

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

Appeal No. 463/2010 (Jean-Marc LIBS v. Secretary General)

The Administrative Tribunal, composed of:

Mr Luzius WILDHABER, Chair,
Mr Angelo CLARIZIA
Mr Hans J. Knitel, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Jean-Marc Libs, lodged his appeal on 4 January 2010. It was registered the same day under No. 463/2010.
2. The appellant submitted a supplementary memorial on 2 February 2010.
3. On 10 March 2010, the Secretary General submitted his observations on the appeal. The appellant filed observations in reply on 9 April 2010.
4. Initially scheduled for 21 April 2010, the public hearing on the appeal was unavoidably postponed (disruption of airline services by volcanic ash) and finally took place in the Tribunal's hearing room in Strasbourg on 17 June 2010. The appellant was represented by Ms Carine Cohen-Solal of the Strasbourg Bar, and the Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, assisted by Ms Maija Junker-Schreckenber and Ms Sania Ivedi, assistants in that department.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The appellant is a fixed-term permanent staff member of the Council of Europe. He is a French national, and occupies a position (grade B4) in the Directorate of Information Technology.

When he lodged this appeal, he was employed on a contract running from 1 September 2006 to 31 December 2010. This contract has since been renewed, but cannot, under the Organisation's rules, be extended beyond August 2011.

This appeal concerns the decision of the Directorate of Human Resources to exclude him from an internal competition.

6. On 8 September 2009, the appellant applied, within the context of an "internal competition open solely to permanent staff", for the post of Web 2.0 and multimedia support assistant (Grade B3), advertised in Vacancy Notice No. 67/2009. In the "applications" section of that notice, it was stated that "applications from all suitably qualified candidates are welcome, irrespective of gender, disability, marital or parental status, racial, ethnic or social origin, colour, religion, belief or sexual orientation".

7. On 10 September 2009, the Head of the Recruitment and Appointments Division of the Directorate of Human Resources wrote to him as follows:

"I refer to your application for the post of Web and multimedia support assistant, Vacancy Notice No. 67/2009, grade B3.

I regret to inform you that, coming from a B4 staff member, your application cannot be accepted, since the Regulations on Appointments do not envisage a staff member's applying for a post at a lower grade than his present one, which would amount to downgrading. The applicable texts, firstly, provide for downgrading only as a disciplinary measure, and, secondly, restrict the appointment and competition procedures to recruitment, transfer, promotion and secondment (Article 2 of the Regulations on Appointments).

I should nonetheless like to thank you for your interest in this post and for your understanding."

8. The Organisation's intranet site published the list of candidates (two) without the appellant's name.

9. On 6 October 2009, the appellant lodged an administrative complaint under Article 59, paragraph 1 of the Staff Regulations.

10. On the same day, he applied to the Chair of the Administrative Tribunal for a stay of execution of the act complained of (Article 59, paragraph 7 of the Staff Regulations).

11. In an Order given on 21 October 2009, the Chair granted the stay of execution, insofar as it concerned continuation of the procedure for filling of the post at issue in the proceedings, and decided that the suspension would end, at latest, on the day on which the Administrative Tribunal gave its decision.

12. On 6 November 2009, the Secretary General decided that the administrative complaint was inadmissible and/or ill-founded, and rejected it.

13. On 4 January 2010, the appellant lodged the present appeal.

APPLICABLE PROVISIONS

14. Appendix II to the Staff Regulations contains the Regulations on Appointments. The relevant provisions read as follows:

“Article 1 – Scope

1. These regulations, issued in accordance with Part II of the Staff Regulations, set out the conditions under which staff members are recruited, transferred, seconded or promoted.
2. These regulations shall be completed by a General Rule of the Secretary General detailing the procedures for their implementation.

Article 2 – Definitions

1. Recruitment is the appointment to a vacant post or position of a candidate who is not a staff member.
2. Employment is the occupation for which the staff member is paid.
3. Post is an employment approved by the Committee of Ministers, included in the Table of Posts.
4. Position is an employment which is established for a fixed term.
5. Transfer is the appointment of a staff member to another post or position carrying the same grade.
6. Secondment is the placement of a staff member, with or without remuneration, to another international organisation or national, regional or local administration.
7. Promotion is the appointment of a staff member to a post or position carrying a higher grade.
8. Vacancy refers to a post or position which is not filled.

[...]

Article 9 – Appointments Board

1. The Appointments Board (hereafter referred to as “the Board”) is the Secretary General’s advisory body in matters of appointment by recruitment or internal competition. Its deliberations, reports, opinions and recommendations shall be confidential. The Board may indicate in its report which information may be communicated to unsuccessful candidates. In no case must personal information on a candidate be revealed to other candidates or third persons.
2. The Board shall be consulted in all cases except in the case of appointments to:
 - A6 and A7 posts, which are covered by Article 25;
 - posts which are covered by Article 26, paragraph 1;
 - posts in the Private Office of the Secretary General, which are covered by Article 27;

- posts and positions which are filled by means of Article 5.

3. Opinions and recommendations submitted to the Secretary General by the Board shall set out the reasons on which they are based, be signed by all persons having participated in the deliberations and, should the occasion arise, be accompanied by their dissenting opinions.

4. The members of the Board shall be completely independent in the discharge of their duties: they shall not receive any instructions.

5. The Board's membership and functions are set out in Articles 10 to 21.

Article 10 – Composition of the Board

1. The Board shall comprise the following members with voting rights:

- the Director of Human Resources or a staff member designated to this end by the Director of Human Resources;
- a staff member of grade A5 at least appointed to this end for two years by the Secretary General (or his or her alternate);
- in the case of recruitment or internal competition to fill a post or position in a specific Major Administrative Entity, a representative of this entity of at least the same grade as that of the post or position to be filled; in the case of recruitment to fill posts or positions in several Major Administrative Entities, a representative of one of these entities of at least the same grade as that of the post or positions to be filled;
- a staff member designated by the Staff Committee.

2. The Chair of the Board shall be the Director of Human Resources or his/her representative.

3. The Deputy Secretary General and the Director General of Administration and Logistics may decide to sit on the Board. If the Deputy Secretary General sits on the Board, he or she shall take the Chair. If the Director General of Administration and Logistics sits on the Board and the Deputy Secretary General does not, the former shall take the Chair. In such cases, the more senior person shall cast the vote of the Director of Human Resources.

4. In the case of a parity vote, the Chair of the Board shall have the casting vote.

5. The equal opportunities officer in the Directorate of Human Resources may sit on the Board in an advisory capacity.

6. The Secretary General may invite up to two more persons, from outside the Council or from among serving staff, to sit on the Board in an advisory capacity.

[...]

Article 14 – Functions of the Board with regard to transfers and promotions

1. The Board shall be responsible for any competitive examination or selection based on qualifications that is conducted as part of the internal competition procedure.

The Board shall:

- scrutinise all applications; it may draw up a short list of those appellants considered best qualified for the post or position to be filled on the basis of the criteria set out in the vacancy notice;
- decide whether shortlisted applicants will be invited to sit tests or examinations;
- assess the results of such tests and examinations;
- if necessary, interview those applicants who have been shortlisted; where written tests or examinations have been held, only those applicants who have obtained satisfactory results shall be interviewed.

2. At the end of the procedure, the Board shall submit a recommendation to the Secretary General on the basis of all the relevant information at its disposal. Where a number of applicants are included in the recommendation, they shall be listed in order of merit.

3. The Board shall supply the Secretary General with recommendations on cases of promotion provided for in Article 21, paragraph 5 and in Article 24.

[...]"

15. Rule No. 1258 of 8 September 2006 was adopted by the Secretary General under Article 1, paragraph 2 of the Regulations on Appointments, and details procedures for their application. The relevant provisions read:

“Article 3 – Secretariat of the Appointments Board

The Secretariat of the Appointments Board shall be provided by the Directorate of Human Resources.

[...]

Article 7 – Recruitment

The list of candidates to be invited to take part in a recruitment procedure shall be drawn up by the Board’s Secretary, in the case of recruitment to fill a post or position in a specific Major Administrative Entity, in consultation with this Entity, on the basis of the qualification requirements set out in the vacancy notice and any instructions given by the Board. The list of candidates will be brought to the notice of the members of the Board who, within a period of at least five working days, may consult in the Secretariat the files of the candidates and make observations. Any difficulties which may arise over the composition of the list shall be discussed by the Board at a meeting if any member so requests. If, within the period indicated by the Board’s Secretary when circulating the list, no Board member has expressed an objection or asked for a meeting to be convened, the list of candidates drawn up by the Board’s Secretary shall be deemed to have been approved.

Article 8 – Transfers and promotions

1. The following documents providing information on the applicants’ competencies and performance are made available to members at Board meetings:
 - a. the staff member’s application;

- b. a personal curriculum vitae prepared by the applicant in a form provided by the Directorate of Human Resources;
- c. the applicant's most recent appraisal report; the applicant may submit the last three appraisal reports to the Board; the applicant may also submit the last objective-setting form to the Board, in particular if this form reflects a change in duties since the last appraisal report was drawn up;
- d. any disciplinary measures included in the applicant's personal administrative file – of which the staff member shall be previously notified.

2. In accordance with Article 14, paragraph 1, of the Regulations on Appointments and at the request of the Major Administrative Entity concerned, the Board may draw up a shortlist of those applicants considered best qualified for the post or position to be filled. Such lists shall be drawn up by the Board's Secretary in consultation with the Administrative Entity to which the vacant post or position is attached, on the basis of the criteria set out in the vacancy notice. The list of applicants, including short-listed and non-short-listed candidates as well as the grounds for not retaining the latter, will be brought to the notice of the members of the Board who, within a period of five working days, may consult in the Secretariat the files of the candidates and make observations. Any difficulties which may arise over the composition of the list shall be discussed by the Board at a meeting if any member so requests. If, within that period no Board member has expressed an objection or asked for a meeting to be convened, the list of applicants drawn up by the Board's Secretary shall be deemed to have been approved.

3. Before the meeting of the Board, the Head of the Major Administrative Entity to which the appointment is to be made shall interview all applicants or those short-listed in accordance with paragraph 2 above. The Head of the Major Administrative Entity may ask a second staff member to attend the interviews. He or she may also delegate this task to other staff members working in the entity concerned. If a shortlist has been drawn up, only those applicants who have been short-listed shall be interviewed.

The interview will give applicants the opportunity to obtain further information about the duties involved.

It will also enable the staff members conducting the interviews to assess the applicants' qualifications more precisely.

On that occasion interviewers must refrain from indicating any preference, making any promise, or proffering any discouraging comments.

4. At the request of the Major Administrative Entity concerned or on his or her own initiative, the Director of Human Resources or a staff member whom he or she designates to this end may attend such interviews and report to the Board when the latter deliberates on the recommendation.

5. The Board may decide to hold interviews with all applicants or with those short-listed in accordance with paragraph 2 above.

6. In cases where the Head of the Major Administrative Entity concerned proposes to hold written tests or examinations, the Board's Secretary, in consultation with the entity concerned, shall prepare a proposal and submit it to the Board, explaining the reasons. Such a proposal may be made before or after holding the interviews described in paragraph 3 above.

7. The Board shall assess the results of such tests and examinations. At that stage, it may decide to make a recommendation or to hold interviews with those applicants who have obtained satisfactory results.

[...]

Article 11 – Appointments to positions and posts

1. Staff members who have passed a competitive examination in accordance with Article 15 of the Regulations on Appointments and are appointed on fixed-term contracts may apply for vacancies notified in accordance with Article 7, paragraph 3 thereof; they may also be transferred in accordance with Article 5 of the same Regulations.

2. Should such staff members be transferred or promoted to posts in accordance with the provisions of the Regulations on Appointments, their fixed-term contract shall be replaced by indefinite-term contracts whose start date shall coincide with the date of their transfer or promotion. The same shall apply if their position is converted into a post.

3. Should such staff members be transferred or promoted to positions in accordance with the provisions of the Regulations on Appointments, their contracts shall be replaced by a new fixed term contract corresponding to the period for which the position they have been transferred or promoted to has been set up. However, in no case must the total length of employment of a staff member appointed on a fixed-term contract exceed five years.

4. Staff members appointed for an indefinite duration may be transferred or promoted to positions, in accordance with the provisions of the Regulations on Appointments, for a period not exceeding the one for which the position has been set up. In such cases, appointments made on posts held by the staff members concerned immediately prior to their transfer or promotion to a position may only be made for a fixed term not exceeding the period for which the positions in question have been set up.

5. Such appointments by transfer or promotion may be extended for periods corresponding to the existence of the positions concerned, or confirmed for an indefinite duration if the positions are transformed into posts. The fixed-term contracts of the staff members appointed on the posts vacated by the indefinite-term staff member as described in paragraph 4 above may be extended accordingly or replaced by indefinite-term contracts, as applicable.

6. Staff members on indefinite-term contracts who are transferred or promoted to positions may subsequently be transferred to same-grade posts or positions or promoted to higher grade posts or positions, in accordance with the provisions of the Regulations on Appointments. They shall be considered as holding the grade of their position for the purposes of Article 21 of the Regulations on Appointments.

7. Should positions be abolished, the staff members assigned to them shall return to their previous posts. Staff members who were promoted to positions which are abolished, shall return to their previous grade and be assigned to the step which they would have reached, if they had not been promoted.

[...]”

THE LAW

16. The appellant requests setting-aside of the decision of 10 September 2009, in which the Directorate of Human Resources declared his application under Vacancy Notice No. 67/2009 inadmissible. He is also seeking €4000 to cover his costs in connection with this appeal.

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

I. THE ARGUMENTS OF THE PARTIES

A) Concerning the admissibility of the appeal

18. The Secretary General starts by objecting that the appellant has no direct and existing interest in proceeding, as required by Article 59, paragraph 1 of the Staff Regulations, in the version then in force. In their case-law, various international administrative tribunals have clarified the nature of this interest, which depends on a staff member's showing that his/her legal position has been adversely affected. In the appellant's case, that condition has not been satisfied.

19. The Secretary General first argues that the explicit character of the Regulations on Appointments (paragraph 14 above) must be taken into account. Their scope is clearly and strictly defined in Article 1, paragraph 1, which states: "These regulations, issued in accordance with Part II of the Staff Regulations, set out the conditions under which staff members are recruited, transferred, seconded or promoted".

20. He makes the point that the appellant's situation matches none of those mentioned in that article. If the appellant were appointed to the post in question, his downgrading to a grade lower than his present one would be neither a recruitment, transfer nor secondment, let alone promotion - and would thus have no basis in law.

21. Moreover, the appellant cites no relevant regulation which has been violated in this case, with possibly adverse effects on his legitimate rights and interests.

22. As a B4 staff member, he cannot therefore claim that he was entitled to apply for the B3 post in question, since neither the Staff Regulations nor the Regulations on Appointments provide for this.

23. The Secretary General adds that, when it informed the appellant that his application could not be accepted, the Directorate of Human Resources was simply complying with the regulations applying to him as a staff member of the Organisation - which means that he cannot claim that this decision harmed his interests. In view of his grade, he therefore has no legally protected interest in applying for an internally advertised post carrying a grade lower than his present one.

24. In view of these various factors, the Secretary General maintains that the appeal is inadmissible under Article 59, paragraph 1, since the appellant has no interest in proceeding.

25. The appellant counters that he does indeed have an interest in proceeding. Such an interest is determined by the existence of a link between an appellant and the measure he complains of, and he undoubtedly has a genuine legal interest in attacking the decision of 10 September 2009, in which the Directorate of Human Resources arbitrarily restricted his right to apply for the post advertised in Vacancy Notice No. 67/2009.

26. He adds that his appeal's admissibility is closely connected with its merits. In his reply of 6 November 2009, the Secretary General clearly stated that, having regard to his present grade, he had no legally protected interest in applying for an internally advertised post carrying a lower one.

27. He strongly contests this, since there is nothing in the Staff Regulations and their Appendices, or in Vacancy Notice No. 67/2009, to justify such a prohibition or restriction on his applying for the post in question.

28. In his view, the Directorate of Human Resources unilaterally added a grade-related condition to prevent him from applying. This is legally questionable, and the Secretary General should therefore have annulled its decision. In fact, no such prohibition was expressly imposed by any regulation, and particularly the Regulations on Appointments, and there was nothing to prevent him from applying for a lower-grade post.

29. The appellant reaffirms that he has a valid interest in defending the opportunity offered him by Vacancy Notice No. 67/2009, even though the advertised post carries a grade lower than his present one. The vital point is that the advertised post would give him an indefinite contract, instead of his present fixed-term contract. His aim in proceeding is to extend his professional career at the Council of Europe beyond the five-year limit which the new staff policy applies to staff on fixed-term contracts.

30. He adds that he possesses the qualifications and competencies required for the post, and so has a direct and existing interest in applying for it, since it matches his profile and would also allow him to continue his professional career at the Council.

31. In view of all this, he undeniably has a genuine personal interest in setting-aside of the decision taken by the Directorate of Human Resources, which means that his appeal is indeed admissible under Article 59, paragraph 1 of the Staff Regulations.

B) Concerning the merits of the appeal

32. The appellant relies on four grounds: irregularity of the decision taken on 10 September 2009, since the Directorate of Human Resources had no authority to take it, misinterpretation of Articles 1 and 2 of the Regulations on Appointments, the adding of an extra condition for eligibility to those specified in Vacancy Notice No. 67/2009, and violation of the interests of the Directorate of Communication and the Organisation.

33. Concerning his first ground, the appellant contests the regularity of the decision in which the Directorate of Human Resources rejected his application, since it had no authority to take that decision. In his view, only the Appointments Board is empowered to decide whether or not applications are admissible.

34. He notes that the Secretary General did not explicitly reject this legal argument in his reply of 6 November 2009; however, the Secretary General does claim that the Directorate's decision was justified, since he would not have been appointed to the post in question if the Board had examined his application. This argument is patently specious, and the Secretary General should have realised this, and set that decision aside.

35. The appellant points out that, under Article 14, paragraph 1 of the Regulations on Appointments, "the Board shall be responsible for any competitive examination or selection based on qualifications that is conducted as part of the internal competition procedure". It is the Board which scrutinises all the applications, and there is no indication in the regulations that its powers in

that matter are shared with the Directorate of Human Resources. It is therefore clear beyond doubt that the Directorate had no authority to declare his application inadmissible.

36. Concerning his second ground, the appellant argues that the Directorate of Human Resources and the Secretary General both misinterpreted the scope of Articles 1 and 2 of the Regulations on Appointments (paragraph 14 above) when they stated that his application amounted to downgrading. This position is at odds with the text and violates the principle of equality of staff.

37. In his view, there is nothing in Article 2 to suggest that a staff member may not apply for a lower-grade post. That article merely defines certain terms, and the Directorate of Human Resources and the Secretary General cannot argue from those definitions alone that any application by a staff member for a post carrying a grade lower than his present one is inadmissible. It is an established case-law principle that decisions must be taken for legally valid reasons - which is clearly not the case in this instance (CJCE 1-3-1962 De Bruyn).

38. The appellant contests the argument that his application would amount to downgrading, since he currently holds a fixed-term contract, and applying for an indefinite contract can only improve his overall position. An improved position cannot be regarded as equivalent to downgrading, which is a disciplinary measure by definition – clearly not the case in this instance.

39. He further maintains that there is no administrative practice whereby the Council of Europe systematically rejects applications by staff members for posts carrying grades lower than their present ones, since this is an unprecedented situation and is due to the Organisation's new staff policy, under which staff on fixed-term contracts now have the same rights as permanent staff. At all events, it is up to the Secretary General to show that such a practice exists and is relevant - and this he has not done.

40. Concerning his third ground, the appellant points out that, under Article 7, paragraph 4 of the Regulations on Appointments, vacancy notices must describe, among other things, the conditions for eligibility and the qualifications required of candidates. The same applies to Article 6, "Notices of vacant posts and positions", of Rule No. 1258 of 8 September 2006.

41. Under that article, vacancy notices may contain indications other than those specified in paragraph 1; this is clear from the words, "As a minimum, notices of vacant posts and positions shall include [...]". Although additional conditions for eligibility may thus be specified, Vacancy Notice No. 67/2009 gives no indication that the post in question is open only to staff holding the same or a lower grade.

42. Moreover, international case-law has established that the conditions applying to a competition must be determined and known before the competition takes place, thus ensuring that candidates are not rejected for failing to comply with conditions of which they are unaware (CJCE 30-10-1974, Grassi).

43. This is why, under Article 8 of the Regulations on Appointments, which states that "applications shall be admissible only if they comply with the conditions set out in the vacancy notice", the appellant may reasonably argue that his application is indeed admissible.

44. The Secretary General should accordingly have set the decision of 10 September 2009 aside, since the Directorate of Human Resources added an extra condition for eligibility to Vacancy Notice No. 67/2009, and declared the appellant's application inadmissible on that basis.

45. Concerning his fourth ground, the appellant considers that the Secretary General's attitude conflicts with the interests of the Directorate of Communication and the organisation as a whole, since it prevents them from availing of his skills and appointing him to the post of Web 2.0 and multimedia support assistant.

46. He adds that the Staff Regulations' general provisions show that the Council's staff policy aims at recruiting staff with highest ability, efficiency and integrity. They also state that, in filling vacancies, account will be taken of the qualifications and experience of serving staff.

47. In view of these provisions, he is convinced that his application satisfies all these requirements.

48. In conclusion, the appellant considers that his request that the decision taken by the Directorate of Human Resources on 10 September 2009 be set aside is justified, and argues that his application under Vacancy Notice No. 67/2009 should thus be submitted to the Appointments Board.

49. The Secretary General, for his part, responds to the appellant's argument that the Appointments Board had sole authority to decide whether his application was admissible by pointing out that the Directorate of Human Resources merely took note of that application and informed him that it was inadmissible, since it did not match the purpose of the internal competition procedure, which was to fill the post in question via transfer or promotion only.

50. The Secretary General adds that the Directorate of Human Resources is responsible for the administrative aspects of appointment procedures, ensuring that the regulations are respected and acting as the Appointments Board's secretariat. In his view, this role gave it full authority to inform the appellant that his application was inadmissible. In deciding to do so, it was exercising no discretionary power, but simply applying the clear provisions of the Staff Regulations in this area.

51. Be this as it may, the Secretary General argues that, even if the Appointments Board were to consider his application, the appellant could still not be appointed to this post for the reasons given above.

52. The Secretary General further contests the appellant's argument that his aim, in applying for the B3 post on an indefinite contract, was to prolong his career at the Council of Europe, since his fixed-term B4 contract could not be extended beyond August 2011.

53. He emphasises that the sole purpose of an internal competition of the kind announced in Vacancy Notice No. 67/2009 is to fill a vacancy via transfer or promotion, procedures which are defined in Article 2 of the Regulations on Appointments (paragraph 14 above).

54. He considers that Rule No. 1258 of 8 September 2006, laying down procedures for the implementation of the Regulations on Appointments, is also clear on this point, and refers in this connection to Article 11, paragraphs 1 and 2 of that Rule (paragraph 15 above).

These provisions are very detailed, specifically mention staff on fixed-term contracts (like the appellant), and clearly do not envisage appointments to a lower grade - a possibility which, if admitted, might be arbitrarily exploited, and lead to staff members' being downgraded without the guarantees which apply to disciplinary and underperformance measures. All of this shows that appointment to a lower-grade post following an internal competition is not covered by the regulations, and would amount to downgrading - provided for in the regulations only as a disciplinary measure (Article 54, paragraph 2e of the Staff Regulations) or penalty for underperformance (Article 14 of Rule 1285 of 28 November 2007 on staff under-performance).

55. The Secretary General states that the Council of Europe's administrative practice has always been to reject applications by staff for posts on a grade lower than their existing one. This practice derives from the fact that staff may be downgraded only when the Secretary General orders this as a disciplinary measure on the Disciplinary Board's advice, or decides to respond in this way to under-performance. This being so, downgrading after a competition, even when voluntary, is not possible.

56. The Secretary General adds, but without giving examples, that the question of allowing staff to apply for lower-grade posts has nothing to do with the new contract policy, and has already arisen in the past, when permission to apply for such posts has always been refused.

57. Concerning the appellant's complaint that rejecting his application would violate the principle of equality between staff members, he points out that all staff are in the same position here, since neither staff on indefinite contracts nor staff on fixed-term contracts may apply, via internal competition, for lower-grade posts. It is not therefore true, as the appellant asserts, that there has been discrimination in this case.

58. The Secretary General adds that the appellant, though recruited on a fixed-term contract, can still be re-appointed on an indefinite contract, in accordance with Article 11 of Rule No. 1258 (paragraph 15 above).

59. Under this provision, the appellant is entitled to participate in any internal competition for a post carrying a grade at least equal to his own and, if he succeeds, to have his fixed-term contract replaced by an indefinite one.

60. In reply to the appellant's argument that the Directorate of Human Resources added an extra condition for eligibility to Vacancy Notice No. 67/2009, since the latter did not state that the vacancy was open only to staff on the same or a lower grade, the Secretary General maintains that the notice must be read in a manner consistent with the Regulations on Appointments, which make it clear that internal competitions are designed to fill vacancies by transfer or promotion. This is why there can be no question of an extra condition's being added in this case.

61. In this connection, the Secretary General refers to the established case-law principle that an authority must, in the interests of sound management, respect the regulations in force, including those which it has itself adopted, unless it has subsequently rescinded or modified them. This means that, far from adding an extra condition to the vacancy notice, the Directorate of Human Resources has simply ensured that the existing regulations are applied and respected. A vacancy notice may never contravene the applicable internal regulations.

62. In conclusion, the Secretary General holds that the various points made above show that he has not violated the regulations, or departed from either the practice or the general principles of law. Nor has there been any misinterpretation of the relevant texts, any mistaken conclusion or any misuse of power.

63. Finally, the Secretary General considers that the appellant's application for costs should also be dismissed, since he has not been misled.

II. THE TRIBUNAL'S ASSESSMENT

A) *Concerning the admissibility of the appeal*

64. The Tribunal first points out that, under Article 59, paragraph 1 of the Staff Regulations, in the version current when the appellant lodged his administrative complaint:

“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. [...]”

65. The Tribunal notes that the arguments which the Secretary General uses to support his objection on grounds of inadmissibility are essentially concerned with the merits of the appeal. He contends that the appellant’s situation corresponded to none of those specified in Article 1 of the Regulations on Appointments, and that this debarred him from participating in the procedure at issue - points which are clearly related to the merits. The Tribunal must accordingly reject the said objection and consider the merits of the appellant’s complaints.

66. It follows that the Secretary General’s objection is ill-founded and must be rejected.

B) Concerning the merits

67. With regard to the first ground, the Tribunal notes that the regulations divide tasks clearly between the Appointments Board and the Directorate of Human Resources. The Board has been given full decision-making powers in this area, so that it can discharge its task of advising the Secretary General on recruitment and internal competitions, while the Directorate’s only task is to provide the Board’s secretariat (see the regulations quoted in paragraphs 14 and 15 above).

68. Article 14 of the Regulations on Appointments states unequivocally that the Board “shall scrutinise all applications” (paragraph 14 above). This means that its task is not simply, as subsequently stated, to “draw up a short list of those applicants considered best qualified for the post or position to be filled on the basis of the criteria set out in the vacancy notice”, but also to decide whether applications are admissible.

69. As for the powers of the Directorate of Human Resources, Article 3 of Rule No. 1258 (paragraph 15 above) clearly states that “the Secretariat of the Appointments Board shall be provided by the Directorate of Human Resources”. Moreover, the Secretary General quotes no regulation which would empower the Directorate to decide on the admissibility of applications in internal competitions, but simply states that its action did not involve the exercise of discretionary power, and that it had a duty to reject any application which was clearly inadmissible. However, the regulations make it sufficiently clear that the Directorate may not take decisions - even decisions which it regards as self-evident - on the Board’s behalf.

Admittedly, Article 7 (paragraph 15 above) of the same Rule does state that, when a post is being filled in a specific major administrative entity, the Board’s Secretary will draw up a list of candidates to take part in the recruitment procedure, in consultation with that entity. It also states, however, that the Board will be consulted, and the list approved only if its members raise no objections. Moreover, any difficulties which arise concerning the composition of the list are, if any member so requests, discussed at a meeting of the Board. However, this provision is specific to the recruitment procedure, and may not be applied by analogy to an internal competition. In this case, too, the Board was never asked for a separate decision, ratifying or adopting the “decision” communicated to the appellant by its Secretary.

In other words, the Directorate of Human Resources had no authority to exclude the appellant from the procedure on the Board's behalf, even though it attempts to argue that this decision was necessary because the application was manifestly inadmissible.

The Secretary General has stated that the Appointments Board had no choice but to ratify the Directorate's decision, but the Tribunal notes that this argument cannot legalise a decision which had no basis in the regulations. Moreover, in the absence of precedents, there can be no certainty that the Board would have taken the same decision.

70. Concerning the second ground, the Tribunal points out that the present dispute derives from a situation created when "positions" became a feature of the Council's employment system, and a policy of recruiting staff on fixed-term contracts was massively applied. The regulations predate the introduction of that policy, and the Council, when it adopted them, certainly did not envisage - and, to the Tribunal's knowledge, has not since envisaged - the possibility that staff might prefer a lower-grade, permanent post to a higher-grade, fixed-term position, exposing them to all the uncertainties associated with lack of job security.

71. Be that as it may, the Tribunal can only note that the vacancy notice did not indicate that the procedure applied only to promotion from a lower grade, or transfer from the same one. Furthermore, the regulations nowhere state that switching to a lower-grade post is prohibited. Finally, the Tribunal notes that, if this were not permitted, the appellant's fixed-term status would, in career development terms, put him on a different footing from permanent staff on indefinite contracts - and so deny him equality of opportunity with them.

72. The Secretary General's assertion that downgrading is possible at the Council only as a disciplinary measure obliges the Tribunal to point out that, as the appellant states, there have already been such cases - in 2002 when, under the exceptional recruitment procedure, a number of temporary staff were given lower-grade permanent posts. It is true that those staff were made permanent on the basis of an external recruitment procedure; however, that procedure was limited to staff who were working, or had worked, for the Council, and the aim was that also pursued by the appellant - employment for an indefinite time.

73. Concerning the third ground, the Tribunal notes that, in the decision complained of, the Secretary General added no extra conditions to those specified in the vacancy notice, but merely applied - albeit on the basis of a mistaken interpretation - the regulations governing this matter.

74. This complaint must therefore be dismissed.

75. Concerning the fourth ground, the Tribunal finds that the appellant cannot claim that the decision to exclude him from the procedure was detrimental to the interests of the Directorate of Communication and the Organisation. In fact, at the point where the procedure stopped, the issue was not his qualifications and competencies, but his status within the Council. The Tribunal is thus unable to say whether he possesses the "highest ability, efficiency and integrity", and also the "qualifications" and "experience of serving staff" (paragraph 46 above), which must be taken into account in making the appointment. In any case, compliance with these conditions or possession of these qualifications cannot justify acceptance of an application which is inadmissible for other reasons.

76. It follows that this complaint must be dismissed.

77. In conclusion, the appeal is founded in respect of the first and second grounds, and the administrative measure complained of must be rescinded.

78. The appellant, who has been assisted by counsel, has applied for €4000 to cover his costs and expenses. The Tribunal considers it reasonable that the Secretary General should reimburse the sum requested for that purpose (Article 11, paragraph 2 of the Statute of the Tribunal – Appendix XI to the Staff Regulations).

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares it founded;

Sets aside the decision complained of;

States that the Secretary General must reimburse the sum of €4000 to cover costs and expenses.

Delivered in Strasbourg on 4 November 2010, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

L. WILDHABER