

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 522/2012 (Tilman HOPPE v. Secretary General)

The Administrative Tribunal, composed of:

Mr Cristos ROZAKIS, Chair,
Mr Jean WALINE,
Mr Rocco Antonio CANGELOSI, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Tilman Hoppe, lodged his appeal on 10 January 2012. The appeal was registered on 17 January 2012 under no. 522/2012.
2. On 24 February 2012, the Secretary General forwarded his observations on the appeal. The appellant stated that he did not wish to submit observations in reply.
3. The public hearing on this appeal was held in the Tribunal's hearing room in Strasbourg on 5 December 2012. The appellant conducted his own defence. The Secretary General was represented by Ms Christina Olsen of the Legal Advice Unit, assisted by Ms Maija Junker-Schreckenber and Ms Sania Ivedi, administrative officers in the same department.

Acceding to a request for the production of evidence (the test questions and the appellant's replies) submitted by the appellant, the Tribunal ordered the production of documents to enable it to understand the test procedure, and read them without disclosing their content to the parties. The appellant had given his prior agreement to this.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

4. The appellant, a German national, applied to take Council of Europe Competition No. e104/2011 for recruitment to a position of project manager (grade A1/A2). The recruitment procedure was organised in accordance with Article 16 of the Regulations on appointments (Appendix II to the Staff Regulations - paragraph 9 below).

5. In an email of 15 September 2011, the Directorate of Human Resources (hereafter “DHR”) informed the appellant that he was invited to take a set of ability tests online, that these tests would be eliminatory and that he could complete them at any time between 19 and 22 September 2011.

6. In an email of 7 October 2011, the DHR informed the appellant of his results and of the fact that, in view of his failure to achieve the required minimum mark, he was not being invited to the final stage of the selection procedure.

7. On 19 October 2011, the appellant submitted an administrative complaint against this decision (Article 59, paragraph 2, of the Staff Regulations). He requested the cancellation of the results of the ability tests on the grounds that these tests were not a fair and appropriate means of selecting applicants for interview.

8. On 18 November 2011 the Secretary General dismissed the complaint for the following reasons:

“(…) You list your university diplomas and your professional experience in support of the argument that the ability tests are not an appropriate way to select candidates for a competition, on the grounds that your qualifications alone should make you eligible for interview.

On this point, it should be noted that your qualifications were duly taken into account during the short-listing phase of applications for this competition, since your diplomas and professional experience led to your inclusion among the 147 candidates short-listed on the basis of their qualifications (…).

Therefore, the verbal reasoning test – which had to be taken in English because the vacancy notice stipulated a very good knowledge of English – was chosen to test candidates’ ability to understand and assess various types of written arguments.

The inductive reasoning test was geared to testing candidates’ ability to understand the relationship between different abstract data and to draw the logical conclusions from them. This test helps measure candidates’ ability to solve problems without being hampered by cultural or linguistic differences. (…)

In your case, no irregularity was noted in the testing procedure. The ability tests which you took were devised by the company SHL – a world leader in the field of ability testing – in close co-operation with the DHR. These tests were tailored to

the needs of the competition and the expectations of the Council of Europe. The use of the tests was approved by the administrative entities concerned by this competition, which are best placed to appraise their own needs in the matter. (...)

(...)

You complain that you had insufficient time to prepare for the tests and find a place to take them, since you were travelling for professional reasons at the time. The ability tests do not require preparation because they appraise not the candidates' acquisition of any specific knowledge but rather their personal ability (...). (...)

In connection with your request for communication of the questions put to you in the inductive reasoning test and the answers to these questions, the Council of Europe is under no obligation to disclose these elements. Firstly, it is not Council of Europe practice to supply copies to candidates who have failed written tests or to send them all the markers' comments. Usually, candidates receive feedback in the form of a summary of the comments on the marking of tests of the type at issue here, that is to say multiple-choice tests, where no comment is required because the marking is confined to assessing whether the reply is correct or not.

(...)

In the light of the foregoing comments, we must repeat that no irregularity was noted in the preparation, organisation or marking of the tests. Similarly, there is nothing to suggest that the relevant authorities in any way exceeded the limits of their discretionary powers or committed any obvious error by pursuing a goal other than that of fulfilling their duty in the framework of the competition in question. The recruitment procedure at issue was fair, and while your disappointment is understandable, no violation of the procedure can be deduced from your arguments (...)."

9. On 10 January 2012, the appellant lodged this appeal (Article 60 of the Staff Regulations).

II. THE RELEVANT LAW

10. Appendix II (Regulations on appointments) to the Staff Regulations provides for two recruitment procedures: competitive examination and selection based on qualifications. The latter is governed by Article 16, which reads as follows:

"1. When selection is based on qualifications, the applicant's qualifications shall be examined, and short-listed applicants shall be interviewed by a representative or representatives of the administrative entity where the post or position is to be filled and by the Director of Human Resources or his/her representative(s). The administrative entity concerned may also decide to organise, with the agreement of the Director of Human Resources and the cooperation of his/her Directorate, job-related tests with short-listed applicants. At the end of the procedure, the Board shall submit a recommendation to the Secretary General on the basis of the

relevant information at its disposal. Where a number of applicants are included in the recommendation, they shall be listed in the order of merit.

2. The selection procedure based on qualifications plus an interview by a representative or representatives of the administrative entity concerned and by the Director of Human Resources or his/her representative(s) shall be followed when recruiting to posts or positions filled by securing the services of civil servants or specialists as provided in Article 12, paragraph 3, of the Staff Regulations. In other instances of recruitment, the Secretary General may decide to follow this procedure, in accordance with the discretion conferred on him or her in accordance with Article 6, paragraph 1, of these Regulations on Appointments.

(...).”

THE LAW

I. THE PARTIES’ SUBMISSIONS

11. In his appeal, the appellant asks to be invited to the interview which constitutes the stage in the competition in question following the stage at which consideration of his application ended. He requested that, should this invitation prove impossible, the Tribunal should redress his rights in an alternative manner.

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

12. The appellant challenges the result which he obtained in the ability tests, the appropriateness of the tests for the needs of the competition, as well as the procedure used, including the lack of supervision. He considers it unfair that his results in these tests led to his elimination from the recruitment procedure.

Secondly, he complains about the refusal to give him access to the test questions and his replies to them, which access would have enabled him to ascertain the correctness of his result. He relies on the principle of transparency and the fact that candidates in a selection procedure for civil service posts in the member states of the Council of Europe should have access to their marked papers.

13. The Secretary General first of all contends that the appellant did not raise the first point of his appeal (invitation to interview) in his administrative complaint. This part of the appeal is therefore inadmissible, in his view, on grounds of non-exhaustion of internal remedies. Furthermore, if the appellant considered that the tests had been prejudicial to him, he should have challenged them within 30 days from receipt of the DHR email on 15 September 2011. He failed to do so, and consequently this part of the appeal is, he argues, inadmissible as being out of time.

14. The Secretary General stresses that the recruitment procedure set out in Article 16 of Appendix II to the Staff Regulations provides for the possibility of “job-related tests”. Secondly, he admits that the ability tests are not, strictly speaking, part of the recruitment

procedure, but says that they will continue to be used for applicants. Two tests were included in the recruitment procedure in question: one concerns verbal reasoning and the other inductive reasoning, geared to checking certain essential competences, in accordance with the interests and needs of the departments in question. The verbal reasoning test was chosen to test candidates' ability to understand and assess various types of written arguments. The inductive reasoning test is used to test their ability to grasp the relationship between various abstract data and to draw the logical conclusions from them. This test assesses candidates' ability to solve problems without being hampered by cultural or linguistic differences. The Secretary General stresses that it is not for the appellant, as a candidate, to assess the relevance of the tests set in the competition in question or to evaluate their appropriateness to the post to be filled by means of the latter.

15. As regards marking of the papers, the Secretary General contends that the guarantee of objective and fair marking lies in a strict marking procedure applicable to all candidates. These requirements were met in the instant case. The tests were marked by computer, and therefore in the most objective, impartial and anonymous possible manner. The 38/100 mark obtained by the appellant in the inductive reasoning test is not vitiated by any manifest error and corresponds to his result.

16. As to the appellant's claims concerning lack of supervision of the tests on the ground that candidates could take the tests whenever and wherever they wished, the Secretary General maintains that if any candidates had cheated, they would have been easily detected at the interview stage, by means of verification tests. Moreover, candidates enjoy a presumption of good faith under all the Council of Europe's recruitment procedures. All the external competitions organised by the Council of Europe require candidates to fulfil a number of criteria in order first of all to be short-listed and then to participate in the recruitment procedure.

17. In reply to the appellant's assertion that he had insufficient time to prepare and find a place to take the tests because he was travelling for professional reasons at the time, the Secretary General maintains that the ability tests do not require any preparation.

18. The Secretary General, in conclusion, invites the Administrative Tribunal to declare the present appeal inadmissible and /or ill-founded.

II. THE TRIBUNAL'S ASSESSMENT

19. The Tribunal must first of all rule on the objections of inadmissibility raised by the Secretary General.

It first of all notes that the appellant's admission to the interview stage in fact constitutes one of the two forms of redress in the event of a finding of a violation of his rights, the second being financial compensation. The fact that the appellant failed to mention this in his administrative complaint therefore has no negative effect on the admissibility of the present appeal. Consequently, the Tribunal dismisses the first objection of inadmissibility raised by the Secretary General.

As to the objection that the appeal was lodged out of time (cf. paragraph 13 above), the Tribunal considers that on receipt of the 15 September 2011 email, the appellant – who in

fact does not challenge the ability tests but rather the manner in which they were carried out and their result – knew nothing about the content of the ability tests and, until apprised of the results, could not have complained that they had been prejudicial to him. Therefore, the second objection of inadmissibility raised by the Secretary General must also be rejected.

20. As to the merits of the appeal, the Tribunal observes that recruitment is a means for an international organisation such as the Council of Europe to increase its competences and benefit from new experience and values. In fact, an erroneous recruitment decision can have detrimental effects on professional relations and the results of the organisation's activities. The recruitment process therefore comprises several stages, from determination of the need for a new staff member to his integration into the organisation, corresponding to specific staffing expectations in the department concerned.

21. The Tribunal first of all observes that Article 16, which lays down the procedure for the competition in question, provides that this procedure comprises "examin(ing) the applicant's qualifications" and, in the case of short-listed candidates, "an interview by a representative or representatives of the administrative entity concerned and by the Director of Human Resources or his/her representative(s)". This provision adds that "the administrative entity concerned may also decide to organise, with the agreement of the Director of Human Resources and the co-operation of his/her Directorate, job-related tests with short-listed candidates".

This text shows that, for short-listed candidates, and the appellant had clearly been short-listed, otherwise he would not have been invited to take the tests, there must be an interview with a representative of the administrative entity concerned, and possibly also a job-related test. This provision makes it clear that the tests are not a defining part of the procedure which can have the consequence of excluding an applicant from the rest of the procedure. Furthermore, the Secretary General himself acknowledges this when he states that Article 16 "provides for the possibility of 'job-related tests'" (paragraph 14 above) and "secondly, he admits that the ability tests are not, strictly speaking, part of the recruitment procedure, but says that they will continue to be used for applicants" (*ibid*).

It follows from this text that a short-listed candidate cannot be eliminated on the sole basis of the result of the tests, as the latter cannot be taken into account until after the candidate's interview.

22. The Tribunal accepts that in order to be able to select the best candidates with the potential to exercise the requisite functions for a given vacancy, the DHR must use the appropriate methods of selection, which include the aforementioned tests. Moreover, such tests are also provided for in Articles 15 and 16, which concern competitive examinations and selection based on qualifications, respectively. However, the decision to use such tests must necessarily correspond to the vacancy profile and the content of the functions and tasks which the staff member will have to exercise. As proof, the Tribunal cites the fact that the aforementioned Article 16 explicitly mentions "job-related tests with short-listed candidates" (paragraph 10 above), whereas Article 15, under the aforementioned competitive examination procedure, expressly mentions the tests as complementing or replacing written examinations. The Tribunal stresses that in the systems established by the aforementioned Articles 15 and 16, tests must under no circumstances be used to "artificially" eliminate as many candidates as possible in order to reduce the number to be invited to the subsequent stage of the

recruitment procedure, namely the interviews, but rather to check on their competences. Furthermore, Article 16 refers to “job-related tests”, because the risk of a highly competent candidate being eliminated must not be overlooked.

23. In the instant case, the Secretary General argues that the verbal reasoning test was geared to verifying candidates’ ability to understand and assess different types of written arguments, and that the inductive reasoning test helped to ascertain their capacity for understanding the relationship between various abstract data and drawing the logical conclusions from them, including gauging the candidates’ ability to solve problems without being hampered by cultural or linguistic differences (see paragraph 12 above).

24. Having read through the tests in question, the Tribunal considers that it cannot accept the Secretary General’s arguments. It notes that the recruitment procedure in which the appellant took part concerned positions as project manager. In the Tribunal’s view, the main function in this type of post, as stipulated in the corresponding vacancy notice, is to direct the various stages of a given project. In order to carry out this task successfully, a project manager must have a command of the relevant techniques, understand the specific characteristics of the task and adhere to its objectives, or else have competences in the relational field, and in particular be able to direct and work in a group and facilitate relations between group members, who will most likely have a multi-national profile, given the international character of the Council of Europe.

25. The Tribunal is not convinced by the Secretary General’s arguments concerning the appropriateness of the ability tests to the needs of the recruitment procedure in question. The verbal reasoning test included various texts, the content of which was irrelevant to Council of Europe activities or the international organisation environment. If, as the Secretary General contends, the aim of this test was to verify the candidates’ ability to understand and evaluate different types of written arguments, it would have been more appropriate to work with texts connected with the activities of the Organisation in which the post was to be filled. Such an approach would have been the only way of verifying the compatibility of the candidates’ abilities with the post. As to the inductive reasoning test, the Tribunal admits that evaluation of the candidates’ capacity to solve problems without being hampered by cultural or linguistic differences, which aim is highlighted by the Secretary General, is certainly relevant to the procedure for recruiting a project manager in an intergovernmental institution such as the Council of Europe. However, the Tribunal observes – and the Secretary General does not dispute this – that, in the framework of this test, the candidates were invited to work on abstract data in order to draw logical conclusions from them. However, a project manager’s activities are indisputably highly concrete and practical. Consequently, if the DHR considers it appropriate, or even vital, to assess the candidates’ ability to solve problems liable to emerge in the course of implementing and conducting a project in a multicultural and multilingual environment, in order to select the best candidate for the post of project manager, it should use more appropriate tests which correspond to the actual needs of the post advertised in the recruitment procedure in question. Such tests would ultimately facilitate concrete evaluation of candidates’ professional competences – as mentioned in Article 16 – and not be geared to reducing the number of candidates whose professional competences would have to be assessed.

26. In the light of these considerations, this ground of appeal is well-founded, and the act complained of must consequently be annulled.

27. Having reached this conclusion, the Tribunal sees no need to rule on the appellant's other grounds of appeal.

III. CONSEQUENCES OF THE DECISION

28. The appellant asks to be called for interview, that is to say the stage in the procedure following that at which his participation ended. The Tribunal observes that under the terms of Article 60, paragraph 2, of the Staff Regulations it only has the power to annul the act complained of and possesses unlimited jurisdiction in disputes of a pecuniary nature. The present appeal certainly does not fall into the latter category. Consequently, the Tribunal cannot order the appellant's admission to the subsequent stage in the procedure.

Furthermore, according to Article 60, paragraph 6, of the Staff Regulations, it is for the Secretary General to execute the decisions of the Tribunal. He will, in due course, be able to execute the present decision by deciding at what stage, and how, the procedure should be resumed. If the appellant considers that the manner in which the Secretary General executes the present decision is detrimental to him, he can rely on the legal remedies available to him to challenge the manner of execution, as other appellants have done in other disputes (TACE, Appeals Nos. 486-489/2011, 491/2011, 498-500/2011, 500/2011 and 502/2011 - Ümit KILINC and others v. Secretary General, decision of 20 April 2012, paragraph 85).

29. As the appellant has not requested the reimbursement of costs and expenses in respect of the present proceedings, the Tribunal sees no need to rule on this matter.

For these reasons, the Administrative Tribunal:

Dismisses the objections of inadmissibility raised by the Secretary General;

Declares the appeal well-founded and annuls the act complained of.

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

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS