

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF

## ADMINISTRATIVE TRIBUNAL

### Appeal No. 267/2001 (Wolfgang PEUKERT v. Secretary General)

The Administrative Tribunal, composed of:

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

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

### PROCEEDINGS

1. Mr Wolfgang Peukert lodged his appeal on 26 February 2001. The appeal was registered under file No.267/2001 on the same date.
2. On 27 March 2001, the Secretary General submitted his observations on the appeal. The Secretary General was represented by Mr R. Lamponi, Head of the Legal Advice Department in Directorate General I - Legal Affairs.
3. The appellant filed observations in reply on 10 May 2001.
4. On 29 May 2001, the Secretary General submitted further observations to the Tribunal.
5. In the meantime, on 17 April 2001, the Secretary General had proposed that the Tribunal be assisted by an *ad hoc* registrar, on the grounds that the registrar and deputy registrar were employed in the department (Registry of the European Court of Human Rights) in which posts were to be filled through the procedure at issue in this case. Furthermore, these two staff members had been candidates for the posts in question.

6. On 11 May 2001, the Tribunal decided that there was no reason to dispense with the services of the registrar and deputy registrar. The latter had in fact already asked the Tribunal to excuse her for other reasons.

7. 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

8. The appellant is a former grade A4 permanent member of staff. Having reached retirement age, he became eligible for a pension on 31 January 2001. On that date, the appellant was a grade A4 staff member working in the Registry of the European Court of Human Rights.

9. This appeal concerns a promotion procedure which took place before his retirement.

10. The appellant applied for one of two posts of Deputy Section Registrar (grade A5) in the Registry of the European Court of Human Rights (Vacancy Notice No.69/2000 of 1 September 2000).

11. On 28 November 2000, he was informed that, in the light of the recommendation made by the Transfers and Promotions Panel after a comparative assessment of the applications, the Secretary General had decided to appoint two other staff members.

12. In the meantime, on 27 November 2000, the appellant had lodged an administrative complaint under Article 59 of the Staff Regulations. The complaint read as follows:

“I learned from an e-mail of 23 November 2000 that my application for one of the two posts of Deputy Section Registrar in the European Court of Human Rights as described in Vacancy Notice No.69/2000 has not been retained.

In view of my experience, my present functions, my age and my seniority and the services rendered during more than 30 years to the Council of Europe, I consider the fact that two colleagues who are both about 20 years younger than myself, have been given precedence *prima facie* indicates discriminatory treatment.

The assessment submitted in connection with my application was formulated by an agent who has been working for the European Court of Human Rights while I was working until 1 November 1998 in the Secretariat of the European Commission of Human Rights. The agent in question therefore only had the possibility to supervise or observe my professional activities during a very short period of roughly two years.

I consider that the decision of the Promotions Panel should however have been taken in the light of an assessment of my work and services rendered during the more than 30 years of my employment in the Council of Europe.”

13. On 5 December 2000, the appellant sent the Secretary General the following memorandum:

“In addition to the reasons stated in my administrative complaint of 27 November 2000 I submit the following:

Some A grades have meantime been ‘proposed’ by the Administration to give up their posts. The acceptance was compensated by very favourable financial arrangements. I consider that the manner in which this scheme was implemented is discriminatory, a view which is apparently also shared by the Staff Committee. I am personally affected as age wise I qualified for early retirement but had no effective possibility to be taken into account.”

14. On 19 December 2001, the Secretary General dismissed the administrative complaint. With regard to the first part of the first ground of complaint, the Secretary General reminded the appellant that the seniority of a staff member is only taken into account in order to differentiate between candidates of equal merit (Article 22, paragraph 2 of the Regulations on Appointments - Appendix II to the Staff Regulations). The Secretary General added that, in the present case, the Transfers and Promotions Panel had examined all the various elements in each candidate’s file, the assessment constituting only one of those elements. The candidates proposed were those whose experience and qualifications best met the requirements of the posts to be filled. Consequently, the decision was neither manifestly wrong nor arbitrary.

With regard to the second part of the first ground of complaint, the Secretary General considered that a period of two years was sufficient time for a staff member to prove his or her worth, and for a superior to assess it. In any event, the appellant’s experience of 30 years had been brought to the panel’s attention by means of his curriculum vitae.

With regard to the second ground of complaint, the Secretary General stressed that the choice of staff members whose employment was to be terminated had been made on the basis of the nature and description of the post held by them, and not on the basis of considerations pertaining to the person of the postholder. He added that nothing in the texts applied in this connection (Committee of Ministers Resolution (92)28 and Appendix VI to the Staff Regulations) required him to accede to a request from a staff member to benefit from these provisions, and that staff members had no “right” to this.

## **THE LAW**

15. The appellant lodged this appeal in order to challenge the Secretary General’s decision to reject his application for one of the posts of Deputy Section Registrar in the Registry of the European Court of Human Rights, thrown open to competition by Vacancy Notice No.69/2000. He asks the Tribunal to annul that decision or, in the alternative, to award him compensation in an amount left to the Tribunal’s appreciation.

Since his retirement was imminent, the appellant also bases his argument on the fact that other staff members had benefited from special termination of service measures (see paragraph 14 above and ATCE, Appeals Nos.268-282 - PALERMITI and others, decision of 31 January 2002).

16. With regard to the grounds of appeal, the appellant refers implicitly to the arguments put forward in his administrative complaint (see paragraphs 12 and 13 above) and adds the following arguments.

Regarding the first ground of appeal, in reply to the Secretary General's statement that the panel had examined the various elements in each candidate's file, the appellant doubts that they contain any relevant elements apart from the candidates' personal submissions, which are no objective proof of their qualifications.

In reply to the Secretary General's statement that the panel had proposed the candidates whose experience best met the requirements of the posts to be filled, the appellant stresses that a person with substantial seniority must, *prima facie*, be considered to have more experience. He notes that no grounds were invoked by the Administration to show that the contrary was true. Moreover, the statement in question was general and vague and did not lend itself to any objective scrutiny; it was also insufficient and unacceptable to disqualify a renowned lawyer who had for more than 30 years rendered services in the field of human rights protection.

17. For his part, the Secretary General disputes that the appellant had any interest in taking proceedings. He points out that, contrary to the appellant's claims, a promotion would not have had any effect on the amount of his pension. In this connection, he refers to Article 10, para.1 of the Pension Scheme Rules (Appendix V to the Staff Regulations), according to which the amount of the retirement pension is calculated in relation to the "salary corresponding to the last grade held by the staff member for not less than one year before termination of his appointment".

18. As to the merits, the Secretary General notes that the appellant does not dispute the content of his assessment and, regarding the qualifications of the two successful candidates, does not put forward any arguments showing that they did not meet the requirements for promotion or had less merit than the appellant himself. On the latter point, the Secretary General points out that, according to the Tribunal's case-law, he has discretion to assess candidates' qualifications and that it is not for the Tribunal to substitute its own assessment for that of the Secretary General, but rather to verify whether he has exercised his discretion in a lawful manner.

The Secretary General stresses that he exercised his discretion out of a concern to appoint staff members possessing to the highest possible degree the qualifications required for the posts in question. He adds that he would have been committing an abuse of discretion if he had allowed his choice to be guided solely by the candidates' length of service. Furthermore, the appellant's claims that promotions had been granted in the past on the basis of seniority were unfounded.

The Secretary General concludes that this ground of appeal must be dismissed.

19. In his observations in reply, the appellant maintains that he still has an interest in taking proceedings even if a promotion would have had no effect on his pension, because the fact that preference was given to younger colleagues constitutes degrading treatment affecting his rights. He further maintains that, in deciding on a question of promotion, account must be taken of each candidate's overall merit.

20. Regarding the second ground of appeal, the appellant refers to the arguments put forward in the administrative complaint and adds that the way in which the Secretary General has acted demonstrates the arbitrary manner in which he often proceeds and, in fact, acted in the case at issue.

21. The Secretary General refers to the reasons given for his decision to dismiss the administrative complaint. He concludes that this ground of appeal must also be dismissed.

22. The Tribunal must examine the appellant's two grounds of appeal separately because they concern two different issues.

#### **A. The promotion procedure**

23. This ground of appeal concerns an internal competition to fill a post through promotion.

24. The Tribunal recalls that, according to the first sentence of Article 59, paragraph 1 of the Staff Regulations, staff members who have a "direct and existing interest" in so doing may complain against "an administrative act adversely affecting them".

This provision accordingly defines the notion of victim and specifies the manner in which the person affected by the measure or omission is entitled to take action. The interest which the affected person puts forward must be a direct one, ie a personal and existing one (see ABCE, Nos.79-93/1983, Buhler and others v. Secretary General, decision of 1 March 1985, para.69; Nos.4-99/1983, Nouari and others v. Secretary General, decision of 1 March 1985, para.73; No.114/1985, Balfego v. Secretary General, decision of 25 October 1985, para.56; see also ATCE, No.226/1996, Zimmermann v. Secretary General, decision of 24 April 1997, para.26; and No.241/1998, Tonna v. Secretary General, decision of 9 November 1998, para.36).

International case-law has established that a candidate in a competition who subsequently retires "still has an interest in exposing a breach of due process which may warrant an award of damages" (see ILOAT, judgment No.1549 of 11 July 1996, Lopez-Coterels).

25. The Tribunal is therefore of the opinion that the appellant - who is claiming damages - retains an interest in taking proceedings despite the lack of any financial implications as to the amount of his pension. Indeed, the appellant has expressed his intention of continuing with the proceedings.

26. In stating his grounds of appeal, the appellant raises an issue which must be settled from the outset.

The appellant points out that he was due to retire shortly after the end of the promotion procedure. The appellant considers that, in this instance, the question was not whether he was the person best able to fill one of the posts thrown open to competition, but rather whether, in the light of the services rendered over a period of 30 years, he deserved a promotion shortly before leaving the Organisation. In support of his argument, he states that it was clear to the Administration that he would never occupy either of the two posts.

27. The Tribunal notes that there is no statutory provision allowing a promotion to be decided solely on the basis of seniority, this criterion being taken into account only where candidates are found to be of equal merit. Consequently, the Tribunal can only dismiss any complaint to this effect and confine itself to examining the other arguments in the light of its case-law relating to promotion disputes.

28. The Tribunal recalls that the Secretary General, being vested with authority to make appointments (Article 36.c of the Statute of the Council of Europe and Article 11 of the Staff Regulations), has a discretionary power in matters of staff management. In exercising that power, he is qualified to ascertain and assess the Organisation's operational needs and staff members' professional abilities. However, this discretionary power must always be exercised in a lawful manner. In the event of a dispute, the international tribunal cannot substitute its own judgment for that of the administration, but it does have a duty to verify whether the disputed decision was taken in accordance with the organisation's regulations and the general principles of law to which the legal systems of international organisations are subject. It is for the tribunal hearing an appeal against an administrative decision taken in the exercise of that discretionary power to determine not only whether that decision was taken by a competent authority and whether it is in due form, but also whether the correct procedure has been followed and, with regard to the legality of the decision under the organisation's own rules, whether the administration's decision took account of all the relevant facts, whether the wrong conclusions have been drawn from the documents in the file, and lastly whether there has been any misuse of power (ABCE No.147-148/1986, Bartsch and Peukert v. Secretary General, decision of 30 March 1987, paras. 51-53; ATCE No.171/1993, Amat v. Secretary General, decision of 21 April 1994).

29. Like the Secretary General, the Tribunal notes that the appellant does not complain of any procedural defect in the assessment of the candidates' merit, be it his own or that of the two staff members who were eventually promoted. In fact, the appellant simply claims that he deserved one of the posts thrown open to competition on the grounds of his seniority.

On the other hand, the appellant has two complaints about the manner in which his assessment was conducted. The Tribunal must therefore ascertain whether the conduct of this preparatory stage was faulty and, if so, whether the final decision could be considered null and void.

The Tribunal notes that there is absolutely no evidence that the conduct of the appellant's assessment departed from the rules laid down previously or was different from that of the other candidates' assessments. Furthermore, the Tribunal considers it important that the person carrying out the assessment was aware of the appellant's very long experience in the field of human rights and was able to draw up his report in the light of that fact. In addition, as noted by the Secretary General, the appellant's curriculum vitae was available to the panel.

With regard to the period of two years covered by the assessment, the Tribunal agrees with the Secretary General that this period was sufficient to form an opinion and carry out the assessment in question.

30. The Tribunal stresses that there is nothing in the elements submitted by the appellant to suggest that the panel's deliberations were based on circumstances which were not relevant

or that its recommendation was the result of an arbitrary assessment of all the elements available to it.

31. The Tribunal notes that the panel considered the successful candidates to be of greater merit than the applicant. For its part, the Tribunal has found no evidence that the disputed decision was based on manifestly erroneous conclusions. Since it is not for the Tribunal to substitute its own assessment of the candidates' qualifications and merits for that of the Secretary General, it concludes that the Secretary General's decision not to appoint the appellant was in no way arbitrary.

32. It follows that this ground of appeal must be dismissed.

### **B. The Secretary General's decision to terminate the employment of other staff members**

33. The Tribunal dealt with the same issue in its decision of 31 January 2002 in the case of Palermi and others (appeals Nos.268-282/2001, to which reference may be made for further details on the question as a whole and the relevant statutory texts (Committee of Ministers Resolution (92)28 and Appendix VI to the Staff Regulations).

34. It must first be pointed out that a staff member is not entitled to take proceedings in the interests of legality or in the interests of the Organisation. He or she can only put forward personal complaints in support of an appeal (see the aforementioned Zimmermann and Tonna decisions).

35. In this appeal, the appellant argues that the termination of service measures applied to other staff members constitute discrimination against him.

36. The Tribunal considers that the decisions to apply the provisions of Resolution (92)28 and Appendix VI to third persons cannot be described as acts adversely affecting the appellant.

37. The Tribunal notes first of all that there is no provision in Appendix VI or Resolution (92)28 obliging the Secretary General to invite the staff of the Organisation to express an interest in termination of their employment.

38. Regarding termination of contract under Article 44 of the Staff Regulations in conjunction with Appendix VI, the provisions are based on objective criteria relating to loss of employment, to the exclusion of any interest expressed by a staff member in the termination of his or her employment. Where Resolution (92)28 is concerned, the Tribunal notes that the aim is to "speed up the renewal of the Organisation's human resources and at the same time facilitate the orderly progress of careers" (preamble). Admittedly, "staff members complying with the age and service requirements (...) may on their own initiative request the Secretary General to apply the termination of service measures provided for by this regulation" (Article 2, paragraph 1); however, the appellant did not do so in due time. Although a termination of service measure taken in respect of one staff member may indirectly affect a large number of other staff members, the fact remains that this measure is an act adversely affecting only the staff member in question and, possibly, the other candidates who requested the application of such a measure.

39. The mere possibility of requesting the application of a termination of service measure and, more generally, the financial interests referred to by the applicant do not constitute direct interests and therefore do not meet the requirements of Article 59, paragraph 1 of the Staff Regulations.

40. It is clear from all the above considerations that this ground of appeal is inadmissible because the disputed measures do not adversely affect the appellant. Consequently, the Tribunal cannot deal with the merits of the issue.

For these reasons,

The Administrative Tribunal:

Declares the appeal unfounded as to the appellant's first ground and inadmissible as to his second;

Dismisses it;

Orders that each party bear its own costs.

Delivered at Strasbourg on 31 January 2002, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

K.HERNDL