CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 239/1997 (X 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. The appellant, hereafter referred to as "X", lodged her appeal on 9 July 1997. It was registered on 10 July 1997 under file No. 239/1997.

2. Her representative, Mr J.-P. CUNY, lodged a supplementary memorial on 17 July 1997.

3. On 1 September 1997, the Staff Committee applied to intervene in the case in support of X's submissions.

4. On 24 September, the Secretary General applied for the case to be struck out off the list because, in his view, it had become redundant (see paragraph 17 below). The appellant's representative filed observations on 24 October 1997, opposing the striking-off.

5. Having consulted the Parties, the Tribunal decided on 26 January 1998 not to strike the case off, and to proceed with the written pleadings.

6. The Secretary General submitted his observations on 20 February 1998. The appellant filed observations in reply on 23 March 1998.

7. In an Order issued on 7 April 1998, under Article 10 of the Tribunal's Statute, the Chair authorised the Staff Committee to submit written observations and identified those documents in the case that were to be communicated to it.

8. The Staff Committee's written intervention was received by the Tribunal on 20 April 1998 and communicated to the Parties in the case. When submitting its intervention, the Staff Committee also requested authorisation to intervene at the hearing; the Tribunal decided on 22 April 1998 not to grant this authorisation.

9. The public hearing took place at Strasbourg on 20 May 1998. The appellant was represented by Mr J.-P. CUNY; and the Secretary General was represented by Mr J. POLAKIEWICZ and Ms M. RANTALA, Administrative Officers in the Directorate of Political Affairs.

THE FACTS

10. When lodging her appeal, X, a staff member of the Council of Europe, requested that her identity be kept secret. Having acceded to that request, the Tribunal will not include in the present decision any factual information that might threaten her anonymity.

11. The appeal challenges the Secretary General's decision of 20 March 1997 to require X to undergo a six-month probationary period under Article 23, paragraph 3, sub-paragraph b. iii, of the Staff Regulations.

12. With regard to the procedural steps prior to that decision, the appellant's Head of Department had sent a memorandum to the Director of Administration on 25 October 1996, reporting alleged shortcomings in relation to both discipline and output. On 27 January 1997, the appellant submitted observations on the memorandum.

13. On 20 March 1997, the Head of the Human Resources Division wrote to the appellant concerning the observations that she had made to him on the memorandum of 25 October 1996. He stated firstly:

> "You have not offered a convincing response to the detailed and specific criticisms in the report by your immediate superiors.
>
> The Secretary General has therefore decided to place you on six months' probation, under Article 23, paragraph 3, sub-paragraph b. iii, of the Staff Regulations.
>
> You will report directly to P. I should like, as a first step, to have an interview with you and P to discuss how you will be assessed during the probationary period."

Secondly, he informed the appellant as follows: "The administration intends to request the Secretary General to take disciplinary measures against you for failure to observe working hours. If you wish to make further representations before this step is taken, please contact my secretary in the next few days to fix a date for an interview. If you have not replied by 7 April 1997, I shall consider that you do not wish to take up this offer."

14. On 16 April 1997, the appellant lodged an administrative complaint against this decision.

15. The Secretary General dismissed the complaint on 16 May 1997.

16. On 9 July 1997, the appellant lodged the present appeal, seeking to have the Secretary General's decision of 20 March 1997 set aside.

17. After the Tribunal had received the appeal, the Secretary General notified it, on 24 September 1997, that the decision to place X on probation had not yet been implemented.

The Secretary General also stated that the appellant's immediate superior had written to the Head of the Human Resources Division on 9 September 1997 to inform him that the appellant's output and the quality of her work showed a clear improvement. Consequently, the Head of the Human Resources Division informed X, in a memorandum dated 16 September 1997, that the Secretary General had decided not to go ahead with the probationary procedure.

18. In the light of the information requested by the Tribunal after it had received copies of these communications and of the Secretary General's application for the case to be struck out off, it appeared that:

- the contested decision could no longer be implemented; any new move to place the appellant on probation would require a fresh decision;

- a fresh decision to place the appellant on probation could not be taken unless a new instance of manifest unsuitability or unsatisfactory output was reported;

- in the event of the Secretary General deciding to submit the appellant to a new period of probation, he could nonetheless take into account the fact that there had previously been grounds for initiating a procedure in respect of the appellant under Article 23, paragraph 3, sub-paragraph b. iii, of the Staff Regulations;

- the contested decision would remain on the appellant's personal administrative file;

- the appellant had meanwhile been transferred to another department.

THE LAW

19. The appeal is directed against the Secretary General's decision to place the appellant on six months' probation under Article 23, paragraph 3, sub-paragraph b. iii, of the Staff Regulations, which provides that:

> "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 (…) 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 or her 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 Chair of the Disciplinary Board and two staff members chosen by the procedure laid down for the Disciplinary Board; (…) 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."

The appellant challenges all those aspects of the Secretary General's decision that affect her adversely, claiming, in particular, that the decision is in breach of the general principles of law and does not comply with the Staff Regulations. She considers that it is invalid both in formal and procedural terms and in substance.

20. The appellant claims, firstly, that the general legal principle of *legem patere quam fecisti* (the law should govern those who make it) has been breached. She points out that, in his memorandum of 20 March 1997, the Head of the Human Resources Division informed her that she would "report directly to P" during the probationary period and that he wished "as a first step" to have "an interview [with the appellant and P] to discuss how [she would] be assessed during the probationary period". Because this interview did not take place, the appellant – who doubts whether she did, in fact, "report directly to P" – considers that the Secretary General failed to observe the instructions which he himself issued, and that this constitutes a breach of the principle cited above.

The appellant further claims that, in the memorandum of 20 March 1997, she was not formally asked by the Secretary General to remedy her alleged shortcomings. She points out that the regulations require the Secretary General to make a formal request to this effect, and that, on the basis of the Tribunal's interpretation of the regulations in other appeals, a merely tacit or implicit invitation could not take the place of a formal request. Moreover, failure to make such a request would be contrary to the Council of Europe's own practice (ABCE, No. 166/1990, Beygo v. Secretary General, Decision of 26 June 1992, paragraph 6).

Thirdly, the appellant claims there was a failure to observe the requirements that she be given an opportunity to improve her work and that "all the facts" be considered.

She points out that the Tribunal had previously ruled that if the Secretary General intended to put a staff member on probation, one of the requirements was that he should give that staff member "a reasonable opportunity to improve his [or her] performance" (ABCE No. 166/1990, Beygo v. Secretary General, decision cited above, paragraph 48). In the present case, however, the Secretary General had not transferred the appellant to another department, despite both a request to that effect from the Head of the Department concerned and the steps taken by the appellant. The Secretary General had thus failed to give the appellant an "opportunity to improve [her] performance".

Furthermore, the Secretary General had not taken into consideration all the facts concerning the situation in the department, which had been criticised by the appellant and had been the subject of a memorandum from the Staff Committee to the Head of the Human Resources Division.

21. With regard to the substantive invalidity of the allegations that her output was unsatisfactory, the appellant pointed to irregularities in the work that she had been asked to do and factual inaccuracies in the information on which the Administration had based its assessment. On the first point, she claimed she had been given work that was not in the job description for her grade. On the second point, she challenged the claim that her output – "a direct and ineluctable consequence" of the disciplinary shortcomings on which action was to be taken in parallel to the disputed procedure – was unsatisfactory. She added that allegations of disciplinary shortcomings were based on a mixture of "peremptory and anecdotal elements" that were no substitute for proof.

22. The appellant concluded by applying for the decision of 16 May 1997 – rejecting her administrative complaint against the decision to put her on probation – to be set aside.

23. The Secretary General argued firstly that the appeal had become redundant because the decision to place the appellant on probation had not been implemented.

With regard to the substance of the case, the Secretary General went on to note that the failure to hold the interview – referred to in the decision to place the appellant on probation – between the appellant, the Head of the Human Resources Division and the appellant's immediate superior was, indeed, unfortunate and had been an additional reason for not continuing with the probationary procedure. Because this consideration related to the period following the decision to place the appellant on probation, it was clearly irrelevant as a ground for setting aside the contested decision *ex tunc*. Moreover, no "law" had been broken because a declaration of intent to conduct such an interview could not be construed as the establishment of a legally binding regulation.

On the question of the absence of a formal request to the appellant to remedy her shortcomings, the Secretary General claimed that her argument was extremely formalistic. The wording of the decision to put her on probation and her awareness of the text of Article 23 of the Staff Regulations, which was referred to in that decision, could leave her in no doubt about its implications. This was borne out by the fact that the appellant's work had, indeed, improved. An interpretation based on the aim and purpose of the article in question confirmed the legal validity of the wording used. Moreover, even an interpretation based on the text of the Article in its generally understood sense could not justify the conclusion reached by the appellant: the article did not stipulate that a decision to put a staff member on probation must necessarily include the precise words "you are formally asked". The use of the word "formally" in the relevant article indicated that any procedure initiated had to be a formal procedure in accordance with certain rules laid down in Article 23. Furthermore, the wording of previous, similar decisions was not binding on the administration for the future, nor did it constitute an administrative practice, the breach of which could warrant the setting aside of the contested decision.

On the question of failure to observe of the requirement that the appellant be given an opportunity to improve her performance, the Secretary General first pointed out that the appellant's principal grievance concerned his failure to transfer her to another department. In his view, however, the circumstances did not warrant the appellant's transfer (and indeed, she had not submitted requests for transfer, or had withdrawn such requests before they were considered) because, contrary to her contention, the shortcomings that had prompted the decision to put her on probation were not the result of a prejudice on the part of her superior.

With regard to opportunities for the appellant to improve her work, he further pointed out that he had written to her on four occasions and that no improvement had been observed. It was only after the decision to put her on probation that a temporary improvement had been reported.

24. In response to the claim that his decision was substantively invalid, the Secretary General noted that the appellant justified her inadequate performance on the grounds that she had not received sufficient instructions. However, he found it unconvincing for her to complain of a lack of instructions only after the poor quality of her work had been pointed out. Furthermore, there had been complaints about certain very specific shortcomings on her part that could not be explained by a lack of instructions. Her other excuses were also unconvincing. Moreover, according to the Secretary General, the appellant does not deny the facts on which the complaints were based.

In conclusion, the Secretary General takes the view that there is no basis for the appeal, the appellant having failed, in her accusations, to establish that the Staff Regulations have been breached.

25. In her observations in reply, the appellant states that the holding of the interview constituted a potestative condition with suspensive effect, and that under general principles of law a decision subject to a condition with suspensive effect is null and void *ex tunc* if the condition explicitly laid down is not fulfilled.

She also states that, under Article 23, a staff member must be "formally" asked to remedy shortcomings. This means that the request to remedy the shortcomings must be explicit.

In addition, according to the appellant, the Secretary General supplied no admissible evidence that he had taken all the facts into consideration – the appellant having complained not merely of what the Secretary General had termed prejudice on the part of her superior, but of an ongoing pattern of behaviour. She also rejects the Secretary General's criticism that she demonstrated inertia by not applying – or by withdrawing applications – for other posts.

With regard to the substantive invalidity of the decision, the appellant believes the Secretary General is ignoring evidence of the fact that she was given tasks outside her job description and that it was her refusal to perform such tasks which prompted the initiation of the probationary procedure. She further maintains that the Secretary General did not have an accurate picture of the facts on which he based his decision.

26. The Tribunal notes that the appeal is against the initiation of a probation procedure, which was not subsequently implemented.

Ruling on the Secretary General's main application, that the case should be struck out off, the Tribunal decided, after receiving the appellant's opinion to the contrary, not to grant the application (see paragraph 5 above).

Having been asked to examine a specific case, the Tribunal must take account of the circumstances of that case in its ruling. The information supplied by the Secretary General on 24 September 1997 indicates that the contested decision to initiate the probationary procedure was not implemented (see paragraph 17 above) and "could no longer be implemented", and, furthermore, "a fresh decision to place the appellant on probation could not be taken unless a

new instance of manifest unsuitability or unsatisfactory output was reported" (see paragraph 18 above). However, the Secretary General added that, should he decide to submit the appellant to a new period of probation, he "could nonetheless take into account the fact that there had previously been grounds for initiating a procedure [in respect of her] under Article 23, paragraph 3, sub-paragraph b. iii, of the Staff Regulations" and that "the contested decision would remain on the appellant's personal administrative file" (*ibidem*).

27. The Tribunal therefore notes that the only question arising concerns the possible use the Secretary General might make – in the context of any other, similar procedure – of the fact he took a decision to start the procedure in question in March 1997.

However, it should be noted here that – in contrast to the circumstances of a previous appeal where the Secretary General had decided not to go ahead with the procedure in view of the satisfactory reports made on the appellant during the probationary period (ABCE, No. 166/1990, Beygo v. Secretary General, decision cited above, paragraph 9) – in the present case, the Secretary General did not implement his decision. As a result, this administrative decision cannot have any damaging consequences for the appellant. This means that the Secretary General will not be able to use the fact of his decision in March 1997 in making a case for deciding to start any subsequent probationary procedure. If he did so, the legality of such a course of action would be subject to scrutiny in any dispute proceedings that might follow.

28. It must therefore be concluded that this appeal became redundant when the Secretary General notified the appellant that he had not implemented the contested procedure.

29. The fact that the Secretary General can keep unusable "historic" information in a personal file is not in itself sufficient grounds for deviating from the Tribunal's conclusion. Moreover, at no time in the course of her administrative complaint or her subsequent appeal did the appellant request that the document in question should not be kept in her personal file.

30. In the light of these considerations, the Tribunal concludes that the appeal must be dismissed.

31. The appellant, who was represented by counsel, has requested 30 000 French Francs in respect of costs and expenses.

32. The Tribunal notes that, under Article 11, paragraph 3 of its Statute, "In cases where it has rejected an appeal, [it] may, if it considers there are exceptional circumstances justifying such an order, decide that the Council shall reimburse in whole or in part properly vouched expenses incurred by the appellant. The Tribunal shall indicate the exceptional circumstances on which the decision is based."

In consideration of the course of the proceedings and the questions that arose during them, the Tribunal grants the appellant the sum of 15 000 French Francs in costs.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares it unfounded; and

Orders that the Council of Europe reimburse X the sum of 15 000 (fifteen thousand) French francs in costs and expenses.

Delivered at Strasbourg on 27 August 1998, the French text of the decision being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C RUSSO