

CONSEIL DE L'EUROPE_____

_____COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 217/1996 (João ARY v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Kåre HAUGE,
Mr José Da CRUZ RODRIGUES, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr João ARY lodged his appeal on 22 February 1996. It was registered the same day under file No. 217/1996.
2. On 22 April 1996, the Secretary General submitted his observations on the appeal.
3. The appellant filed further observations on 10 June 1996.
4. The Chair decided there would be a single hearing to deal with both the present appeal and Appeal No. 219/1996 (Palmieri v. Secretary General).
5. The public hearing took place in Strasbourg on 22 October 1996. The appellant was represented by Mr J.-P. CUNY, a member of the Versailles Bar; and the Secretary General was represented by Mr R. LAMPONI, Principal Administrative Officer in the Directorate of Legal Affairs, assisted by Mr P. GARRONE, Administrative Officer in the same directorate.

THE FACTS

6. The appellant became a Council of Europe employee on 16 November 1983. He is a permanent staff member on grade A3. At present, he holds a post of Administrative Officer in the Office of the Clerk of the Council of Europe Parliamentary Assembly (Clerk's Office).

7. On 14 October 1994, in Vacancy Notice No. 141/94, the Secretary General advertised for internal competition a post of Principal Administrative Officer (grade A4) in the Clerk's Office. The appellant applied.

8. On 19 December 1994, the Secretary of the Transfers and Promotions Panel informed him that his application had been considered under the procedure laid down in the Regulations on Appointments and that, in the light of the recommendation the panel had made after comparing and assessing the applications, the Secretary General had decided to appoint another staff member to the post.

9. On 20 December 1994, the appellant lodged an administrative complaint concerning the panel's assessment and comparison of the applicants' merits.

10. On 19 January 1995, the Secretary General dismissed the complaint.

11. On personal grounds, the appellant decided not to appeal to the Administrative Tribunal.

12. On 23 November 1995, the Tribunal delivered its decision in Appeals Nos. 202-207/1995 (Palmieri, Grayson and Others v. Secretary General). During the preparations for hearing those appeals, the Director of Legal Affairs gave the Tribunal information about the procedure used for adopting the Transfers and Promotions Panel's records:

"In reply to an information request from the Tribunal, the Director of Legal Affairs stated in a letter dated 13 October 1995 that the established practice was that the record was drawn up by the panel's secretary and issued under the authority of its Chair. After the Chair had signed it, the record was submitted to the Secretary General and other panel members made whatever clarifications or amendments they considered necessary, on the understanding that if these were substantive the Chair and the Secretary General were informed of them. This, he said, had been the practice for a number of years and its purpose was to shorten the procedure for filling vacancies, the staff member promoted or transferred being appointed as from the first day of the month following the panel's meeting" (paragraph 21 of the decision).

In its decision, the Tribunal granted the appeals and set aside the challenged appointment.

13. On 24 November 1995, the appellant submitted a further complaint to the Secretary General concerning the other staff member's appointment. He stated that he had just learnt, from the aforementioned Tribunal decision, that the Secretary General's decision, in the internal competition advertised in Vacancy Notice No. 141/94 (see paragraph 7 above), to appoint

another member of staff in the light of the recommendation made by the panel after its assessment and comparison of applications for the post, had been taken before all those who had taken part in the panel's deliberations, in particular the Chair of the panel, had signed the record provided for in Article 14, paragraph 5, of the Regulations on Appointments (Appendix II to the Staff Regulations).

14. On 22 December 1995, the Secretary General replied that, in his decision of 19 January 1995, he had dismissed the complaint of 20 December 1994 and that the present complaint was an objection to the decision of 19 January 1995 and as such was manifestly inadmissible.

15. After this decision, the appellant applied to the Administrative Tribunal.

THE LAW

16. The appellant challenged the Secretary General's decision to appoint another staff member to the post advertised in Vacancy Notice No. 141/94 of 14 October 1994.

17. On the admissibility of the appeal, he stated that the appeal was in response to a new development concerning the decision challenged – the discovery that the Council had quite clearly adopted an illegal practice.

18. On the substantive issues, he observed that the spirit of the Regulations on Appointments required that the Secretary General be fully conversant with the panel's deliberations. The practice the Council had adopted met neither the procedural requirements nor the underlying substantive ones. The principle of legal certainty had thereby been seriously compromised and the principle of legitimate expectation had also suffered as a result.

19. He accordingly asked the Tribunal to set aside the challenged appointment.

20. The Secretary General maintained that the appeal was late and therefore inadmissible. In his view, the appellant had not met the time-limit in that the complaint from which the present dispute arose had been filed on 24 November 1995 whereas the decision challenged had been taken on 19 December 1994.

Noting that an earlier administrative complaint had been submitted in good time and dismissed, the Secretary General argued that, even assuming there were exceptional circumstances within the meaning of Article 59, paragraph 2, final sub-paragraph, of the Staff Regulations which could be taken into account – though that would clearly be contrary to legal certainty after more than a year had elapsed, – they could not be taken into consideration here since a complaint had been submitted in time and the only remaining remedy had been an application to the Administrative Tribunal, a remedy which, at the time, the appellant had decided not to pursue. In the Secretary General's view, another appeal's success could not be regarded as a "new development": the finding that there had been an irregularity in another administrative procedure could be regarded as a legal precedent but not as fresh evidence.

21. On the substance of the appeal, the Secretary General argued that the principle of legal

certainty, the principle of legitimate expectation and the principle of proportionality all precluded calling in question the appointment at this late date on the grounds of a mere procedural irregularity. To do so would be contrary both to the rights of the person appointed and the interests of the department concerned.

22. In his observations in reply to the Secretary General's, the appellant noted that, under Article 60, paragraph 3, of the Staff Regulations, "in exceptional cases and for duly justified reasons", the Administrative Tribunal was empowered to "declare admissible an appeal lodged after the expiry of these periods". It was therefore open to the Tribunal to decide whether his case was of an exceptional nature and whether he was justified in requesting that his appeal be heard despite his having lodged it after the time-limit laid down in the first sentence of Article 60, paragraph 3.

Secondly, his having lodged a previous complaint could not be treated as rendering the second complaint inadmissible. The second complaint related to a different matter arising from an undoubted and serious procedural defect of which – in view of the confidentiality of the panel's deliberations – it had been impossible for him to know until the Administrative Tribunal's decision of 23 November 1995 on Appeals Nos. 202-207/1995.

Lastly, he maintained that, from the law, case-law and legal writings on the international civil service, it was quite clear that, in exceptional circumstances, time-limits in legal proceedings, which were essentially a matter of procedural convenience, could be extended. He referred, here, to the case-law of the Administrative Tribunal of the International Labour Organisation (*Lindsey v. International Telecommunications Union*, Judgment No. 61 of 4 September 1962) and to the case-law of the Court of Justice of the European Communities (*Saudray v. EEC Commission*, Judgment of 14 December 1965, Case 5-65, European Court Reports 11, pp. 1 227 and 1 232)

23. The Tribunal notes, on the basis of his arguments, that, in maintaining that his appeal is admissible, the appellant relies on Article 59, paragraph 2, final sub-paragraph. Paragraph 2 of Article 59 reads:

"The complaint must be made in writing and lodged via the Head of the Human Resources Division:

- a. within thirty days from the date of publication or notification of the act concerned; or
- b. if the act has not been published or notified, within thirty days from the date on which the person concerned learned thereof; or
- c. within thirty days from the date of the implicit decision rejecting the request as mentioned in paragraph 1.

The Head of the Human Resources Division shall acknowledge receipt of the complaint.

In exceptional cases and for duly justified reasons, the Secretary General may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.”

The Tribunal must therefore establish whether the present case is an exceptional one and whether there are “duly justified reasons” for treating as admissible a complaint which, as the appellant’s submissions acknowledged, was lodged well after the expiry of the thirty-day period, which ran from 19 December 1994 (see paragraph 8 above).

24. In the Tribunal’s view its decision in Appeals Nos. 202-207/1995 cannot, on its own, be regarded as providing grounds for allowing an appeal to be lodged after the time-limit. The appellant himself in fact acknowledged this in so far as he requested that his appeal be ruled admissible on account of a well-established matter in which his trust had been abused, and not simply on account of the Tribunal’s finding in the aforementioned appeals.

However, the Tribunal holds that, although the discovery of the Administration practice brought to light in Appeals Nos. 202-207/1995 constituted fresh evidence of which the appellant had been unaware when filing his first complaint, it none the less was not an exceptional occurrence such as the provision which the appellant wants applied would require.

He therefore cannot validly rely on the last sub-paragraph of Article 59, paragraph 2.

25. Certainly the appellant argued that, on account of the confidentiality of the proceedings, it was possible for him to be aware of the existence of the document which he alleged to have been irregularly drafted, yet not of its content. He likewise pointed out that the Secretary of the Transfers and Promotions Panel had informed him that his application had been examined in accordance with the procedure laid down in the Regulations on Appointments.

26. The Tribunal holds, however, that it cannot be inferred from this that we are dealing here with an exceptional matter. It notes that the administrative complaints and the appeals which gave rise to its decision of 23 November 1995 did not challenge the Secretary General’s impugned decision on the ground of the manner in which the Transfers and Promotions Panel’s record had been drafted. That irregularity came to light during the proceedings after the Tribunal had been asked to set aside the Secretary General’s decision on other grounds.

27. The appeal must therefore be ruled inadmissible.

For these reasons, the Administrative Tribunal:

Declares the appeal inadmissible;

Dismisses it; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 2 December 1996, the French text being authentic.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C RUSSO