative decision in question, the extension of Mr G.'s contract, to be annulled.

It added that the complaint was to take effect when the Secretary General signed the order extending Mr G.'s contract. In the event of his already having done so, the complaint would take full legal effect at once.

12. The Secretary General rejected the complaint on 13 November 1995.

He repeated his view that the rules applicable to the recruitment of officials on grades A7 and A6 differed from the more general provisions governing the appointment of other staff, quoting, in particular, Article 19, which as a special rule he considered to take precedence over the general rule in Article 20, and recalled that to remove any legal uncertainty, he had submitted the matter to the Committee of Ministers and secured its formal agreement.

The Secretary General maintained that the procedure followed could not interfere with the Staff Committee's powers under the Staff Regulations. He had not considered the post to be vacant and even if there had been a vacancy the Staff Regulations did not grant the Staff Committee any authority regarding A7/A6 appointments. In support of this, he referred to the

wording of Article 9 of the Regulations on Appointments. The complaint therefore had to be rejected from all points of view.

13. The Staff Committee was not directly informed of the renewal of Mr G.'s contract, the date of which has not moreover been communicated to the Tribunal either, but learnt of it indirectly via a staff notice dated 6 November 1996, as a result of which it lodged a further complaint ("the second complaint") on 20 November 1995.

The Staff Committee noted that in his reply to the first complaint the Secretary General had made certain statements from which it appeared that a) the decision to extend Mr G.'s contract presupposed the Committee of Ministers' formal agreement and b) the Committee of Ministers' decision constituted an *ad hoc and ad personam* amendment .It maintained that the procedure adopted by the Secretary General fell within the scope of Article 6 of the Regulations on Staff Participation. Since this article required the Staff Committee to be consulted before the matter was referred to the Committee of Ministers, the absence of such consultation rendered a precondition of the Secretary General's decision to extend Mr G.'s contract null and void. The circumstances were such as to invalidate the decision to extend the contract. In particular, the Staff Committee would have had the opportunity to present a written submission to the Committee of Ministers setting out the *legem patere quam fecisti* rule preventing the Council's governing body from effecting an *ad hoc and ad personam* amendment to the Staff Regulations.

The Staff Committee concluded its complaint by asking the Secretary General to annul the contested administrative decision, that is the extension of Mr G.'s contract.

14. There has been no response to the second complaint. It is against its implicit rejection that the appellant has lodged this appeal.

THE LAW

15. The appellant challenges the Secretary General's decision to extend the contract of Mr G., the Director of Administration (A7), an official seconded to the Council of Europe.

16. The Secretary General maintains firstly that the appeal is inadmissible on several grounds. He also maintains that it is unfounded and calls for it to be dismissed.

The objection to admissibility raised by the Secretary General

17. Regarding its right to bring this appeal, the appellant considers that the procedure used by the Secretary General to renew the contract - a request to the Committee of Ministers for a derogation from the provisions of Article 20 of the Staff Regulations - was in breach of Article 6 of the Regulations which provides that "staff members shall be entitled to express their views .... on any measures in application of these Regulations or amendments to them ...". The Staff Committee considers that as representative of the general interests of the staff (Article 8 of the Staff Regulations) it should have had the opportunity to explain its position to the Committee of Ministers.

18. The Secretary General maintains that the appeal is inadmissible *ratione temporis* (on three counts) and *ratione personae*. He also considers that there are two other grounds for inadmissibility.

19. Concerning the inadmissibility *ratione temporis*, the Secretary General argues firstly that the second complaint was out of time as a result of the appellant's failure to lodge its complaint within the mandatory thirty-days deadline laid down in Article 59 para 2 of the Staff Regulations (first count). The complaint only relates to the alleged violation of Article 6 of the Regulations on Staff Participation. Yet the action which would have been to the appellant's detriment was the referral to the Committee of Ministers and not, as the appellant claims, the staff notice of 6 November 1995, signed by Mr G.. The period of thirty days therefore started on 25 April 1995 or, at the latest, 25 July 1995.

20. The Secretary General also considers that in so far as the appeal concerns his alleged violation of Article 20 of the Staff Regulations it is out of time for failure to comply with the mandatory sixty-day deadline for referral to the Administrative Tribunal laid down in Article 60 para 3 of the Staff Regulations (second count). He notes that the question of how to interpret articles 20 and 19 was the subject of the first administrative complaint (see paragraph 5). As this was rejected on 13 November 1995, the appellant should have lodged an appeal with the tribunal within sixty days, which was not the case.

21. The Secretary General thinks that there was a further failure to comply with the thirty-day deadline for lodging administrative complaints provided for in Article 59 para 2, since the second complaint only applied to the Committee of Ministers' decision of April 1995. As the complaint contained no reference, either explicit or implicit, to the extension of the Director of Administration's contract, in so far as this appeal is concerned with the extension of Mr G.'s contract it is inadmissible for failure to lodge a complaint within the thirty-day period (third count).

22. Moreover, the Secretary General does not consider the fact that the Staff Committee made the first complaint conditional on the adoption of the decision to extend Mr G.'s contract sufficient to justify a reprise at this appeal of the arguments presented in the first complaint.

23. The Secretary General considers that the appeal is inadmissible *ratione personae* in so far as it was lodged by the Staff Committee for an alleged violation of Article 20 of the Staff Regulations. This would be in breach of Article 59 para 6 of the Staff Regulations, which reads:

> "The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*:
>
> (....)
>
> to the Staff Committee, where the complaint relates to an act of which it is subject or to an act directly affecting its powers under the Staff Regulations;"

According to the Secretary General, Article 20 of the Regulations does not vest in the Staff Committee any power which an alleged violation of Article 20 could 'directly affect' ".

24. On the other hand, the Secretary General considers the second complaint to be inadmissible as well as it runs counter to the decision rejecting the first complaint. Currently, this is legally impossible because the referral of the case before the Administrative Tribunal constitutes the only procedure to challenge the rejection of a complaint. The second complaint, instead of being directed towards an administrative act, is directed towards certain elements of the decision that rejected the first complaint.

25. The Secretary General also recalls that complaints can only be lodged against administrative decisions that have already been taken. In this case, the appellant stated in the first complaint that the complaint was intended to take effect when the Secretary General signed the order extending Mr G.'s contract. In the event of his having already done so, the complaint would take full legal effect at once (see paragraph 12).

This is not sufficient to justify a reprise at this appeal of the arguments concerning the interpretation of Articles 19 and 20 of the Staff Regulations advanced in the first complaint, on the pretext that Mr G. signed the staff notice of 6 November 1995.

26. In conclusion, The Secretary General concludes by stressing the importance of scrupulous compliance with Articles 59 and 60 of the Staff Regulations. Any review of legality must adhere strictly to the laid down procedures. Failure to do so could affect legal certainty within the Organization. A decision by the Secretary General affecting an official's legal situation has implications going beyond the direct legal effects on the staff member concerned and affects the management of the Organization as a whole, particularly the structure and functioning of the department to which the staff member is assigned. This applies particularly in the present case, which calls into question the renewal of the contract of an official holding one of the most responsible posts in the Council, the Director of Administration.

27. In reply to these arguments, the appellant reaffirms the admissibility of the appeal. It notes that the measure prejudicial to it was not the referral to the Committee of Ministers but the decision, contrary to the Staff Regulations, to reappoint an international civil servant. Its purpose in lodging the appeal was to contest not the decision to refer to the Committee of Ministers but the implicit dismissal of an administrative complaint against an administrative decision already taken which was lodged as soon as the decision became known.

The appellant also considers that it is entitled to rely on the procedural irregularity of a measure preceding the measure challenged, the decisions in the appointment procedure being interconnected. In support, it refers to the case-law of the Court of Justice of the European Communities (CJEC, judgment of 8 March 1988, cases 64, 71 to 73 and 78/86 Sergio and others).

Regarding the appeal's admissibility *ratione personae*, the appellant maintains that there was undoubtedly interference with a power which the Staff Regulations vest in it, in that the Secretary General did not consult it before referring the matter to the Committee of Ministers.

28. The Tribunal considers that in order to establish whether the appeal is admissible, it must first determine the nature of the appellant's complaint and when and if its interests were eventually adversely affected.

In the second complaint the appellant asked the Secretary General to annul the administrative decision that adversely affected it, that is the extension of Mr G.'s contract. In support of its request, the appellant argued that the previous stage in the procedure - which in this case was a precondition of the contract's extension - had not been conducted in a regular fashion, since the Staff Committee's rights were not respected.

In this context, the Tribunal attaches particular importance to the nature of the events which took place in April 1995. It considers that the Secretary General did not approach the Committee of Ministers to request an amendment to the Staff Regulations of a strictly legal nature, that is with a view to altering the text of the Regulations, or to inform it of his intention

to extend Mr G.'s contract (in which case, the situation would have been similar to that provided for in Article 25 para 2 on appointments to grades A7 and A6: "The Secretary General shall make an appointment after an informal exchange of views with the Committee of Ministers, during which he shall make known his intentions and the reasons for his choice").

The Secretary General chose a third option: he asked the Committee of Ministers for a derogation from the Staff Regulations for a specific case. Without, of course, prejudging the legality of such a step, it has to be observed that any interference with the Staff Committee's powers would have occurred not only when the matter was referred to the Committee of Ministers - as would have been the case if the Secretary General had requested an amendment to the Regulations - but also when he renewed the contract in question. The substantive difference between these two eventualities affects not only the point at which the Staff Committee could complain of interference with its institutional powers but also, and above all, the type of corrective measures it could request of the Tribunal. In the first case, the Staff Committee could only ask the Tribunal to find that the referral to the Committee of Ministers had been illegal, on the grounds that any decision taken subsequent to this referral could be challenged in another appeal. In the second case, the Staff Committee could not ask the Tribunal to find that the method of bringing the matter before the Committee of Ministers was illegal but could simply ask for the contested renewal of the contract to be annulled, albeit relying on the previous irregularities.

The Tribunal also wishes to add, with regard to the arguments relating specifically to the second and third counts, that the second complaint was quite distinct from the first and that, contrary to what the Secretary General maintains, it was contesting the extension of the contract.

29. The Secretary General's grounds of inadmissibility *ratione temporis* must therefore be dismissed on all three counts.

30. Regarding the grounds of inadmissibility *ratione personae*, the Tribunal considers, on the basis of what it has just found, that in the second complaint and in the appeal that has followed it the Staff Committee has complained of interference with powers vested in it. The fact that it has relied on a breach of Article 20 of the Staff Regulations cannot justify declaring the appeal inadmissible, though it could, in certain circumstances, be grounds for the inadmissibility of this particular complaint. This objection must therefore also be dismissed.

31. With regard to the other two grounds, the Tribunal finds that, contrary to what the Secretary General maintains, the second complaint does not constitute a complaint against the dismissal of the first one. Admittedly, the appellant does refer to the Secretary General's arguments in his reply to the first complaint and the *petitum* is the same; however, the legal arguments cannot be construed as a critique of the dismissal decision of 13 November 1995. Moreover, Article 59 of the Regulations does not prohibit the submission of a second complaint containing different legal arguments relating to the same contested decision, on condition that the time limits laid down in Article 59 para 2 are respected. In this case, they were.

32. The Tribunal notes that the issue of when the first complaint took effect has no relevance to the admissibility of the second. On the other hand, the right to repeat the arguments advanced in the context of the first complaint is linked to the fact that they were again raised in the second one.

33. The appeal is therefore admissible and must be considered on its merits.

On the merits of the appeal

34. In its supplementary memorial of 21 February 1996 (paragraph 3 above), the appellant considers itself justified in arguing that the extension of the contract in question without its prior consultation contravened Article 20 *in fine* of the Staff Regulations.

In its observations in reply to those of the Secretary General, the appellant makes a number of points concerning the scope of Article 20 of the Staff Regulations and its relationship to Article 19 and replies to the Secretary General's argument that Article 6 of the Regulations on Staff Participation, which the appellant relies on in its second complaint, is inapplicable in this case.

At the hearing, the appellant stated that it had never claimed that the Secretary General had infringed a Staff Committee right arising from Article 20. However, the way that Article 20 had been applied in this case affected its rights under Article 6.

35. In his memorial, the Secretary General states that the appellant complains of an alleged violation of Article 6 para 1 of the Regulations on Staff Participation and a violation of Article 20 of the Staff Regulations.

Regarding the first point, the Secretary General maintains that he did not propose any amendment to the Committee of Ministers. Having discovered an apparent contradiction between Articles 19 and 20, he resolved it by putting Article 20 back in context. He adds that "realising, however, that such an interpretation was open to debate, he decided, to be on the safe side, to seek Committee of Ministers approval in the form of an exception to the requirements of Article 20 so as to give Mr G. a further contract exceeding the 6-year limit".

This means that Article 6 of the Regulations on Staff Participation was not applicable in this case and cannot therefore have been contravened.

Regarding the second point, the Secretary General maintains that Article 19 of the Staff Regulations is a special provision when set alongside Article 20. Article 19 explicitly provides that an A7 official's initial contract may be renewed, but does not impose any limitation on the number of renewals, the duration of each successive renewal or the total length of the official's period of service.

The renewal of the contract did not therefore contravene the relevant provisions of the Staff Regulations.

36. This case concerns the renewal of the contract of an official seconded from a national administration.

The Tribunal notes that the parties have relied on, interpreted and analysed Articles 19 and 20 of the Staff Regulations in a number of respects. The main issue that has arisen throughout the proceedings has been the renewal of Mr G.'s contract.

37. The Tribunal wishes to stress that assessing the legal implications of the facts falls under its jurisdiction.

At the oral proceedings, the appellant stated that it had never claimed that the Secretary General had infringed a Staff Committee right arising from Article 20.

The only question therefore is whether there was an infringement of Article 6 of the Regulations on Staff Participation, which reads:

> "1. The Secretary General and the Staff Committee shall consult each other on any draft that either intends to submit to the Committee of Ministers on matters that come within the competence of the Committee of Ministers under Article 16 of the Statute of the Council of Europe and which relate to:
>
> - alteration or amendment of the Staff Regulations,
>
> - alteration, amendment or adoption of other regulations concerning the staff.
>
> 2. The Secretary General shall keep the Staff Committee informed of any proceedings before the Committee of Ministers in pursuance of Article 16 of the Statute of the Council of Europe which relate to the matters referred to in paragraph 1 above."

38. The Tribunal notes that the main difference between the parties concerns the nature of the referral to the Committee of Ministers by the Secretary General as well as the decision that was subsequently taken.

The appellant maintains that a request to the Committee of Ministers for an exemption for which there is no legal provision entails an alteration or amendment, even in the absence of a formal text for that purpose.

The Secretary General considers that he made no proposals to the Committee of Ministers for an alteration or amendment of the Staff Regulations (see paragraph 36).

39. In the absence of any information on the terms in which the Secretary General referred the matter to the Committee of Ministers, the Tribunal can only take account of the decision taken by the Committee of Ministers which gave its authorisation "exceptionally and by derogation from the provisions of Article 20 of the Staff Regulations" (see paragraph 6). Moreover, the final sentence of Article 20 states that "the duration of the appointment shall in no case exceed six years".

This leads the Tribunal to conclude that the exception secured from the Committee of Ministers by the Secretary General has to be interpreted as a *de facto* alteration of the Staff Regulations. The Secretary General had the option, as he himself envisaged at one time (see paragraph 9), of proposing an alteration to the wording of Article 20 of the Staff Regulations - naturally after consulting the Staff Committee - and the Committee of Ministers would then of course have had the opportunity to adopt the proposed alteration.

However, the Secretary General adopted the course of action which led to the current dispute. Article 6 of the Regulations on Staff Participation is couched in sufficiently broad terms to require the application of the procedure in question.

The procedure adopted was therefore not in order.

40. The Tribunal notes that the appellant stated that it was not calling into question Mr G.'s merits but that, as representative of the general interest, it was raising a matter of principle.

The Tribunal recalls that it has already found that the appellant, one of the Council of Europe's statutory bodies, enjoys "powers" - as referred to in Article 59 paragraph 6 c of the Staff Regulations - which amount to substantive rights whose infringement can give rise to an appeal procedure by the Staff Committee (see decision No 160/1990, Staff Committee v Secretary General, of 27 September 1990, paragraph 46). Moreover, the "exceptional" nature of the derogation does not exclude the possibility that the same situation could arise in the future.

It follows that the irregularity found to have occurred cannot be deemed to be purely technical: the Staff Committee's interests have been adversely affected and the situation needs to be remedied.

In particular, the failure to consult the Staff Committee about the procedure followed in April 1995 prevented it from exercising the powers vested in it under Article 7 paragraph 1 of the Regulations on Staff Participation: "The Staff Committee may communicate to the Committee of Ministers any proposals on the matters referred to in Article 6, paragraph 1".

The Tribunal therefore finds that the contested decision must be declared null and void.

41. The appellant, having used the services of a lawyer, claims for 15 000 French francs in costs and expenses. The Tribunal considers that claim to be reasonable within the terms of Article 11 para. 2 of the Statute of the Administrative Tribunal.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares it founded;

Annuls the contested decision;

Orders that the Council of Europe shall reimburse the appellant the sum of 15,000 (fifteen thousand) French francs for expenses.

Delivered at Strasbourg on 2 July 1996, 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 out by Mr Alan GREY
in the public hearing of 2 July 1996