

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 456/2008 (Sergey GOLUBOK v. Secretary General)

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Hans G. KNITEL, Judge,
Mr José da CRUZ RODRIGUES, Substitute Judge,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Sergey Golubok, lodged his appeal on 21 October 2008. It was registered the same day as File No. 456/2008.
2. The appellant filed his grounds of appeal at the same time.
3. On 20 November 2008 the Secretary General submitted his observations on the appeal. The appellant filed observations in response which were received by the registry on 7 January 2009.
4. The appellant submitted documents on 10 March 2009.
5. The public hearing of this appeal was held in Strasbourg on 12 March 2009. The appellant represented himself, with the assistance of Mr Emmanuel Simonet, and the Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, Directorate of Legal Advice and Public International Law, assisted by Ms Maija Junker-Schreckenber and Ms Sania Ivedi from the same department.
6. During the proceedings the appellant submitted a number of documents.

THE FACTS

A. The circumstances of the case

7. The appellant is a permanent member of the Council of Europe's staff and a Russian national. Appointed under a fixed-term contract from 2 June 2008 to 31 December 2009, he is currently employed as an assistant lawyer at the registry of the European Court of Human Rights.

8. In July 2008 the appellant applied to sit the competitive examination for a fixed-term contract post (grade A1/A2/A3) as a Russian lawyer (vacancy notice e42/2008).

9. On 16 September 2008 he was informed that the Appointments Board had decided to reject his application for the examination in question.

10. In reply to the appellant's request for information, the Directorate of Human Resources told him on 17 September 2008 that his application did not meet one of the criteria stipulated in the vacancy notice, namely a "minimum of two years' professional experience acquired in the legal field (preferably in the judicial service) in Russia or in international organisations".

11. On 17 September 2008 the appellant addressed an administrative complaint to the Secretary General against the decision rejecting his application (Article 59 of the Staff Regulations).

12. In an order of 28 September 2008 the Chair of the Tribunal rejected an application made by the appellant under Article 59, paragraph 7 of the Staff Regulations to stay the execution of the impugned act.

13. In a communication dated 6 October 2008 and received on 17 October 2008, the appellant was told that his administrative complaint had been rejected.

14. On 21 October 2008 he lodged the present appeal (Article 60 of the Staff Regulations).

15. The written examination was held on 31 October 2008 and candidates shortlisted for interview were invited to attend on 27 February 2009.

16. In the meantime, on 12 February 2009, the appellant lodged a new application for a stay of execution of the impugned act.

17. In an order of 26 February 2009 the Chair granted the requested stay of execution insofar as it concerned the impugned appointment procedure for the post to be filled.

B. Applicable provisions

18. 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.
(...)

6. The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*

- a. to former staff members;
- b. to persons claiming through staff members or former staff members, within two years from the date of the act complained of; in the event of individual notification, the normal time-limit of thirty days shall apply;
- c. to the Staff Committee, where the complaint relates to an act of which it is subject or to an act directly affecting its powers under the Staff Regulations;
- d. to candidates outside the Council, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure.
(...)”

THE LAW

19. The appellant asks the Tribunal to annul the decision to exclude him from participation in external competition e42/2008 and to allow him to sit the written examination.

20. The Secretary General, for his part, asks the Tribunal to declare the appeal inadmissible and/or ill-founded and to dismiss it.

A. SUBMISSIONS OF THE PARTIES

1. Admissibility of the appeal

21. The Secretary General enters two pleas of inadmissibility. He argues that the appeal is inadmissible in two respects: the appellant has no interest in bringing proceedings, and the administrative complaint was lodged too late.

22. Regarding the first plea, in the Secretary General's view, it is important to ascertain whether the present appeal meets the admissibility criteria laid down by the Staff Regulations in Article 60, paragraph 1 and Article 59, paragraph 6 d).

23. He argues that because the competitive examination advertised in vacancy notice e42/2008 was an external recruitment procedure, the appellant's application was governed by the rules in place for external applications

24. In view of the aforementioned provisions, then, since the appellant's application to take part in the competitive examination in question had been rejected, he was not entitled under the Staff Regulations to lodge a complaint against the decision to reject his application or, *a fortiori*, to appeal when his complaint was dismissed.

25. Indeed, not only do the Staff Regulations allow that right solely to candidates whose application to sit the examination has been accepted; any complaint or appeal by them must relate "to an irregularity in the examination procedure". But the appellant's application to sit the examination in question was not accepted. And his appeal, seeking recognition that he satisfied all the criteria set out in the vacancy notice, does not challenge any irregularity in the examination procedure.

26. Given these circumstances the Secretary General considers that the present appeal is inadmissible because the appellant is not entitled to bring his case before this Tribunal.

27. The Secretary General further contends that the appellant cannot claim that he is entitled to lodge the present appeal by virtue of his status as a Council of Europe staff member under Article 59, paragraph 1 of the Staff Regulations.

28. In his view the concept of a staff member's direct and existing interest has been established by the case-law of the international administrative courts: this requires staff members

to show that their legal position has been adversely affected. In the instant case, the appellant is not claiming any breach of the statutory provisions and regulations applicable to him as a staff member of the Organisation. The Secretary General points out here that the status of a member of staff does not, in itself, imply a right to apply, or even a legally protected interest in applying, to take part in an external recruitment procedure since eligibility to take part is governed exclusively by the criteria set out in the vacancy notice. The Secretary General adds that there is nothing in the Staff Regulations establishing, in respect of staff members, a legal interest in taking part in a recruitment procedure that is different from, and more protective than, the interest of candidates who are not employed by the Council of Europe.

29. The Secretary General states that the competition advertised by vacancy notice e42/2008 did not treat candidates employed by the Council of Europe differently from those who were not so employed at the time of making their applications. The appointments procedure chosen was from this point of view an ordinary external recruitment procedure based on and governed by the Staff Regulations.

30. Consequently, any attempt to base this appeal on Article 59, paragraph 1 of the Staff Regulations because the appellant is a staff member misunderstands the procedure followed and wrongly seeks treatment different from that given to candidates who are not employees of the Council of Europe, in breach of the principle of non-discrimination between candidates.

31. In the light of these considerations the Secretary General argues that the present appeal is also inadmissible as regards Article 59, paragraph 1 of the Staff Regulations since the appellant has no interest in bringing proceedings.

32. Regarding the second plea of inadmissibility, the Secretary General notes that the appellant complains that vacancy notice e42/2008 was not consistent with the provisions of the Regulations on Appointments. He adds that the appellant made this allegation in his administrative complaint of 17 September 2008. According to the Secretary General, however, the appellant should have lodged an administrative complaint against the vacancy notice within thirty days of the notice's publication if he considered it prejudicial to him. The Secretary General adds that the appellant was aware of the vacancy notice by 8 July 2008 at the latest (date of his application via the Council of Europe's Internet site). The Secretary General points to international case-law in support of his plea.

33. The appellant for his part adduces the following arguments in reply to the Secretary General's first plea.

34. Referring to Article 59, paragraph 1 of the Staff Regulations, the appellant emphasises that he is a staff member of the Organisation and has a "direct and existing interest". Concerning this second condition, he states that the decision to exclude him from the competitive examination affects his legitimate interests.

35. Regarding the Secretary General's interpretation of Article 59, paragraph 6 d), the appellant states that this provision is not concerned with the right of staff members to lodge an appeal under paragraph 1 of that same Article 59. The appellant refers here to the Administrative

Tribunal's case-law (ATCE, Appeal No. 250/1999, *Schmitt v. Secretary General*, decision of 9 June 1999).

36. Regarding the second plea of inadmissibility, the appellant points out that he lodged his appeal the day after receiving notice of the administrative decision which he is challenging. The appeal was thus lodged within the time limits allowed.

37. In answer to the Secretary General's argument that the time limit for lodging the administrative complaint should have run from the time when the appellant applied to take part in the competitive examination, the appellant denies that this argument is factually and legally correct. He says that prior to 16 September 2008 (when he learned that his application had been rejected) he had no reason to lodge an administrative complaint because his rights had not been affected.

38. In conclusion, the appellant asks the Tribunal to reject both pleas of inadmissibility.

2. Merits of the appeal

39. Regarding the merits, the appellant adduces two grounds which are, firstly, that the vacancy notice's requirement of two years' experience is incompatible with the Regulations on Appointments (Appendix II to the Staff Regulations) and, secondly, that if in the view of the Tribunal the requirement of two years' experience was indeed compatible with the Staff Regulations, then the appellant did indeed have the requisite experience.

40. Concerning the first ground, the appellant states that the post to be filled was a fixed-term position of grade A1/A2/A3. Article 3, paragraph 1 of the Regulations on Appointments says that candidates "must have a university education with a suitable degree." He adds that no other stipulation is made and that experience is relevant only in the absence of a degree (last sentence of the aforementioned article) or in deciding the successful candidate's entry grade (Article 24, paragraph 2 of the Regulations on Appointments). Since the appellant had the qualifications required for a grade A1 post, he argues that additional requirements would be inconsistent with the Staff Regulations.

41. Concerning the second ground, the appellant points firstly to the Secretary General's contention that the only experience relevant in his case was that gained after June 2006. But the appellant says that he had, by that time, gained the qualification of "specialist in law", classified in Russia as higher than a bachelor's degree and equivalent to a master's. The appellant adds that prior to that date the experience he had gained met the requirements of the vacancy notice, since there was nothing in that notice to say that the experience taken into account had to be gained *after* a given qualification was obtained.

42. The appellant further claims that the Organisation failed to take account of the traineeships he had served in the Council of Europe and in a non-governmental organisation. There was no reason why that experience should not be taken into account.

43. Lastly, in reply to the Secretary General's reference to Article 23 of the Regulations on Appointments and the right to career advancement, the appellant says that, although on a fixed-term contract, he has the status of a temporary staff member, something that has never been disputed.

44. In conclusion, the appellant asks the Tribunal to annul the decision to exclude him from the competitive examination in question.

45. The Secretary General for his part, replying to the appellant's first ground, specifies the provisions of the Staff Regulations which allow the Appointments Board not to confine itself solely to the requirement in Article 3, paragraph 1 of the Regulations on Appointments. Article 7, paragraph 4 of the Regulations says that the publication notice must describe the duties attaching to the vacant post or position and state the conditions for eligibility, the qualifications required of candidates and the time-limit for submission of applications. Article 8 further stipulates that applications are admissible only if they comply with the conditions set out in the vacancy notice.

The Secretary General adds that the Appointments Board has discretionary power in the drafting and approval of vacancy notices. In his view the Appointments Board is the body best qualified to define the criteria – such as academic qualifications or professional experience – which a staff member needs in order to occupy a given post in the Council of Europe. In the present case the Appointments Board took the view that candidates needed two years' professional experience in order to be eligible for an external competitive examination for a post as Russian lawyer at the European Court of Human Rights

Regarding the obligation that candidates must satisfy the requirements of a vacancy notice before they are invited to take part in a competitive examination, Article 8 of the Regulations says that "Applications shall be admissible only if they comply with the conditions set out in the vacancy notice". The Board's unanimous finding was that the appellant's application did not. That decision does not exceed the discretionary power of the Appointments Board and is not vitiated by any irregularity.

46. Concerning the second ground, the Secretary General points out that the appellant, in his application form, had described his Russian degree – the only one relevant under the vacancy notice – as a bachelor's degree (equivalent to 3 or 4 years' higher education). He adds that the appellant is now claiming the qualification of a "specialist in law", equivalent to a master's degree (5 years' higher education). The Secretary General argues that, whilst this is the appellant's error, it had no bearing on the assessment of his dossier, because it had never been alleged that he lacked a relevant degree, merely that he lacked sufficient professional experience.

47. The Secretary General notes that the appellant gained the qualification of "specialist in law", as required by vacancy notice e42/2008, in June 2006. Consequently the Appointments Board can only take into account the professional experience gained after he obtained that qualification, namely after June 2006.

48. The vacancy notice stipulated that candidates had to have at least two years' professional experience in the fields mentioned above. The Council of Europe's administrative practice, when

calculating the length of required professional experience, is to count only experience acquired after the gaining of a degree relevant to the professional experience required.

The Secretary General states that international case-law and the practice and rules of other international organisations adopt a similar approach. The Appointments Board judged that the time the appellant spent working in a law firm before gaining his degree counted as training and not as relevant professional experience. It was the view of the Secretary General that the work done by the appellant prior to gaining his degree could not be taken into account in calculating his professional experience as required by vacancy notice e42/2008.

49. The Secretary General adds that traineeships are not counted as professional experience. The reason is that traineeships, together with unpaid work, are precisely that – training – whereas professional experience has a productive goal. Thus the appellant’s traineeships with non-governmental organisations or the Council of Europe cannot be taken into account in the calculation of his professional experience, specifically in view of the established administrative practice of the Council of Europe and numerous other international organisations.

50. The appellant’s professional experience was calculated from the time he gained his qualification as a “specialist in law” in June 2006. It is apparent from his curriculum vitae that he was employed as a member of a law firm for three or four months part-time and for a further four months full-time. He then worked for a month and nine days as an assistant lawyer at the European Court of Human Rights (from 2 June 2008 to 12 July 2008, the closing date set in vacancy notice e42/2008). The appellant’s professional experience in the field stipulated in vacancy notice e42/2008 is approximately nine months (three or four of which were part-time). The Secretary General concludes that the appellant’s professional experience thus clearly falls short of the requirements of vacancy notice e42/2008.

51. Regarding the alleged breach of the right to career advancement within the Council of Europe by a failure to apply Article 23 of the Regulations on Appointments, the Secretary General refutes the appellant’s allegation, saying that this provision does not give every Council of Europe staff member the right to be invited to take part in a competitive examination for an A-grade post. The aim of that article is solely to ensure that all staff members can, regardless of their grade – and provided they have the requisite qualifications – apply for external competitive examinations recruiting for category A posts and go back to their old jobs if their work has not proved satisfactory during the probationary period.

52. The Secretary General concludes from all the above considerations that he has not breached the Staff Regulations or any related texts and that the impugned decision is not vitiated by any irregularity.

B. THE TRIBUNAL’S ASSESSMENT

1. Admissibility

53. Regarding the first plea of inadmissibility, the Tribunal sees no reason to depart from the case-law established by the *Schmitt* decision, to which the appellant refers. Indeed the Tribunal

has recently endorsed this in four decisions delivered on 31 March 2009 (ATCE, Appeals Nos. 408/2008, 409/2008, 413/2008 and 415/2008, *Pace Abu-Ghosh, Nikoghosyan, Verneau and Oreshkina*).

54. In the *Schmitt* decision the Tribunal clearly ruled that that staff members taking part in an external recruitment procedure could lodge an administrative complaint against a decision not to admit them to the examination on the basis of an entitlement under paragraph 1 of Article 59, not paragraph 6 d) of that same article (aforementioned *Schmitt* decision, paragraph 14). At the time the Tribunal noted that a situation of discrimination existed between external and internal candidates. But it observed that this discrimination would not be removed by curtailing the statutory rights of staff members. The Tribunal also pointed out that “[t]he governing bodies of the Council of Europe must take whatever positive steps are necessary” (*ibid.*, paragraph 16) and, referring to the case-law of the European Court of Human Rights, it reiterated that “[a]ny persons who consider themselves the victims of decisions adversely affecting them are entitled to initiate legal proceedings” (*ibid.*).

The Tribunal notes that a period of nine years has elapsed without the Organisation’s governing bodies taking the necessary measures. Had this not been the case, the governing bodies could have remedied this *de facto* discrimination created by the Staff Regulations and related texts.

55. For these reasons this plea of inadmissibility must be rejected.

56. Regarding the second plea of inadmissibility, the Tribunal notes that an administrative complaint has been lodged under Article 59 of the Staff Regulations against a prejudicial act. But it is patently clear that, in this case, the wording of the vacancy notice could not of itself be prejudicial to the appellant. Prejudice arises not so much from the wording of the vacancy notice as from the way in which the Organisation applied this to the appellant when it assessed a subjective criterion – professional experience – on the basis of his application.

57. Consequently the administrative complaint was not lodged late and the Secretary General’s plea must be rejected.

58. In conclusion, both pleas must be rejected.

2) *Merits of the appeal*

59. In his first ground the appellant argues that the Secretary General misinterpreted the Staff Regulations – specifically Article 3, paragraph 1 of the Regulations on Appointments – in deciding that candidates had to be able to demonstrate two years’ experience in order to be eligible for the competitive examination.

60. The Tribunal notes that, as the Secretary General points out, the wording of Article 7, paragraph 4, first sentence of the Regulations on Appointments provides a broad enough base to include, as one of the eligibility criteria, the criterion of professional experience. The text reads as follows:

“The notice shall describe the duties attaching to the vacant post or position and state the conditions for eligibility, the qualifications required of candidates and the time-limit for submission of applications.”

These required qualifications are undoubtedly something different from the “qualifications” referred to in Article 3 of the Regulations and which the appellant claims are the only stated requirement for admission to the competitive examination. In the Tribunal’s view, the qualifications mentioned in Article 7 are the means of proving that candidates have the proficiency required by Article 7 and it is within the powers of the Appointments Board to set minimum criteria, under Article 7, of eligibility for the selection process.

61. Consequently this ground is without merit.

62. Concerning the second ground, this raises above all the issue of whether experience acquired prior to the gaining of a degree can be taken into consideration in deciding whether a candidate has the experience required in the vacancy notice.

63. The Tribunal believes that the experience to be taken into account is that acquired after the degree was obtained. During the hearing before the Tribunal the appellant admittedly explained that in other universities in Russia it was possible to obtain the same degree after a shorter one-year course. But that fact is not a relevant consideration which would lead the Tribunal to change its view, because its task is not to rule on a question of principle but on the appellant’s case.

64. This conclusion having been reached, the question raised before the Tribunal concerning the appellant’s error in drawing up his application, that is to say his use of the term “bachelor’s” instead of “master’s” degree, is not material to the outcome of the appeal, since whatever the level of this degree, the fact remains that it was the appellant’s first degree.

Moreover, in this specific case the Tribunal sees no need to address the matter of whether the experience gained from traineeships at the Council of Europe and in a non-governmental organisation should be taken into consideration since these periods, plus the appellant’s experience which is not disputed, would in any event not add up to the minimum of two years’ experience required by the vacancy notice.

65. Consequently this ground is without merit also.

66. In conclusion, the appeal is ill-founded and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Dismisses it;

Orders each party to bear its own costs.

Adopted by the Tribunal in Strasbourg on 12 May 2009, and delivered in writing pursuant to Article 35, paragraph 1 of the Tribunal's Rules of Procedure on 13 May 2009, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

E. PALM