

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

TRIBUNAL ADMINISTRATIF **ADMINISTRATIVE TRIBUNAL**

Appeal No. 416/2008 – Inga ŠVARCA v. Secretary General

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Angelo CLARIZIA and
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Inga Švarca, lodged her appeal on 18 July 2008. It was registered the same day as File No. 416/2008
2. The appellant filed her grounds of appeal at the same time.
3. On 22 September 2008 the Secretary General submitted his observations on the appeal. The appellant filed observations in response on 5 January 2009 requesting, amongst other things, a number of investigative measures (submission of documents and hearing of witnesses).
4. The public hearing of this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 12 March 2009. The appellant was represented by Dr Frank Diedrich, lawyer, and the Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, assisted by Ms Sania Ivedi from the same department.

THE FACTS

A. *The circumstances of the case*

5. The appellant is a temporary member of the Council of Europe's staff and a Latvian national. She was recruited under a temporary contract and assigned to a grade B4 post in the registry of the European Court of Human Rights.

6. The appellant applied to sit the competitive examination for recruitment of a Latvian lawyer to the registry of the European Court of Human Rights (vacancy notice e108/2007). When she completed her application form she gave her private e-mail address as her contact address for e-mail communications.

7. The appellant sat the written part of this examination on 21 January 2008.

The examination consisted of four papers. Paper I, designed to test candidates' ability to summarise and extract the essentials from a text, was marked first. Candidates scoring less than 8/20 were eliminated. The paper marked next was paper III, designed to test candidates' abilities in legal analysis. The pass mark for the next two papers (II and IV) was 10/20. The appellant's marks were 10/20 in paper I and 9.5/20 in paper III. The average of these two marks being 9.75/20, the appellant's other written papers were not marked.

8. On 24 April 2008 the appellant addressed an administrative complaint to the Secretary General challenging the results of the written examination. In it the appellant stated *inter alia* that she had learned of these results on her return from holiday on 10 April 2008. Her complaint read as follows (original text in English):

"I herewith lodge a complaint against the results of the written examination held on 21st January 2008 for a post of Latvian lawyer at the Registry of European Court of Human Rights. I learned of the aforementioned results upon my return from vacation on 10 April 2008.

I respectfully contest the mark of 9,5/20 given for Paper III (Practical case) for the following reasons:

According to one of two evaluators, the case analysis was well-structured, it was written in fluent English, there were innovative ideas, analysis under Article 13 was very good and the conclusion, i.e. the result reached, was 'correct'. The other evaluator gave, however, a rather critical evaluation. Taking into consideration the positive evaluation of one examiner and the fact that the evaluations were contradictory, I strongly believe that the mark assigned for paper III has not been correct. Thus, I request you to take appropriate measures by ordering a re-evaluation of this paper.

Further, the subsequent decision that I am not qualified to be invited to the final stage of the selection procedure should be revised accordingly. I attained the minimum marks required for the other papers."

9. In a communication dated 20 May 2008 the appellant was told that her administrative complaint had been rejected. It had been deemed ill-founded and thus had to be rejected.

10. On 18 July 2008, the appellant lodged the present appeal.

B. Applicable provisions

11. The power to lodge an administrative complaint is governed by Article 59 of the Staff Regulations. The relevant parts of it are as follows:

“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.

(...)”

THE LAW

12. The appellant appealed against the Secretary General’s decision in respect of the marking of paper III. She asks for a re-assessment and for papers II and IV to be marked. She also asks for reimbursement of the costs she has incurred.

13. The Secretary General, for his part, asks the Tribunal to declare the appeal inadmissible because it was lodged too late. In the alternative, he asks that it be declared ill-founded and dismissed.

A. SUBMISSIONS OF THE PARTIES

1. Admissibility of the appeal

14. The Secretary General enters two pleas of inadmissibility. He argues that the appeal is inadmissible because the administrative complaint was made too late. In the alternative, he argues that part of the appeal should be declared inadmissible because the appellant makes allegations in her appeal which did not feature in her administrative complaint.

15. Regarding the first plea, the Secretary General points out that the appellant is seeking to have annulled the act of which she was notified in an e-mail on 20 March 2008, which told her that her marks in the written papers were not good enough and that as a result she was not being invited to take part in the rest of the competitive examination. But she only lodged her administrative complaint on 24 April 2008, more than 30 days after the act which she claims was prejudicial to her.

The appellant states that the facts prompting her to lodge an administrative complaint only became known to her on 10 April 2008, but the Secretary General considers that it is her fault that she learned of the results belatedly. It was the appellant's responsibility to take all appropriate measures to ensure that she was informed and could act if necessary.

16. After pointing to the case-law of the Tribunal and other international courts on the matter of the importance of adhering to time limits, the Secretary General states that these decisions provide ample proof that the time limit for appeal is an essential limit, which is necessary to ensure the stability of legal situations and cannot be challenged even on grounds of fairness or other circumstances of the kind invoked by the appellant.

17. Regarding the second plea of inadmissibility, the Secretary General argues that the appellant's allegation that the rules and standards for marking the papers were not published is made for the first time in the appeal. She did not raise this point in her administrative complaint, and the fact of doing so for the first time before the Tribunal is contrary to the Tribunal's case-law (ATCE, Appeal No. 284/2001, *Lobit-Jacquin v. Secretary General*, decision of 27 March 2002).

18. In the light of all these considerations the Secretary General argues that the present appeal should be dismissed as being out of time. In the alternative, he asks that part of the appeal be declared inadmissible on the ground that the appellant made new allegations in her appeal which did not feature in her administrative complaint.

19. The appellant for her part maintains that her appeal is admissible in its entirety. She makes the following points with regard to the two pleas.

20. Regarding the plea that her administrative complaint was made too late, the appellant says she was on holiday from 17 March to 9 April 2008 in South Africa. During that period she was not able to access her e-mail and could not be reached by phone. Consequently, since the appellant had learned the results of the examination on 10 April 2008 her administrative complaint, lodged on 23 April 2008, was made within the time limit set in Article 59, paragraph 2 b) of the Staff Regulations. She adds that the fact that the result of the written tests was communicated to her at her private e-mail address, with no prior indication of when she might expect to be notified, cannot be deemed a "notification" within the meaning of Article 59, paragraph 2 a) of the Staff Regulations but an "act of which the person concerned has learned" (paragraph 2 b) of that same article).

21. She comments that the case-law mentioned by the Secretary General is not relevant here since, according to the European Court of Human Rights, the time limit for lodging an appeal runs from the moment when "*a person became aware of a decision or received it, he complains of, provided her or his legal counsel was not present at proceedings linked to the decision*".

22. In answer to the second plea the appellant states that in her administrative complaint she objected to the results of the written tests as a whole and asked for the entire selection procedure to be reconsidered, including the decision to exclude her from the final stage of the competitive examination. The appellant thus claims that she did not put forward new arguments in her appeal but elaborated on the allegations and requests made in her administrative complaint of 23 April 2008.

23. In conclusion, the appellant argues that her appeal should be declared admissible.

2. The merits of the appeal

24. As to the merits, the appellant adduces two grounds: she claims that the two markings of paper III contradicted each other and she cites the confidential nature of the criteria used in marking the examination papers, criteria which were not made public or communicated to the appellant during the complaint proceedings. She adds that this confidentiality allows the examiners virtually unlimited discretion.

25. In conclusion, the appellant disputes the mark of 9.5/20 which she was awarded for paper III and asks for this test to be re-marked and for papers II and IV to be marked.

26. The Secretary General, for his part, argues that there was no irregularity in the way in which the competitive examination was managed, conducted and marked.

27. Concerning the first ground, the Secretary General states that the marking of the papers was impartial, anonymous and objective. It was done using a number of criteria. With regard to the comments made by the examiners for paper III, he adds that the examiners' comments were not contradictory and there is no justification for having the appellant's script marked by a third examiner or, *a fortiori*, for the re-assessment that the appellant is seeking.

28. Concerning the appellant's second ground, the Secretary General notes that the Staff Regulations make no provision for the criteria used in marking recruitment examinations to be made public. On this point the Secretary General refers to the wording of Article 15 of the Regulations on Appointments (Appendix II to the Staff Regulations), which should be read in conjunction with Article 9, paragraph 1 of those same Regulations.

29. In the light of the foregoing the Secretary General considers that there was no breach of regulations, practice or general principles of law. The relevant facts were not assessed incorrectly, no erroneous conclusions were drawn from the documents in the appellant's file, and there was no abuse of power.

II. THE TRIBUNAL'S ASSESSMENT

A) Admissibility

30. The Secretary General enters two pleas of inadmissibility: the administrative complaint was lodged too late and the appellant is laying before the Tribunal allegations which she did not make in her administrative complaint.

31. Regarding the merits of the two pleas of inadmissibility, the Tribunal accepts the appellant's contention that she was on holiday in South Africa. Because of this fact, she claims, she did not see her e-mail message until she got home. The Tribunal sees no need for further proof of the fact that she was in South Africa or to hear witness testimony to that effect.

32. The Tribunal notes first of all that there are no provisions in the regulations concerning the form in which information is to be communicated. It notes, too, that the parties have not relied on any such provisions.

33. The Tribunal points out that it has repeatedly emphasised the importance of compliance with the prescribed time limits when lodging an administrative complaint, in order to ensure observance of the principle of legal security inherent in the Council of Europe system, in the interests of both the Organisation and its staff (ATCE, Appeal No. 263/2000, *Kakaviatos v. Secretary General*, decision of 12 October 2001, paragraph 27).

34. The Tribunal notes that when submitting her application the appellant gave her private e-mail address as her contact address for communications. Not only did the appellant submit her application electronically; she was also told that under the general terms of recruitment candidates could receive written replies by e-mail.

The appellant does not dispute the fact that the message sent on 20 March 2008 by the Directorate of Human Resources reached her inbox but states simply that she was unable to read it until she returned home on 9 April 2008. But it was up to the appellant, knowing that she would be away from home for twenty-three consecutive days, to take the necessary measures to deal with the communication difficulties she would encounter. Not having done so, she cannot invoke communication difficulties or criticise the fact that the Secretary General notified her by e-mail. The Tribunal points out that international courts have previously dealt with similar cases (ILOAT, judgment 1740 of 9 July 1998) and have reached the same conclusion.

35. The Tribunal further emphasises that the issue giving rise to the present appeal stems not from the fact that the appellant was notified by e-mail but rather from the fact that she rendered herself uncontactable for just over three weeks. In fact, she would have had the same problem if she had been notified by letter to her postal address – unless the Council had used registered mail, which its rules do not require it to do.

36. Lastly the Tribunal notes that the appellant learned of the impugned decision on 10 April 2008 and waited until 23 April 2008, ie thirteen days, before lodging her administrative complaint.

37. It follows from the above that the plea of inadmissibility on grounds of lateness must be upheld.

38. In conclusion, the appeal is inadmissible for the reasons stated above; the Tribunal does not need to look at the other plea of inadmissibility and cannot consider the merits of the case.

For these reasons, the Administrative Tribunal:

Declares the appeal inadmissible;

Dismisses it;

Orders each party to bear its own costs.

Adopted by the Tribunal in Strasbourg on 17 June 2009, and delivered in writing pursuant to Article 35, paragraph 1 of the Tribunal's Rules of Procedure on 24 June 2009, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

E. PALM