

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

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 240/1997 (Adrianus van LOON v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Nicolas VALTICOS, Deputy 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 Adrianus van LOON lodged his appeal on 23 September 1997. On 24 September, it was registered under file No. 240/1997.
2. On 24 October 1997, the Secretary General submitted his observations on the appeal. On 26 November 1997, the appellant submitted his observations in reply.
3. The public hearing took place in Strasbourg on 26 January 1998. Mr van LOON presented his case in person. The Secretary General was represented by Mr R. LAMPONI, Head of the Legal Adviser's Department, Directorate of Legal Affairs, and Mr T. MARKERT, Principal Administrative Officer in the same directorate.

### THE FACTS

4. Mr van Loon started working at the Council of Europe on 1 October 1993, as a legal expert attached to the European Audiovisual Observatory on a long-term temporary contract.

The European Audiovisual Observatory was set up on 15 December 1992 by Resolution (92) 70 of the Committee of Ministers. Under the resolution, it was “established for an initial period of three years, at the end of which the Audiovisual EUREKA Co-ordinators’ Committee

[would] decide on the continuation of the Observatory's activities on the basis of a report evaluating [them]". According to the Secretary General, it was for that reason that staff recruited to work at the Observatory were offered temporary rather than permanent contracts.

5. Mr van Loon's first contract (grade A2, step 1) was for one year, ending on 30 September 1994. It was then extended to 30 September 1996 and afterwards further extended to 31 December 1996. On 1 January 1997, it was renewed for a period scheduled to end on 30 June 1997.

6. On 6 August 1996, Vacancy Notice N° 91/96 announcing external recruitment of a legal expert to be responsible for the network of partner institutions and organisations (grade A2/A3) in the European Audiovisual Observatory stated: "The successful candidate will initially be appointed on a two-year contract, which may be extended. This Vacancy Notice is issued subject to the adoption by the Committee of Ministers of the resolution confirming the continuation of the Observatory."

7. Under Resolution (97) 4 of 20 March 1997, the Committee of Ministers decided to confirm the continuation of the European Audiovisual Observatory as an enlarged partial agreement of the Council of Europe.

8. On 4 April 1997, after the external recruitment procedure announced in Vacancy Notice No 91/96, the appellant was offered employment for an initial period of two years, renewable, starting on 1 April 1997. The offer stated that he would be appointed at grade A2, step 4 – the same grade and step as in the long-term temporary appointment he already held in connection with the same duties.

9. On 15 April 1997, the appellant filed an administrative complaint against the decision to offer him a grade A2 rather than A3 post and against the decision to offer him a two-year contract rather than an indefinite one.

10. In accordance with Opinion No. 1/1997 of the Advisory Committee on Disputes of 18 July 1997, on 28 July 1997 the Secretary General, accepting the findings of the Advisory Committee on Disputes, dismissed the administrative complaint.

The view of the Advisory Committee on Disputes was that the Secretary General's policy on recruitment at grade A3, which had been introduced in May 1996 (memorandum of 13 May 1996 addressed to the Director of Administration), fell within his discretionary powers and that even without this new policy the appellant's previous experience fell short of the requirements of Article 24, paragraph 2, of the Regulations on Appointments:

"An applicant may only be appointed to an A3 post by recruitment if he or she is at least 33 years old and has had eight years' professional experience in the exercise of functions which are considered equivalent to those attaching to grade A2."

The memorandum established new rules governing recruitment at grade A3. In it, the Secretary General stated (translation): "... even when candidates meet all the requirements laid down in Article 24, paragraph 2, for appointment at grade A3, they are not automatically entitled to be recruited at that grade. Such appointment is a matter for the Secretary General's

discretion.”

Exercising this discretion, the Secretary General asked that (translation), “in future, staff be recruited at grade A3 only in highly exceptional cases where it [was] warranted by special considerations of qualifications, experience or age which were relevant to the vacant post” and added that he wished (translation) “to be consulted in person prior to each appointment”.

In reply to a question from the Advisory Committee on Disputes, the appellant had said that he had not been familiar with the memorandum at the time of the job offer.

11. On 1 October 1997, following an internal recruitment procedure, the appellant was transferred to the Mass Media Section in the Directorate of Human Rights, on a provisional contract with appointment at grade A2, step 4, and with a probationary period commencing on 1 April 1997 and ending on 31 March 1998. This new contract replaced the contract dated 4 April 1997. The appellant signed the new contract on 13 October 1997, with the proviso that his acceptance of the A2 appointment was subject to the outcome of this appeal.

## **THE LAW**

12. The appellant exercised his right to appeal against the Secretary General’s decision of 4 April 1997 offering him a contract for an initial two-year period at grade A2. He challenges the decision on two grounds: first, that he was entitled to a contract of indefinite duration and, second, that he should have been offered a grade A3 appointment. The decision, he contends, is unfounded, partly because it is based on wrong assumptions and/or inaccurate assessment of his experience, and partly because no clear reasons were given for it.

13. After lodging the appeal, and on his transfer to the Directorate of Human Rights (see paragraph 11 above), he was offered a new contract at grade A2, to take effect retroactively on 1 April 1997. Following this new offer, he withdrew his first ground of appeal.

14. Under his second ground of appeal, he maintains that he was not a “newly recruited” member of staff. Article 2, paragraph 2, of the Regulations on Appointments provides: “Recruitment is the appointment to a vacant post of a candidate who is not a staff member”. The appellant points out that he has been continuously employed since 1993 on a long-term temporary contract and was offered a permanent post because, after the competition subsequent to the Vacancy Notice announcing the external recruitment procedure, the Secretary General decided he was the person best qualified for the post. However, the post was offered to him as an internal candidate entitled to apply under the external recruitment procedure. His appointment therefore confirmed him in the post he already held, in accordance with the policy adopted in many Council of Europe member states whereby temporary employment contracts that have been twice renewed automatically become permanent and hence bring more favourable conditions.

On this basis, the appellant argues that as he was not a newly recruited member of staff he could not be subject to the new recruitment policy imposed by the Secretary General in his memorandum of 13 May 1996. On the contrary, he maintains, since he had been recruited on 1 October 1993, Article 24, paragraphs 1 and 2, was not applicable in his case and the provision

that applied was Article 24, paragraph 3, together with Rule 617 of 15 July 1982, which reads:

“A staff member in grade A2 with at least four years’ professional experience prior to recruitment in the exercise of duties with comparable requirements may be exempted from part of the minimum waiting period of four years’ service in that grade for promotion to grade A3, in accordance with the following scale ...”

On this basis, the appellant considers that he was entitled to an A3 appointment. In support of this contention he refers to his curriculum vitae which, in his opinion, shows that his experience was sufficient for him to be entitled to a reduction in the minimum waiting period for promotion from grade A2 to grade A3 and that, consequently, since 1 April 1996 he has fulfilled the requirements for promotion to grade A3.

Alternatively, if the Tribunal were to regard him as a newly recruited member of staff, he contends that, on the basis of his previous experience and under Article 24, paragraph 2, of the Regulations on Appointments, he was none the less eligible for recruitment at grade A3.

15. In conclusion, he requests that the Tribunal rule the contested decision unlawful. He also:

a. seeks confirmation from the Administrative Tribunal that a person appointed as a permanent member of staff after service on a long-term temporary contract cannot be considered to be a “new” staff member and consequently should not be subject to the same rules as “newly” recruited staff;

b. asks the Administrative Tribunal to confirm that, for reasons of fairness, social justice and social security, staff appointed to posts that are permanent in character should be given indefinite contracts;

c. asks the Administrative Tribunal to have the Secretary General revise his decision on the job offer made on 4 April 1997 by correcting its interpretation of the Staff Regulations and the Regulations on Appointments and giving a clearer statement of reasons so that the appellant can be appointed retroactively to a grade A3 post for an indefinite period commencing no later than 1 April 1997;

d. asks the Administrative Tribunal to have the Secretary General appoint him retroactively, on the basis of the outcome of the revision requested under *c* above, to a grade A3 post for an indefinite period commencing no later than 1 April 1997.

16. The Secretary General holds that the appeal is partly inadmissible and partly unfounded.

17. He considers first of all that the appellant’s requests relating to anything other than a finding of unlawfulness of the contested decision are inadmissible in so far as the Tribunal is not competent to make general statements of law or give instructions to the Secretary General with respect to his future conduct. He adds that if ever his decision on the offer of the contract were to be annulled, he would of course abide by the Tribunal’s reasoning and act accordingly. None the less, the other claims, he says, are inadmissible as they stand.

The Secretary General notes that they are also inadmissible in so far as they were not raised in the complaints procedure which must precede any appeal.

18. He maintains that the argument in the first ground of appeal that in April 1997 the appellant was not a “newly recruited” member of staff since he had been recruited in October 1993 is neither compatible with the Staff Regulations nor justified by the policy considerations put forward to support it. He submits that interpreting “recruitment” in Article 4 of the Staff Regulations to mean the recruitment of temporary staff is clearly contrary to the regulations currently in force and that this is borne out by the other provisions of the Staff Regulations and their appendices. Furthermore, he argues, there is no provision in Article 3 of Rule 821 governing the conditions of employment of temporary staff whereby either the Regulations on Appointments or the provisions of the Staff Regulations relating to recruitment apply to temporary staff.

“Recruitment”, as used in the Regulations on Appointments, must therefore be understood as referring exclusively to the recruitment of permanent staff. According to the Secretary General, this has been accepted by the Tribunal in the past, at least implicitly (see ABCE, Appeal No. 100/1984 (Van Lamoen), Decision of 20 December 1984, paragraph 60, and Appeal No. 132/1986 (Coin), Decision of 17 February 1987, paragraph 57).

The Secretary General says he has some sympathy with the appellant’s concern about the large discrepancies between the status of permanent staff members and that of temporary staff and that improvements to the status of temporary staff are being considered.

He also points out that it is the Organisation’s established practice to regard recruitment for the purposes of the Regulations on Appointments as meaning only recruitment to the permanent staff.

19. According to the Secretary General, even if the argument put forward by the appellant were accepted, it would have no bearing on the present case. The appellant’s contention is essentially that, on the basis of the argument, he should be promoted under Article 24, paragraph 3, of the Regulations on Appointments. Like the other paragraphs of Article 24, however, that paragraph does not establish a right to promotion. It merely provides that “appointment by promotion may be made”. The relevant procedure was set down in the Office Circular of 11 September 1992. Promotion is subject to a request by the Director or Head of Department of the staff member concerned and to examination of the staff member’s file by the Transfers and Promotions Panel.

20. Neither the appellant’s Head of Department nor the appellant made any such request for promotion, and even if the appeal were to be interpreted as containing such a request the appellant could not obtain retroactive promotion without completing the required formalities.

21. The Secretary General is of the opinion that the appellant’s subsidiary argument must be dismissed, given that he did not have the professional experience required under Article 24, paragraph 2, of the Regulations on Appointments and since, even had he had such experience, the decision whether to appoint him at grade A3 was a matter for the discretion of the Secretary General, who exercised it properly in deciding not to appoint him at that grade.

With respect to the first point, the Secretary General notes that on recruitment the appellant had nine years' and nine months' professional experience whereas a total of ten years' professional experience is required for eligibility for a grade A3 appointment.

Even were the appellant to have had ten years' professional experience, he would not have an automatic right to be appointed at that grade. Decisions on appointment at a specific grade are a matter in which the Secretary General has a wide discretion, as consistently held in the Administrative Tribunal's case-law regarding promotions.

22. In conclusion, the Secretary General holds that his decision to offer the appellant a contract at grade A2 was not only consistent with proper exercise of his discretion but was in fact the only decision legally possible. He therefore asks the Tribunal to declare the appeal to be partly inadmissible and at all events un-founded, and to reject it.

23. In reply to the observations submitted by the Secretary General, the appellant maintains his arguments and argues that his new contract takes account of a number of elements (step in grade and expatriation allowance) which show that in those respects he is not regarded as a new member of staff.

He also points out that in his memorandum of 13 May 1996 to the Director of Administration, the Secretary General stated that he wished to be personally consulted in cases where the Human Resources Division was considering appointing a member of staff to an A3 post. However, in the present case, the Secretary General was not personally consulted for the simple reason that the Human Resources Division did not think there were any special considerations relating to the appellant's qualifications, experience or age to justify an A3 appointment. The appellant therefore requests that the Tribunal assess whether or not the Secretary General had reasonable grounds for deciding that there were no exceptional factors which justified appointing him at grade A3.

24. As regards the Secretary General's inadmissibility objection to two of the appellant's submissions (sub-paragraphs 15.*a* and *b* above), the Tribunal holds that in determining a specific case it may base its reasoning on interpretation of any provision applicable to the case.

25. It also notes that the appellant has withdrawn his first ground of appeal concerning the nature of the contract offered to him in April 1997 (paragraph 13 above). Consequently, it will rule only on the second ground of appeal. It further notes that the contract offered to the appellant in April 1997 was replaced, during the proceedings, by another contract dated 13 October 1997 (see paragraph 11 above) but that the dispute is unaffected since the grade offered to the appellant was once again A2 and not A3.

26. The first argument in the appellant's second ground of appeal is that he was recruited as a permanent staff member in October 1993. The Tribunal disagrees. The Staff Regulations and the Regulations on Appointments are clear: "Recruitment is the appointment to a vacant post of a candidate who is not a staff member" (Article 2, paragraph 2, of the Regulations on Appointments). And Article 1 of the Staff Regulations states unequivocally: "These Regulations shall apply to any person who has been appointed ... to a permanent post ... but shall not apply to temporary staff". Vacancy Notice No. 91/96 clearly stated that the appointment would be on the basis of an external recruitment procedure

(paragraph 6 above). It was also clear from the terms of the contracts offered to the appellant first in 1993 and then subsequently up to April 1997 that the job was a temporary one.

27. Consequently, the Tribunal takes the view that the appellant did not become a permanent member of staff until April 1997. Given the absence of any provision whereby all the effects of recruitment can legally be traced back to the day the appellant started work as a temporary staff member, the appellant is not entitled to claim permanent staff member status with retroactive effect from October 1993. Consequently, it was not possible, either in April 1997 or before, for the appellant to claim application of Article 24, paragraph 3, of the Regulations on Appointments, which lays down the requirements for appointment to grade A3 by promotion.

28. As the appellant's case was covered by Article 24, paragraph 2, the Tribunal must check whether the provision was correctly applied. However, on account of the conclusion it has reached, it is not required to decide whether the applicant was entitled to a grade A3 appointment by promotion, either in April or afterwards, as that question falls outside the present dispute.

29. The appellant maintains that, on account of his previous experience, by April 1997 he had the necessary experience for appointment at grade A3 – that is, “eight years’ professional experience in the exercise of functions which are considered equivalent to those attaching to grade A2”. As evidence of this, he alleges that after completing his four-year university course in September 1987, he acquired professional experience, from 1 July 1988 onwards, at a level equivalent to grade A2. Consequently, by 1 April 1997, he had one year's experience at a level equivalent to grade A1 and eight years' and nine months' experience at a level equivalent to grade A2.

30. The Secretary General holds that in April 1997, the appellant did not have the necessary experience. He notes that, under Article 24, paragraph 2, eight years' professional experience in the exercise of functions considered equivalent to those attaching to grade A2 are required for appointment to grade A3. As, under Article 24, paragraph 1, appointment at grade A2 is subject to two years' professional experience, it is logical (and this is confirmed by Rule 617 of 5 July 1982 when read with Article 24, paragraph 3, second sub-section) to treat the first two years after university as equivalent to grade A1 and therefore to regard the requirement for eligibility for appointment at grade A3 as being a total of ten years' professional experience. In the Secretary General's view, in April 1997, the appellant had experience totalling only nine years and nine months whereas Article 24, paragraph 2, requires ten years.

31. To sum up, the Tribunal notes that the parties differ fundamentally in their assessment of the experience which the appellant gained in the second year after completion of his four-year university course.

It notes that in assessing the appellant's experience, the Secretary General exercised a discretionary power vested in him. The Tribunal may review the lawfulness of any decision alleged to have exceeded the inherent limits of such assessment but there is no evidence here to suggest that in exercising his discretion the Secretary General exceeded those limits.

32. Having arrived at this conclusion, the Tribunal does not consider it necessary to examine the appellant's argument that the Secretary General's re-interpretation of the rules after his

“recruitment” in 1993 had unfair and unreasonable consequences in his particular case and was therefore unacceptable from the point of view of social policy and social justice. However, it notes that in this connection the appellant would seem to have suffered the consequences of the special status which the European Audiovisual Observatory had in October 1993 and which, as pointed out by the Secretary General, was responsible for the policy of recruitment on a temporary basis.

The Tribunal is likewise not required to determine the complaint about the Secretary General’s memorandum of 13 May 1996 to the Director of Administration, or whether Article 24, paragraph 2, entitles new staff members to recruitment at grade A3 if they are able to prove they have at least eight years’ professional experience in the exercise of functions equivalent to those attaching to grade A2.

The appellant was not offered an A3 contract because he was not considered to have the necessary experience. The Tribunal, on the basis of the evidence brought before it, is not convinced that he had the necessary experience.

33. Not having found any breach of the rules governing the recruitment of members of staff, the Tribunal concludes that the Secretary General’s decision to recruit the appellant at grade A2 was in no way unreasonable.

34. As no illegality has been found, the appeal must be rejected.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible in so far as it concerns the appellant;

Declares it unfounded;

Dismisses it; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 23 April 1998, the French text of the decision being authentic.

The Registrar of the  
Administrative Tribunal

The Deputy Chair of the  
Administrative Tribunal

S. SANSOTTA

N. VALTICOS