CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

Appeal No. 263/2000 (Panos KAKAVIATOS v. Secretary General)

The Administrative Tribunal, composed of:

Mr Kurt HERNDL, Deputy Chair,
Mr José da CRUZ RODRIGUES,
Mr Helmut KITSCHENBERG, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr Panos KAKAVIATOS lodged his appeal on 3 October 2000. On the same date the appeal was registered under No. 263/2000.

2. On 28 November 2000 the appellant, represented by Professor M. PIQUEMAL, lodged further pleadings concerning his claims and the evidence adduced.

3. On 29 November 2000 the Secretary General forwarded his observations concerning the appeal. The Secretary General was represented by Mr J.POLAKIEWICZ, Deputy Head of the Legal Advice Department in the Directorate of Legal Affairs.

4. The appellant submitted his observations in reply on 21 December 2000.

5. On 30 January 2001 the Secretary General lodged further observations with the Tribunal.

6. On 1 February 2001 the Staff Committee, represented by its Chair Ms Tina MULCAHY, applied to intervene in the proceedings, requesting authorization to submit written observation in support of the appellant's submissions.

7. In an Order issued on 28 February 2001, the Deputy Chair of the Administrative Tribunal authorised the Staff Committee to submit written observations.

8. On 8 March 2001, the Staff Committee submitted its written observations, copies of which were disclosed to the parties.

9. On 19 March 2001 the appellant submitted comments on the Staff Committee's intervention. On 21 March 2001 the Secretary General also lodged further observations.

10. As the parties had expressed their willingness to forego oral proceedings, the Tribunal decided that there was no need to hold a hearing

THE FACTS

11. At the time of introducing his appeal the appellant, a Greek and US national, held a post of administrative assistant in the Council of Europe Directorate of Communication and Research. He took up his duties with the Organisation in January 1996 on a monthly temporary contract. In 1998 he was granted an annual contract and in 1999 two six-month contracts; on 1 January 2000 he obtained another annual contract.

12. The appellant originally entered France in September 1995 as a student. After attending classes in Paris with the Alliance Française, he continued his studies at the Institut national des études françaises in Strasbourg. In November 1995 the appellant accepted a half-time "freelance" contract for a short term (9-19 January 1996) with the ARTE television channel.

13. After staying with a Strasbourg family, the appellant rented a furnished bachelor flat which he occupied from 1 October to 14 December 1995. At the end of this term of rental, the appellant went back to the United States.

14. The appellant subsequently returned to Strasbourg in order to complete his contractual duties with Arte and to sit French language examinations. It was then that he contacted the Council of Europe and was offered a one-month employment contract. When asked by the Council of Europe Administration to fill in the application form, he gave the address of the Strasbourg flat which he had occupied earlier and planned to rent again.

15. In memoranda dated 28 January and 11 February 2000 to the Head of the Human Resources Department, the appellant asked to be granted the residence allowance. He gave details of his personal situation at the time of recruitment and explained that he had only subsequently learned of the residence allowance.

16. On 16 February 2000 the Head of Human Resources sent the appellant a memorandum under cover of the Head of Division, worded as follows:

> "Subject: residence allowance
>
> Further to your memorandum of 28 January requesting a residence allowance, I regret to inform you that it cannot be granted.
>
> Under the terms of Article 40 of Rule No. 821 laying down the conditions of recruitment and employment of temporary staff, for temporaries employed on a monthly basis the monthly residence allowance supplants the daily subsistence allowance payable under "J" type contracts.
>
> Now, Article 40 stipulates that daily subsistence allowance is payable to staff members resident over 100 km from the duty station **at the time of recruitment**. This allowance is warranted by the need to compensate the staff member for the subsistence expenses incurred in taking up his/her employment with the Organisation. The monthly residence allowance has the same purpose.
>
> In your case, regard was had to particulars which you yourself supplied (notably a Strasbourg address and an indication of occupational activity likewise in Strasbourg) in offering you employment contracts of the local type.
>
> It is therefore clear that you do not meet the requirements for award of the residence allowance."

17. On 18 February 2000 the appellant replied to the memorandum from the Head of Human Resources, stating that he had not been resident in Strasbourg when recruited early in 1996. He again asked the Head of Human Resources to reconsider the 1996 decision not to grant him the allowance ("*I ask you again to please reconsider the decision in 1996 not to give me this entitlement*").

18. By electronic mail of 30 March 2000, the Head of Human Resources informed the appellant that the Administration had transmitted his request for a review of his situation to the Legal Advice Department, requesting an opinion. He was also invited to forward documents in support of his claims to a staff member of the Legal Advice Department, responsible for examining his case. The applicant subsequently provided documents chiefly relating to his studies and employment in Strasbourg.

19. In another electronic mail message to the Head of Human Resources on 29 May 2000, the appellant recalled that for the past six months he had been requesting the award of the expatriation allowance or the residence allowance. Referring to the memorandum of 16 February 2000, he stressed that at the time of recruitment he had in fact been resident over 100 km from Strasbourg, and gave an address in the United States. After stating the facts of his case, he said that he was awaiting a final decision on his request.

20. On 7 July 2000 the appellant lodged an administrative complaint asking to be awarded the residence allowance in so far as prescribed by Article 40 of Rule No. 821 and from the time when he was first employed. He complained firstly that upon

recruitment in January 1996 he had not been informed by the Administration of the existence and conditions of award of the residence allowance. He claimed to have put the Strasbourg address on the form strictly for practical reasons. Next, referring to the memorandum of 16 January 2000, he challenged the construction placed by the Head of Human Resources on the concept of residence, one which in his view equated residence with a brief stay. Lastly, he alleged a departure, to his detriment, from an "administrative practice" which he claimed had been followed in other cases.

21. On 3 August 2000 the Secretary General, through the Director of Administration and Logistics, dismissed the appellant's administrative complaint. He gave the following reasons for the decision:

> "You have lodged an administrative complaint alleging the refusal of your application for a residence allowance with effect from your initial recruitment.
>
> It should be noted at the outset that your conditions of employment are governed by contractual provisions referring directly to the provisions made in a Rule of the Secretary General, namely Rule No. 821. A copy of this text is routinely supplied to staff members by the Recruitment Divisions of the Human Resources Department upon initial recruitment. In signing your first and subsequent contracts, you moreover acknowledged that you had taken note of "**the conditions attached to the contract**". Even assuming that this text was not straightway handed to you, you should normally have requested a copy of it. For that reason your ignorance of the contractual conditions applicable to you, supposing it to be proven, is inexcusable and can in no way justify retroactivity of the residence allowance which you claim.
>
> Your complaint is at all events to be considered inadmissible as it is submitted out of time. Indeed, your application for a residence allowance was made on 28 January 2000 and rejected on 16 February 2000. Your administrative complaint was lodged on 7 July, which is more than thirty days after your application was turned down.
>
> In any case your complaint is also unfounded in that you were offered the first contract when you were already in Strasbourg. At no time did the Council of Europe contact you while abroad with an offer to come and work at its headquarters. You yourself took the initiative of contacting the Council of Europe to offer your services. In so doing you gave a Strasbourg address. It was in the light of the particulars supplied by you that an offer of employment was made to you for one month in order to meet a momentary need of the Organisation, and that your employment was subsequently extended on the same terms. It is therefore hard to see in what way the Council of Europe should now consider itself obligated to pay you a "residence" allowance with retroactive effect; indeed, it can bear no responsibility for a situation which you brought about by supplying it with incomplete if not incorrect particulars at the time when the contract was drawn up.
>
> It should also be recalled that this indemnity does not have the same purpose as the residence allowance prescribed by the Staff Regulations for permanent staff up to 1 January 1998.

The indemnity at issue – referred to as a residence allowance – is actually a standard rate subsistence allowance (see the head under which this provision appears). In the case of short-term "J" or "M" type contracts, Articles 40-42 of Rule No. 821 provide for a "daily subsistence allowance" under "J" type contracts, the daily subsistence allowance being replaced by a "monthly residence allowance" for "M" type contracts.

The "residence" allowance is for the purpose of offsetting, at a fixed rate, the travel and subsistence expenses incurred by a staff member travelling to Strasbourg in order to fulfil his/her contract with the Organisation. This accounts for the high rate of the allowance for "M" type contracts, viz. 15-20% of the remuneration (for permanent staff members recruited before 1998, the level of the residence allowance is far lower). It is purely intended to make up for the expenses incurred by a staff member on a monthly contract who is obliged by the brevity of his/her employment to pay for the upkeep of two residences at once. If the staff member was already on the spot – irrespective of the reason – there would be no cause to pay the either the daily subsistence allowance or the residence allowance.

These are the principles followed in practice by the Administration with regard to the award of this allowance.

Consequently, in so far as admissible, your administrative complaint is ill-founded."

22. On 3 October 2000 the complainant lodged the present appeal against the dismissal of his administrative complaint.

THE LAW

23. The appellant has appealed against the Secretary General's decision not to retroactively award him the residence allowance prescribed by Article 40 of Rule No. 821. He asks the Tribunal to set aside this decision and to award him expenses and fees.

AS TO THE ADMISSIBILITY OF THE APPEAL

24. The Secretary General submits that the appeal is inadmissible, contending that the appellant's administrative complaint was inadmissible in being lodged out of time.

The Secretary General submits that the act complained of by the appellant is the decision of 16 February 2000. The person duly authorised to give the appellant a reply to the question raised, namely the award of the residence allowance, was at all times the Head of Human Resources acting on behalf of the Director General of Administration. Regarding the decisional character of the memorandum in question, the terms clearly indicate that it was an administrative decision that could occasion an administrative complaint, and was not an incidental memorandum. The thirty day time-limit for lodging the administrative complaint therefore ran from the

memorandum of 16 February. It follows that the administrative complaint, lodged on 7 July 2000 ie more than thirty days after the date of the decision complained of, is inadmissible *ratione temporis*.

The Secretary General does not deny the occurrence of contacts subsequent to the decision of 16 February between the appellant and the Head of Human Resources. According to the Secretary General, these contacts in no way alter the point of origin of the act complained of. He considers that they bear witness to the appellant's disagreement with the decision taken by the Head of Human Resources. In this connection, the Secretary General draws attention to the appellant's request, in his memorandum of 18 February 2000, to have the decision reconsidered, which would indicate that the appellant considers it to have been taken on 16 February 2000.

As regards the contacts between the Human Resources Department and the Directorate General of Legal Affairs, the Secretary General maintains that these do not detract from the decisional character of the memorandum of 16 February.

25. For his part, the appellant contends that the appeal is admissible, asserting that the memorandum from the Director of Human Resources dated 16 February 2000 is devoid of finality and in his opinion constitutes a incidental memorandum.

In this respect, the appellant invokes firstly the contacts subsequent to that decision between the Human Resources Department and the Directorate General of Legal Affairs for the purposes of reconsidering his request. He claims that in these circumstances he was not only entitled but also obliged to refrain from challenging the memorandum in question, to the extent that the complaint which it raised was not yet definite.

Secondly, the appellant observes that he did indeed object to the non-payment of the residence allowance as indicated by the pay slip for June 2000. He adds that in his administrative complaint of 5 July 2000, the sole reason for his referring to the memorandum from the Head of Human Resources was to refute the arguments invoked by the Administration to justify non-payment of the allowance.

Lastly, he relies on a precedent of the Administrative Tribunal of the International Labour Organisation (Judgments nos. 292, Molloy v. Eurocontrol of 6 June 1977, 323, Connelly-Battisti (no. 5) v. UNESCO of 21 November 1977 and 1408, Frints-Humblet v. Eurocontrol of 1 February 1977) in order to contend that appeal to a higher authority remains possible at any stage and reactivates the time-limits for appeal on each occasion when the effect of decision under appeal recurs, which is said to apply in this case.

26. In its intervention, the Staff Committee supports the appellant and notes that the objection of inadmissibility raised by the Secretary General is founded purely on a textual analysis of the memorandum from the Head of Human Resources dated 16 February 2000. Thus it does not take account of the factual, documented proofs which the appellant has been able to adduce and which show that his request was reconsidered by the Administration. It further contends that, this being a dispute of a pecuniary nature, international case-law permits an appeal to be made at any point in time.

27. In order to determine whether the Secretary General's objection of inadmissibility was founded, it should be recalled that the disputes procedure laid down in Articles 59 and 60 of the Staff Regulations stipulates that the administrative complaints and appeals which staff members may lodge against administrative acts adversely affecting them must comply with certain time-limits. The formalities and procedures laid down in the Staff Regulations are designed to ensure observance of the principle of legal certainty inherent in the Council of Europe system, in the interests of both the Organisation and its staff. Observance of the principle of legal certainty requires that the time-limit after which the Administrative Tribunal may no longer review an administrative act (see ABCE, Appeals Nos. 118-128/1985, Jeannin and others v. Secretary General, decision of 14 February 1986, paras. 63-65; Appeal No. 129/85, Levy v. Secretary General, decision of 14 February 1986, paras. 29-31) be a known date.

28. According to Article 60 para. 1 of the Staff Regulations, an appeal cannot be lodged until after the administrative complaint concerning the dispute has been dismissed. Hence the provisions of Part VII "Disputes" complement each other. That being so, Article 60 para. 1 requires not only that the complaint has been lodged with the Secretary General but also requires the person concerned to raise, within the time-limits prescribed in Article 59, the complaints which it is subsequently intended to lay before the Tribunal (see ABCE, Appeals Nos. 226/1996, Zimmermann v. Secretary General, decision of 24 April 1997, para. 21, with references; no. 241/1997, Tonna v. Secretary General, decision of 9 November 1998, para. 31).

29. Where the administrative complaint is concerned, Article 59 of the Staff Regulations stipulates:

> "1. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them. The expression "administrative act" shall mean any individual or general decision or measure taken by the Secretary General. If the Secretary General has not replied within sixty days to a request from a staff member inviting him or her to take a decision or measure which he or she is required to take, such silence shall be deemed an implicit decision rejecting the request. The sixty-day period shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.
>
> 2. 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.
> ..."

30. It follows that non-compliance with the time-limit for lodging the administrative complaint renders the appeal inadmissible.

31. In the present case, the Secretary General contends that the act adversely affecting the staff member, within the meaning of Article 59 para. 1 of the Staff Regulations, is the decision contained in the memorandum dated 16 February 2000 from the Head of Human Resources. The appellant contests the decisional character of the memorandum. He also claims to have challenged the non-payment of the residence allowance as indicated by the pay slip for June 2000. Lastly, relying on an international precedent, he considers himself entitled to lodge a complaint to a higher authority every time the decision under appeal takes effect. The Staff Committee supports the appellant's contention.

32. The Tribunal notes that in January 1996 the Council of Europe Administration offered the appellant an initial temporary employment contract. On the strength of the particulars given by the appellant on a form at the time of his engagement, the contract the terms of employment with locally recruited status, that is simply the amount of remuneration, and did not mention a residence allowance. A succession of local status temporary employment contracts followed, running for periods of six months to one year. Only at the beginning of 2000 did the appellant apply to the Head of Human Resources for the residence allowance. Following the Head's reply dated 16 February 2000 and other contacts with the Administration, the appellant lodged his administrative complaint on 7 July 2000.

33. The Tribunal immediately notes that the provisions of Rule No. 821 of 1 December 1992 laying down the conditions of recruitment and employment for temporary staff may be hard for a newly recruited temporary staff member to understand. It is certainly desirable that the forms and other items of information provided upon engagement should clearly set out the rights of the staff member and the effect which the requested information may have, in order to meet the requirement of transparency in staff management. In this case, the Tribunal notes that while the appellant knew nothing about the effect of the particulars supplied to the Administration, or about the right, under certain conditions, to receive the allowance prescribed by Rule No. 821, he states that these facts came to his notice after he was engaged (see paragraph 15 above).

34. The Tribunal considers that the fact of having offered the appellant local status contracts without reference to the residence allowance has not clearly disclosed a decision by the Administration to refuse him the grant of the residence allowance. Indeed, the administrative procedure relating to the question of the award of the residence allowance only commenced with the application made by the appellant in January and February 2000. An application of this kind, asking the Secretary General to take a decision or a measure may be submitted at any time, as Article 59 para. 1 of the Staff Regulations specifies no time-limit.

35. On 16 February 2000 the Head of Human Resources wrote to the appellant in the form of a memorandum replying to the appellant's written request to receive the residence allowance. The very terms of the second sentence in the memorandum establish without any doubt that the Head of Human Resources did inform the appellant of the decision not to grant him this allowance. The statement of grounds for the refusal put forward considerations of law and fact, constituting the foundations for the decision to refuse the allowance. This interpretation is substantiated by the concluding remark of the Head of Human Resources that the appellant did not meet the requirements for award of the allowance.

36. At no time during the subsequent exchanges between the appellant and the Council of Europe Secretariat did the Administration alter the position which it had adopted in the memorandum dated 16 February 2000.

37. It emerges from the foregoing that the refusal by the Head of Human Resources on 16 February 2000 to grant the appellant's request constitutes the act adversely affecting him. The transmission of this memorandum thus had the effect of actuating the time-limit under Article 59 para. 2 of the Staff Regulations for referral of an administrative complaint to the Secretary General.

38. The appellant, relying on a precedent of the Administrative Tribunal of the International Labour Organisation (see paragraph 25 above), submits that the refusal of a request for the award of an allowance has a continuing effect, reflected in each pay slip, so as to reactivate on the first of each month the time-limit for lodging an administrative complaint and an appeal where applicable.

39. The Tribunal cannot accept this contention. Pay slips do indeed constitute acts which can have an adverse effect and may thus be the subject of a complaint and possibly an appeal (see ABCE, aforementioned decisions in the appeals by Jeannin and others v. Secretary General, paras. 66-68, and Levy v. Secretary General, paras 32-33. Judgments of the European Court of Justice of 15 June 1976, Wack v. Commission, 1/76 paras. 5-7; 22 September 1988, Canters v. Commission, 159/86, para. 6; 27 June 1989, and Giordani v. Commission, 200/87, para. 13. Judgment of the Court of First Instance of 1 October 1992, Schavoir v. Council, T-7/91, para. 34, and Order of 24 March 1998, Meyer and Others v. Court of Justice, T-181/97, para. 24-27).

However, the provisions of the Staff Regulations and the requirement of legal certainty preclude any possibility that a final decision taken by the Organisation could be indirectly challenged in an administrative complaint against an act subsequently, albeit recurrently, executed, when the decision was not contested in due time (see, *mutatis mutandis*, Court of First Instance, aforementioned Order in the case of Meyer and Others, para. 31. This likewise applies to pay slips in so far as they reflect an earlier decision that was not validly contested.

40. The Tribunal discerns no exceptional circumstance that would relieve the appellant of the obligation to comply with the time-limit (Article 59, para. 2 of the Staff Regulations).

41. In the light of all the foregoing considerations, the present appeal is inadmissible. Consequently, the Tribunal cannot examine the case on the merits.

For these reasons, the Administrative Tribunal:

Declares the appeal inadmissible;

Dismisses it; and

Orders that each party bear its own costs.

Delivered in Strasbourg on 12 October 2001, the French text of the decision being authoritative.

The Registrar of the Administrative Tribunal	The Deputy Chair of the Administrative Tribunal
S. SANSOTTA	K. HERNDL