CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 525/2012 (Staff Committee (XI) v. Secretary General)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Mr Jean WALINE,
Mr Rocco Angelo CANGELOSI, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The Staff Committee of the Council of Europe lodged its appeal on 15 March 2012. The appeal was registered the same day under No. 525/2012.

2. On 22 May 2012, the appellant submitted further pleadings.

3. On 24 August 2012, the Secretary General forwarded his observations on the appeal. On 24 September 2012, the appellant filed a memorial in reply.

4. The public hearing on this appeal, originally scheduled for 9 November 2012, was held in Strasbourg on 5 December 2012. The appellant was represented by Mr Giovanni Palmieri, Chair of the Staff Committee, assisted by Ms Mélina Babocsay and Ms Carol Kendall, members of the said Committee. The Secretary General was represented by Ms Christina Olsen, from the Legal Advice Department in the Directorate of Legal Advice and Public International Law, accompanied by Ms Maija Junker-Schreckenberg and Ms Sania Ivedi, administrative officers in the same department.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

5. The Council of Europe's Staff Committee entered into discussions with the Organisation concerning compensation for the abolition by the Committee of Ministers of the so-called "non-co-ordinated" allowances which are specific to the Council of Europe. In this context, the Secretary General was also considering abolishing the housing loans governed by Instruction No. 36 of 19 June 1997.

6. A meeting between the Organisation and the appellant took place on 21 October 2010 and the conclusion recorded in the meeting report reads as follows: "Repeal Instruction No. 36 of 19 June 1997 concerning the grant of housing loans, despite disagreement. Provide information on the DHR web site on financial assistance".

7. On 31 May 2011, an announcement appeared on the Council of Europe's intranet portal, informing staff that staff members with disabilities could be awarded an exceptional home adaptation grant.

8. On 19 July 2011, the appellant asked to be included in discussions on the implementation of this decision, with particular reference to the conditions for the award of the grant.

9. On 21 July 2011, the Directorate of Human Resources denied the request, stating that, contrary to what the appellant claimed, the Staff Committee had in fact been involved in the setting-up of the home adaptation grant scheme and that it was not the intention of the Organisation to alter the framework within which the exceptional grant was administered (award by the welfare officer based on a review of applications).

10. On 23 August 2011, pursuant to Article 59, paragraph 1, of the Staff Regulations, the Chair of the Staff Committee sent the Secretary General an administrative request, worded as follows:

> "The award of grants to staff with disabilities to enable them to adapt their homes to the needs arising from their condition is something that the Staff Committee can only applaud.
>
> Any such measure, however, needs to be framed by general and abstract rules in order to ensure transparency and strict compliance with the law. It is up to you, of course, to choose whichever instrument you deem most appropriate (rule, instruction, etc.), and to consult the Staff Committee in accordance with the relevant provisions of Appendix I to the Staff Regulations.
>
> If, on the other hand, you continue along the current lines, i.e. discretionary grant not governed by any regulatory instrument, not only will you be flying in the face of one of the basic principles of the rule of law but you will also be infringing the statutory rights of the Staff Committee.
>
> The Staff Committee trusts, therefore, that you will agree to rectify the situation in the near future."

11. On 4 October 2011, the Deputy Secretary General rejected this administrative request. She pointed out that discretionary grants were awarded on a case-by-case basis, subject to

available funding, and that granting the Staff Committee's request would be tantamount to establishing a new staff allowance, which had never been the Council's intention. After outlining the background to the recent exchanges on this subject, she concluded as follows:

> "As you are aware the Welfare Officer works in close liaison with staff members for these kinds of situations and fulfils an advisory role. I can assure you that the award of the special home adaptation grant abides by all principles of good administrative practice, including that of equal treatment between staff members."

12. On 25 October 2011, the appellant submitted to the Secretary General an initial administrative complaint under Article 59, paragraph 2, of the Staff Regulations. It asked that the Secretary General's decision denying its request to be consulted on all the rules governing the award of the grant (and indeed any "discretionary" grant) be annulled.

13. On 24 November 2011, the Secretary General gave a decision on this administrative complaint.

After noting that the Administration had negotiated with the previous Staff Committee the implementation of this grant to compensate for the abolition of the housing loan scheme, the Secretary General stated that this was a one-off, exceptional grant that was designed to help individual staff members or their families in specific circumstances, within the limits of available resources. He added that, while he did not recognise the merits of the request, he had nevertheless decided to discontinue the special home adaptation grant for staff with disabilities.

The Secretary General concluded that, consequently, the administrative complaint should be considered devoid of purpose.

14. On 19 December 2011, the appellant submitted a second administrative complaint to the Secretary General under Article 59, paragraph 2, of the Staff Regulations. This second complaint read as follows:

> "By letter dated 24 November 2011, the Secretary General's representative informed us of the "decision to discontinue the system of exceptional home adaptation grants for staff members with disabilities". The fact is, however, that following discussions with the Staff Committee in 2010 about "compensation" for the abolition of all non-co-ordinated allowances, the Secretary General had pledged to implement this grant. The Administration's undertaking on behalf of the Secretary General is clearly apparent from the documents in the case-file.
>
> In these circumstances, the abolition of the grant referred to in the aforementioned letter amounts to a violation of the commitments made to the Staff Committee and, as such, violates the general legal principle of legitimate expectation. In other words, in making the decision complained of, the Secretary General has reneged on his promise. It follows that the decision is defective and the Staff Committee requests that it be annulled."

15. On 18 January 2012, the Secretary General rejected the administrative complaint as ill-founded. In his view, the agreement that he had reached with the Staff Committee had been observed and it was the Staff Committee which had failed to keep its word, by calling

into question the arrangements governing the grant. He went on to say that "in accordance with the instructions which he gave to the Directorate of Human Resources when it was decided to discontinue the exceptional grant scheme, discussions are still under way between the Administration and the Staff Committee to try to find a solution to this issue and nothing has been decided yet".

16. On 15 March 2012, the Staff Committee lodged this appeal.

II. APPLICABLE REGULATIONS

Powers of the Staff Committee

17. Under the terms of Article 59, paragraph 8 c), of the Staff Regulations:

> "8. The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*:
>
> (…)
>
> 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;"

18. Appendix I to the Staff Regulations sets out the Regulations on staff participation. Part II is concerned with the Staff Committee. The relevant provisions in this instance are Articles 4 and 5, which read as follows:

Article 4 – General attributions

> "1. The Staff Committee shall represent the general interests of the staff and contribute to the smooth running of the Council by providing the staff with a channel for the expression of their opinions. It may also defend the interests of retired staff and other beneficiaries of the Pension Scheme.
>
> 2. The committee shall be responsible for organising elections of staff representatives to those bodies of the Council where provision is made for such representation, unless it is expressly provided that the said representatives shall be appointed directly by the committee.
>
> 3. The committee shall participate in the management and supervision of social welfare bodies set up by the Council in the interests of its staff. It may, with the consent of the Secretary General, set up such welfare services."

Article 5 – Matters within the competence of the Secretary General

> "1. The Staff Committee shall bring to the notice of the Secretary General any difficulty having general implications that concerns the interpretation and application of the Staff Regulations. It may be consulted on any difficulties of this kind.

2. The Staff Committee may propose to the Secretary General any draft implementing provisions relating to the Staff Regulations, as well as any measures of a general nature to be taken by him or her concerning the staff.

3. The Secretary General shall consult the Staff Committee on any draft provision for the implementation of the Staff Regulations. He or she may consult it on any other measure of a general kind concerning the staff."

THE LAW

19. In its appeal, the appellant requests that the Tribunal "annul the Secretary General's decision not to introduce into the Council of Europe's internal legal order housing grants for serving or former staff members with disabilities, despite the commitments he had made to the appellant".

The appellant contends that the Secretary General has violated the general legal principle of legitimate expectation which implies, inter alia, keeping one's word. The appellant further maintains that the decision complained of also violates the principle of good faith.

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

I. AS TO THE ADMISSIBILITY OF THE APPEAL

A. Parties' submissions

21. The Secretary General submits that the appeal is inadmissible on three grounds. He further submits that two complaints made by the appellant are inadmissible: violation of the statutory right to be consulted and violation of the principle of legal certainty.

22. He begins by noting that, under Article 59, paragraph 8 c), of the Staff Regulations, the appellant can avail itself of the complaints procedure only if the complaint relates to an act of which the appellant is subject or to an act directly affecting its powers under the Staff Regulations. In the case in point, the appeal is directed against the Secretary General's decision to discontinue the system of exceptional grants for adapting the homes of staff, or members of their families, who have disabilities.

The Secretary General infers from this that the appellant has no interest in bringing proceedings relating to an act the subject of which are the staff who might have qualified for the grant.

23. The Secretary General goes on to contend that the appeal is not directed against an act that directly affects the appellant's powers under the Staff Regulations.

24. Lastly, the Secretary General maintains that, since, in its appeal, the appellant seeks the annulment of the Secretary General's decision to discontinue the exceptional grant scheme, such annulment would be tantamount to ordering the Secretary General to reinstate the scheme. According to the Secretary General, however, it is not within the power of the

Tribunal to decide whether a grant should or should not be implemented and the appeal is therefore inadmissible for lack of jurisdiction.

25. As regards the inadmissibility of the complaints concerning violation of the statutory right to be consulted and violation of the principle of legal certainty, the Secretary General submits that the appellant does not have an "existing" interest in bringing proceedings as the exceptional grant has been abolished. The appellant's interest in requesting that a legal instrument be drawn up, as well as its right to be consulted about such a text, cannot be said to exist therefore, the grant in question having been abolished.

26. For its part, the appellant believes its appeal to be admissible.

27. In reply to the first objection, the appellant draws attention to the fact that, in his reply to the appellant's administrative complaint, the Secretary General did not at any stage in the pre-litigation procedure challenge its authority to deal with this matter. The appellant further submits that it is clear from the wording of the decisions rejecting the two administrative complaints that the appellant was in fact the subject of the act complained of, as it had received a promise to maintain the grant as compensation for the abolition of the housing loan scheme. The appellant further contends that, as the recipient of this promise and as a subject of law in the Organisation's internal legal system, it is, both formally and substantively, the subject of the act in which the Secretary General notified it that the promise would not be kept.

28. As to the second objection that the Tribunal has no jurisdiction, the appellant maintains that it is not asking the Tribunal to order the Secretary General to adopt an instrument but rather to annul an administrative decision which it considers to be defective, something that is clearly within the power of the Tribunal to do.

29. Lastly, the appellant expresses its bewilderment at the third objection, which, in its view, seeks to assert that the appellant should be consulted only about the introduction of new instruments and not about the abolition of existing ones. In the appellant's opinion, this issue relates more to the merits than to the admissibility of the appeal.

B. The Tribunal's assessment

30. With regard to the first objection, the Tribunal notes that the appellant is complaining not about the substance of the impugned decision but about the way in which it was adopted, in breach of the Staff Committee's rights and powers. At the same time, the Secretary General states that the grant has been abolished, which is indeed correct. He goes on to say, however, that this abolition arose from his desire to replace the grant with a different scheme. The appellant's interest in the outcome of the dispute is obvious, therefore.

31. As to the second objection, in regard to which the appellant has observed that the Secretary General raised no such objection at the administrative complaint review stage, the Tribunal notes firstly that, in accordance with its case-law, it is open to the Secretary General to raise an objection to admissibility, without being deemed to have exceeded the time-limit, up to the time of his first submission to the Tribunal. No inference may be drawn, therefore, from the fact that the Secretary General did not reject the administrative complaint as being inadmissible.

32. As to the merits of the objection, the Tribunal notes that, through its appeal, the appellant is challenging an act of which it was the subject and which affected its powers. Given that the issue of whether a complaint has merit is different from that of whether a complaint can be lodged, the Tribunal fails to see how the Secretary General could plead that the appeal is inadmissible on this count.

33. With regard to the third objection, the Tribunal notes that the statutory texts – Article 60, paragraph 2, of the Staff Regulations – grant the Tribunal a power of annulment without excluding administrative acts of the kind at issue here. It is important, furthermore, not to confuse review by the Tribunal to ensure lawfulness with execution of the Tribunal's decision. Execution comes after review, and is governed by specific provisions.

34. Lastly, with regard to the two objections concerning the grounds of appeal, the Tribunal notes that the existence of a statutory right to consultation on a given text and the interest in requesting a legal instrument are matters that relate more to the merits of the case and cannot be used to plead that the grounds in question are inadmissible.

35. In conclusion, all of the objections raised by the Secretary General are unfounded and must be dismissed.

II. AS TO THE MERITS OF THE APPEAL

The appellant

36. The appellant relies on three grounds: violation of legitimate expectation, violation of the Staff Committee's statutory right to be consulted and violation of the principle of legal certainty.

37. With regard to the first ground, the appellant observes that, as stated by the Secretary General in his decision to reject the administrative complaint, there had been an agreement between them concerning the implementation, with some degree of flexibility, of the exceptional grant to compensate for the abolition of the housing loan scheme. It so happens that the enactment of an instruction or rule would be compatible with the kind of flexibility required, with the Secretary General continuing to enjoy a wide margin of discretion. The Secretary General has not shown, therefore, that the appellant's request was incompatible with the agreement concluded in 2010. The enactment of an instrument, on the other hand, would require the Secretary General to consult the appellant about a text and the general principle of law relating to legal certainty would be secured. The appellant infers from this that there has been a breach of the principle of legitimate expectation because there had been an agreement between them, and an infringement of the general legal principle *legem patere quam ipse fecisti*.

38. With regard to the second ground, the appellant considers that the Organisation should have consulted it insofar as the matter could have been deemed to constitute a measure for the implementation of Article 12 of Appendix IV to the Staff Regulations on indemnities for handicapped children and such consultation is provided for in Article 5, paragraph 3, of Appendix I to the Staff Regulations.

39. As to the third ground, the appellant contends that the principle of legal certainty does not merely involve assessing the quality and consistency of the rules enacted but requires,

more fundamentally, that legal situations be governed by general and abstract rules and not merely by announcements on the Council intranet portal, which have no legal status or effect. The appellant infers from this that only by drafting a regulatory instrument could the Secretary General have ensured the kind of legal certainty that ought to obtain in relations between the Organisation and its staff.

40. In conclusion, the appellant requests that the Secretary General's decision to discontinue the special disability grant be annulled.

The Secretary General

41. With regard to the first ground, the Secretary General notes that there was no negotiation but that he did consult the appellant, something, incidentally, which he was not required to do. Under the Council of Europe system, moreover, even where there is an obligation to consult the appellant, the Organisation is not bound by its opinion when making a decision.

42. The Secretary General emphasises that he acted in good faith and that it was the Staff Committee which, by calling into question the arrangements governing the grant as agreed, failed to honour its commitments and undermined the agreement.

43. With regard to the second ground, the Secretary General denies having infringed the appellant's statutory right to be consulted. To his mind, the grant in question has no connection with Article 12 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations), as this provision deals with the indemnity for handicapped child and reimbursement of educational or training expenses related to the handicap. The Staff Regulations, moreover, make no mention of staff having any right to claim an exceptional grant of this kind. The said grant is not covered, therefore, by paragraph 3 of Article 5 of Appendix I. Consequently, there has been no infringement of the right to be consulted.

44. With regard to the third ground, the Secretary General asserts that, from the time he abolished the exceptional grant scheme, the appellant cannot legitimately claim that the absence of a legal instrument amounts to a violation of the principle of legal certainty. In any event, the scheme, as implemented prior to its abolition, provided all the necessary safeguards because it allowed staff to determine the content of the applicable law.

45. In conclusion, the Secretary General asks the Tribunal to declare the appeal ill-founded.

III. THE TRIBUNAL'S ASSESSMENT

A. Preliminary consideration

46. Before examining the various questions before it with regard to the admissibility and merits of the appeal, the Court believes it is worth emphasising that, during the proceedings, the parties were somewhat vague about the scope and outcome of the dealings they had with one another in 2010 (agreement or consultation) and the request submitted to the Tribunal (annulment of the decision not to introduce the grant despite the promises given or annulment of the decision to discontinue the scheme).

47. As to the first question, the Tribunal concludes from the evidence before it that there was, even though the appellant disagreed with the decision to abolish housing loans, a consensus in favour of abolition, the quid pro quo for which was the introduction of a flexible system of exceptional grants for people with disabilities. It is clear from the meeting report of 21 October 2010 (paragraph 6 above) that this issue was one about which the appellant felt strongly, thus explaining the Staff Committee's unhappiness over the abolition of the housing loans.

Secondly, irrespective of the fact that there is an obligation to consult the appellant on such matters, it is clear that efforts were made to reach a consensus and agreement. The agreement reached in October 2010, however, related more to the principle and less to its actual implementation, even though it was clear from that point that there was no question of creating a new allowance and, most importantly, that the scheme needed to be flexible.

48. In response to the second question, the Tribunal notes that the fact that the request is submitted to the Tribunal in different ways cannot be construed as meaning that the appellant submitted different requests. Rather, what is involved here is a variation in the manner of presenting one and the same *petitum* drawing attention to the Secretary General's refusal to enact rules on housing grants for staff with disabilities, as expressed firstly through the refusal to enact such rules and secondly through the decision to abolish the grant per se.

49. These elements form the background against which the appellant's three grounds must be considered.

B. On the merits

50. The Tribunal considers that the ground relating to lack of consultation should be examined first.

51. It takes the view that, in the instant case, the appellant's action in requesting the enactment of formal rules did not constitute a breach of the agreement that had been concluded in 2010 but simply a request to be consulted beforehand in order to further improve the system. The fact that the said agreement had been concluded could certainly not prevent the appellant from making the request or the Secretary General from refusing to comply because, as the Tribunal has made very clear, it was a question of prior consultation rather than negotiation.

52. At the hearing, the Secretary General denied that there had been an agreement, and the fact is that the words used at the hearing must take precedence over what is stated in the memorial and at the negotiation stage.

53. The Tribunal is of the opinion that requesting the establishment of a legal framework for the award of a grant does not amount to reneging on an agreement. It is clear from the meeting report of 21 October 2010, moreover, that there was disagreement between the parties (paragraph 6 above). It is therefore incorrect to conclude from this that a promise was not kept. Under the statutory text, moreover, the appellant cannot claim a right to regulation but has merely a right to be consulted.

54. The Tribunal accepts that it is for the Organisation to decide whether or not to maintain the grant scheme, but it is clear that, given the circumstances of the case, namely the introduction of this grant, albeit with flexible rules as to how it should be applied, as compensation for abolishing the housing loan scheme, the Organisation had an obligation to consult the appellant before making a decision. The Tribunal cites as evidence of this the fact that now, following the abolition of the housing loan, consultations are under way between the Directorate of Human Resources and the appellant concerning the introduction of the scheme that is to replace the housing loans.

55. In his memorial, moreover, the Secretary General noted that the principle of legal certainty required that staff be able to determine the content of the applicable law. He did not agree with the appellant that enacting a rule or instruction would have the effect of providing greater legal certainty as, in his view, the grant application form fully satisfied those criteria. Now, after studying this form, the Tribunal must point out that, by way of eligibility requirements, the latter merely states that the "Directorate of Human Resources will consider criteria of a social kind for the purposes of examining the application" but gives no indication or examples, with the result that the reference is extremely general.

56. It follows that this argument is well-founded. Having reached this conclusion, the Tribunal does not need to examine the other two arguments.

57. The Tribunal nevertheless wishes to reiterate the importance that must be placed on protecting and integrating people with disabilities in the workplace. Admittedly this appeal does not concern an issue arising from the integration of people with disabilities in the Council of Europe, but that does not prevent the Tribunal from drawing the Council's attention to the need to actively address situations of this kind and the Tribunal can only welcome the Secretary General's decision to issue instructions to the Directorate of Human Resources and to begin discussions with the appellant "to try to find a solution to this issue" (decision of 18 January 2012, rejecting the administrative complaint, paragraph 15 above). The Tribunal can only hope that this process produces a new approach soon.

58. Secondly, the Secretary General has given no indication of the reasons which prompted him to go back on an agreement and to abolish the scheme in question. Granted, he did say that he wished to introduce a new scheme and that the appellant would be consulted. He has not, however, given any indication as to the progress made in this area. Even supposing, too, that he does actually introduce this new scheme, the fact remains that for a while at least, no grants will be awarded, or even available, to people with disabilities. Regardless of what the Council's policy is in this area, it is important to note that the European Social Charter, which is the Council's landmark instrument in the protection of economic and social rights, provides in paragraph 15 of part I that "Disabled persons have the right to independence, social integration and participation in the life of the community" and in paragraph 3 of Article 15 of Part II states that the Parties undertake "to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure". These principles also need to be considered when it comes to adapting homes.

59. Lastly, the Tribunal cannot help noting that the Secretary General decided to abolish the grant in question after the appellant lodged its first administrative complaint, and notified it of his decision by rejecting this complaint.

While it is correct that Article 59 of the Staff Regulations has no provision similar to the one in paragraph 5 of Article 60 for proceedings before the Tribunal ("While an appeal is pending, the Secretary General shall avoid taking any further measure in respect of the appellant which, in the event of the appeal being upheld, would render unfeasible the redress sought"), the fact remains that, by his decision, taken while the complaint was pending, the Secretary General made the redress sought difficult, if not unfeasible.

Indeed, during the proceedings before the Tribunal, the Secretary General drew on the fact that housing loans had been abolished to contest the present appeal. The fairness of proceedings, however, requires that the principle laid down in paragraph 5 of Article 60 of the Staff Regulations likewise apply to the pre-litigation phase of the appeal, as governed by Article 59 of the same Regulations.

C. Conclusion

60. In conclusion, the appeal is well-founded and the impugned decision must be annulled.

For these reasons, the Administrative Tribunal:

Dismisses the objections to admissibility raised by the Secretary General;

Declares the appeal to be well-founded;

Annuls the decision complained of.

Adopted by the Tribunal in Strasbourg on 11 April 2013 and delivered in writing on 12 April 2013 pursuant to Rule 35, paragraph 1 of the Tribunal's Rules of Procedure, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. ROZAKIS