

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 546/2014 (Jannick DEVAUX v. Secretary General)

The Administrative Tribunal, composed of:

Mr Christos 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, Jannick Devaux, lodged her appeal on 2 March 2014. The appeal was registered on the same day under no. 546/2014.
2. On 22 April 2014, the Secretary General submitted his observations on the appeal.
3. On 22 May 2014, the appellant filed observations in reply.
4. The parties having agreed to waive oral proceedings, the Tribunal decided on 26 June 2014 that there was no need to hold a hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The appellant, a French national, was recruited as a grade B5 permanent staff member on 1 September 2012. She had previously been employed as a temporary staff member on

grades B3, B4 and B5 for a total period of ten years and nine months starting from 21 August 2000.

6. Shortly after her appointment had been confirmed at the end of her probationary period, the Directorate of Human Resources (hereafter “the DHR”) sent her, in November 2013, an offer regarding the crediting of her periods of temporary service in accordance with Article 5 of the New Pension Scheme (Appendix V bis to the Staff Regulations), under which staff members who were employed as temporary staff prior to their appointment to a permanent post may be credited with the periods of temporary service completed in the Organisation for the purposes of pension entitlement. The appellant states that although the documents were dated 1 November 2013, she received them on 22 November 2013 in an undated internal mail envelope.

7. The offer was worded as follows:

“When you were recruited, the Directorate of Human Resources drew your attention to the provisions of the Pension Rules which offer you the opportunity to be credited with your periods of temporary service (see Article 5 of the Rules). In accordance with the implementing instructions, the application to be credited with these periods must be made **within six months** after confirmation of your appointment as a permanent staff member. In your case, this period expires on 28 February 2014.

I can inform you that the cost of crediting you with the temporary service completed from 21/08/2000 to 29/06/2012, representing a total of 10 years and 9 months, is approximately 108 937.00 € (of which about 36 501.00 € would be reimbursed by IRCANTEC).

This sum corresponds to:

- 1) **9.3%** of the first monthly salary as a permanent staff member multiplied by the number of months to be credited;
 - 2) the employer’s share of the contributions paid in respect of old-age insurance to the general social security scheme and to the supplementary scheme administered by IRCANTEC (*Institution de Retraite Complémentaire des agents non-titulaires de l’Etat et des Collectivités locales*).
- (...)"

8. On 6 December 2013, the appellant was received at her own request by a DHR staff member who answered her questions about the crediting of her temporary service. After this interview, the appellant asked, in an email written the same day, for clarification of the legal basis for the cost of crediting her temporary service and the method of calculation used. She pointed out that she had received the offer dated 1 November 2013 on 22 November 2013.

9. In an email dated 10 December 2013, the DHR, quoting Article 5 of the New Pension Scheme, gave the following answer:

“(...) the calculation is governed by Article 5 of the relevant Pension Scheme. The salary used as a basis for this is stipulated in iii).

By ‘the Organisation giving its agreement’, we also mean reimbursement of the employer’s share paid by the Organisation to the different pension schemes (CRAV/IRCANTEC) for the periods to be credited. Since we pay the employer’s share to the pension scheme in respect of which the service is to be credited, it is not logical for the CoE to finance two employer’s shares for the same period, one paid to CRAV/IRCANTEC, the other to the NPS. This is the practice which we have applied consistently since the co-ordinated pension scheme came into being (1974).

Crediting of temporary service is not obligatory. It is optional and staff members who do not accept the conditions must forego this opportunity.

(...)"

10. On 12 December 2013, in the light of the explanations provided to her, the appellant contested the calculation of her contribution based on her first salary as a permanent staff member and asked for a new offer to be made to her, with the calculation of her contribution based on the salaries she had received as a temporary staff member, and not on a notional salary.

11. On the same day, the appellant submitted an administrative complaint in which she requested the annulment of the offer sent to her by the DHR and the submission of a new offer based on the salaries she had received as a temporary staff member. On 13 January 2014, her administrative complaint was dismissed.

12. On 12 March 2014, the appellant lodged this appeal.

II. RELEVANT LAW

13. The relevant provisions of the New Pension Scheme “NPS” (Appendix V bis to the Staff Regulations) read as follows:

Article 1 – Scope

“1. The Pension Scheme established by these Rules, hereinafter referred to as the “New Pension Scheme” (NPS), applies to staff members who:

(...)

- hold indefinite term or definite or fixed-term appointments in the Organisation.
2. A staff member, who, during his last appointment with a co-ordinated organisation, benefited from the provisions of Article 11 of the scheme set up by the adoption of the 94th Report of the CCG and who has not repaid the amounts provided for under that Article, shall be deemed to have relinquished entitlement to benefit from the said scheme and shall irrevocably be affiliated to the NPS.
3. The NPS shall not apply to other categories of personnel defined in the Organisation, such as, temporary staff, or to personnel hired under local labour legislation, etc.
4. In these Rules, the term “Organisation” refers to the Council of Europe, the term “other Organisation” means any other co-ordinated organisation having adopted the NPS and the term “staff member” means the staff referred to in paragraphs 1 and 2 above.”

Article 4 – Definition of service conferring entitlement to benefits

“1. Subject to the provisions of Articles 5 and 41, paragraph 1, entitlement to benefit under these Rules shall be determined by the total of the periods actually served in the Organisation or in another Organisation:

- i) as a staff member;
- ii) in any other capacity prior to appointment as a staff member, provided any periods so served were not separated by breaks of more than one year.”

Article 5 – Calculation of service conferring entitlement to benefits

“(...)

5. The crediting of the periods referred to in Article 4, paragraph 1 ii) shall be conditional on:

- i) the staff member submitting an application to that effect within six months following his taking up duty as a staff member; the application shall specify the periods of service with which the staff member wishes to be credited;
- ii) the Organisation giving its agreement;
- iii) the staff member paying, for each month of service with which he is to be credited, the contribution

provided for in Article 41, calculated on the basis of his first monthly salary as a staff member.”

Article 41 – Staff member’s contribution – Costing the scheme

- “1. Staff members shall contribute to the NPS.
2. The staff members’ contribution shall be calculated as a percentage of their salaries and shall be deducted monthly.
3. The rate of the staff contribution shall be set so as to represent the cost, in the long term, of 40% of the benefits provided under these Rules. The rate shall be 9.3%. This rate shall be reviewed every five years on the basis of an actuarial study, the procedures for which are appended hereto. The staff contribution rate shall be adjusted, with effect from the fifth anniversary of the preceding adjustment, the rate being rounded to the nearest first decimal.
4. Contributions properly deducted shall not be recoverable. Contributions improperly deducted shall confer no rights to pension benefits; they shall be refunded at the request of the staff member concerned or those entitled under him without interest.”

14. Article 1 of the Staff Regulations reads as follows:

Article 1 – Scope

- “1. These Regulations shall apply to any person who has been appointed in accordance with the conditions laid down in them as a staff member (hereinafter referred to as “staff members” or “staff”) of the Council of Europe (hereinafter referred to as the “Council”).
2. Staff members shall be appointed either to a post in the Table of Posts or to a position.
3. The conditions of employment of the different categories of temporary staff members shall be laid down by the Secretary General in a General Rule, which shall stipulate which provisions of these Regulations shall be applicable to them.”

THE LAW

I. THE TIME TAKEN TO SEND THE APPELLANT THE OFFER REGARDING THE CREDITING OF HER TEMPORARY SERVICE AND THE ADMINISTRATION’S ADVISORY ROLE WITH RESPECT TO HER

15. The appellant submits that the DHR sent her the offer regarding the crediting of her temporary service belatedly, thus depriving her of more than two months’ reflection time out of the six provided for under Article 5, paragraph 5.i), of the New Pension Scheme. She also alleges that the Administration failed in its advisory role by not providing her with clear explanations regarding the calculation of the sums requested or with the information needed to find the best possible solution when faced with an important decision on her pension entitlement.

16. According to the appellant, at the information meeting held on 6 September 2012, the Administration informed the staff members concerned that they would be contacted individually by the DHR at the end of their trial period. In the appellant’s case, this period ended on 1 September 2013. However, the Administration submitted its proposal on 22 November 2013, two months and 22 days after the end of her trial period. The Administration gave no answers to her questions to help her reach a decision, particularly as regards the pension to which she would be entitled under the general social security scheme and the choices available to her. In its email of 10 December 2013, the Administration refers solely to Articles 4 and 5 of the Pension Rules without providing any further information which might have been of assistance to the appellant. Lastly, as to the fact that she submitted her

administrative complaint before receiving the reply from the DHR, the appellant submits that, in fact, the Administration had not replied in time for the purposes of an administrative complaint, namely by 12 December 2013.

17. The Secretary General notes firstly that the appellant did not advance these grounds of complaint at the stage of her administrative complaint and that they are therefore inadmissible for failure to exhaust domestic remedies.

18. He then argues that Article 5, paragraph 5.i), of the New Pension Scheme does not place an obligation on the Administration to make offers to staff members regarding the crediting of previous service. The Administration had in fact shown diligence in submitting such an offer to the appellant in November 2013. Furthermore, the six-month period provided for in that article was not a “reflection period” as stated by the appellant. In any event, the fact that the offer regarding the crediting of her temporary service was sent to her in November 2013 did not cause her any prejudice because she had had over three months in which to decide on the matter, which seemed ample time.

19. The Tribunal considers that it does not need to rule on the question, raised by the Secretary General, concerning the exhaustion of remedies, given that the ground of complaint must in any event be dismissed for the following reasons.

20. The Tribunal acknowledges that, because the Administration’s offer was received belatedly by the appellant, she had less time than the six months mentioned in the offer to decide whether she accepted it. However, despite the complexity of the calculation method, the Tribunal does not consider that the appellant suffered any real prejudice on that account, such that it could be concluded that the act complained of adversely affected her within the meaning of Article 59, paragraph 2, of the Staff Regulations. Moreover, the appellant alleged the existence of a prejudice due to the failure to observe the six-month period, but she did not prove its existence.

21. Consequently, this part of the appeal is unfounded.

22. For the sake of completeness, the Tribunal adds that the aim of the Council of Europe is to safeguard human rights, democracy and the rule of law. It must not only perform that role in an outward direction, vis-à-vis the member states, but also inside the Organisation, vis-à-vis its staff. The Tribunal stresses therefore in this context that the Administration, which is responsible for “human resources” questions, must treat staff in a manner that respects their human dimension. This rule applies in particular in the case of questions relating to pensions. As well as being very important and sensitive for staff, these questions are usually very complex.

The Tribunal therefore considers that the Administration should offer staff effective assistance at every stage in order to explain to them how the system works and ensure that they have a good understanding of these questions and feel supported.

II. THE APPLICATION OF ARTICLE 5 OF THE NEW PENSION SCHEME AND THE REFERENCE IN THAT ARTICLE TO THE NOTION OF “STAFF MEMBER”

23. The appellant contests the calculation of the contribution she would have to pay for the crediting of her temporary service. She seeks the annulment of the Administration’s decision

to take her first salary as a B5 permanent staff member as the basis for calculating this contribution and asks the Tribunal to order the Secretary General to make her a new offer with the contribution calculated on the basis of the salaries actually paid to her as a temporary staff member of grades B3, B4 and then B5.

24. The appellant submits that the Administration discriminates between staff members because, for the same salary, she would have to pay a higher contribution, given that other staff members contribute in proportion to the salaries actually received. In her view, the Administration's argument that the basis for the contributions of temporary staff members who become permanent is in all cases the first salary as a permanent staff member, and that this constitutes fair treatment for the staff members concerned, is flawed because, to purchase pension rights, staff members who had been employed as temporaries on a higher grade would pay on the basis of the grade on which they were recruited, although they were previously receiving higher salaries. Consequently, it was not a case of her seeking "preferential" conditions, as the Administration claimed, but rather a case of the Administration granting preferential conditions.

25. The appellant notes that the actual purpose of the rules and of the purchasing option described in them is to allow staff members who previously did not have the status of permanent staff members contributing to the Council of Europe pension scheme to have their previous service credited and thus acquire pension rights corresponding to the whole period for which they had worked for the Organisation. This system made it possible for new entrants to the Council of Europe pension scheme to be in the same situation as if they had always been covered by that scheme, subject to the reimbursement to the Council of Europe of the sums it had paid to the social security scheme and the payment of contributions to the Council of Europe pension scheme. Furthermore, the Council of Europe's practice could not justify discriminatory or dysfunctional treatment. The appellant therefore asks to contribute in proportion to the salaries actually received.

26. The Secretary General notes that Article 1 of the New Pension Scheme defines the scope of the scheme, the staff members to whom it applies and the meaning of the term "staff member" in the Rules. The term "staff member" means the staff referred to in paragraphs 1 and 2 of Article 1, in other words the staff members to whom the New Pension Scheme applies. According to the third bullet point of Article 1, paragraph 1, the term "staff member" refers exclusively to staff members who hold indefinite term or definite or fixed-term appointments. The term "staff member" must therefore be interpreted in accordance with the definition given in Article 1, in other words as meaning "permanent staff member".

27. Article 4, paragraph 1, specifies the periods of service taken into consideration for the purpose of determining pension entitlement. A distinction is drawn between periods of service completed "as a staff member" and those completed "in any other capacity prior to appointment as a staff member". This second category includes periods of service completed as a temporary staff member, the crediting of which is dealt with in Article 5, paragraph 5. Once again, the Secretary General argues, it may be noted that the term "staff member" only refers to permanent staff members. Temporary staff members do not have staff member status under the New Pension Scheme. By definition, these Rules do not apply to them.

28. The Secretary General then notes that Article 5, paragraph 5, enumerates the three requirements on which the crediting of periods of service completed as a temporary staff member is conditional. Sub-paragraph iii) specifies that a staff member wishing to have these

periods of service credited must pay, “for each month of service with which he is to be credited, the contribution provided for in Article 41, calculated on the basis of his first monthly salary as a staff member”. The offer sent to the appellant regarding the crediting of her temporary service was accordingly calculated on the basis of her first monthly salary as a permanent staff member.

29. The Secretary General adds that, in addition to the New Pension Scheme, the Staff Regulations, and in particular Article 1, also refer exclusively to permanent staff members when the term “staff member” or “staff” is used in any of their provisions. When used in the Staff Regulations, the term “staff member” or “staff” therefore refers to permanent staff of the Council of Europe, without there being any need to point this out each time. Moreover, both the Pension Scheme Rules adopted on 20 April 1977 by Resolution (77)11 of the Committee of Ministers and the New Pension Scheme adopted on 27 November 2002 by Resolution Res(2002)54 of the Committee of Ministers originated from within the co-ordinated organisations, which use the first monthly salary as a permanent staff member as the basis for this contribution. It is incorrect, therefore, to claim that the Administration, in taking into account the appellant’s first monthly salary as a permanent staff member, added a condition which is inconsistent with the letter and spirit of the document in question.

30. As to the appellant’s allegation that the calculation of her contribution was based on “notional salaries” and not on “salaries actually received” by her when she was temporary, the Secretary General reiterates that the calculation of the appellant’s contribution on the basis of her first monthly salary as a permanent staff member is simply a strict, and perfectly legal, application of the applicable regulations. The list of cumulative requirements on which the crediting of periods of service prior to appointment as a permanent staff member is conditional indicates that the pension scheme only allows an operation of this kind in very precise and restrictive circumstances: the periods of service in question must predate the appointment as a staff member, there must not have been a break of more than 12 consecutive months between periods of service, and the periods of service must have been completed under a direct employment relationship between the staff member and the Organisation (see Article 4, paragraph 1, sub-paragraph iii) of the New Pension Scheme). This crediting therefore consists in subsequent recognition of an earlier period of employment for pension purposes. The crediting of temporary service is based on a legal fiction: it extends a period of employment retroactively from the time of appointment as a staff member. Only permanent staff members are affiliated to the Pension Scheme. If the overall coherence of the pension scheme is to be maintained, the retroactive extension of the period of employment can therefore only be based on the conditions of first employment as a permanent staff member. It is the staff member’s situation at the time of his or her appointment which has to be taken into account.

31. The Secretary General refutes the appellant’s argument that “for the same salary, she would have to pay a higher contribution, given that other staff members contribute in proportion to their actual salary”. In his view, the appellant’s situation cannot be regarded as comparable to that of persons appointed initially as permanent staff members, to whom the crediting of temporary service is of no concern. Moreover, the crediting of periods of temporary service completed prior to appointment as a staff member is an option which staff members are free to choose or not. The Council of Europe’s agreement is subject to the staff member’s acceptance of the conditions offered to him or her for the crediting of temporary service, and in particular the calculation of the contribution which he or she is required to pay.

32. The Secretary General therefore considers that the offer regarding the crediting of the appellant's temporary service is consistent with the terms of the New Pension Scheme and the practice applied in the Council of Europe and the other co-ordinated organisations. He therefore submits that the appellant's appeal is partially inadmissible and/or ill-founded.

33. The Tribunal notes that this dispute derives from a disagreement between the parties as to the interpretation of the provisions which offer temporary staff members who have become permanent the opportunity to have periods of temporary service in the Organisation credited to them for pension purposes.

34. It notes in this connection that the "quality of law" depends on a rule being precise and foreseeable in its application in order to avoid all danger of confusion, misunderstanding or incomprehension. For this purpose, the criterion of "legality" requires that all rules should be sufficiently precise to allow staff members – if necessary with the benefit of informed advice – to foresee, to a reasonable extent in the circumstances of the case, the consequences of a given act. This is particularly important in the case of the rules determining all the principles governing the salary and benefits paid by the Organisation to each member of its staff in return for their services. The Tribunal must also dismiss the appellant's complaint that she suffered discrimination in relation to other staff of grade B5. Having become a permanent staff member, she was no longer in a comparable situation to that of staff recruited from the outset as permanent staff members.

35. The Tribunal also notes that the provisions relevant to a particular case are often interconnected and must therefore be interpreted as a logical whole.

36. In the instant case, the Tribunal observes that the parties do not contest the scope of the New Pension Scheme. The only question which arises is whether the Administration applied the relevant provisions of the NPS in a manner consistent with the aim pursued by those rules when calculating the appellant's contribution on the basis of her first salary as a permanent staff member.

37. The Tribunal answers this question in the affirmative. If the Administration had proceeded in the manner suggested by the appellant, in other words by calculating her contribution on the basis of the salaries she had received as a temporary member of staff, it would actually have been discriminating against staff members recruited directly as B5 permanent staff members, to whom the NPS had applied since the start of their appointment. The Tribunal considers, therefore, that the calculation method employed by the Administration has its logical basis in the NPS, which forms an integral part of the Staff Regulations.

38. The Tribunal adds, however, with reference to the criteria which a rule must satisfy (see paragraph 31 above), that if the provisions of the NPS applied in the instant case had been drafted more clearly and precisely, the appellant would have been better able to foresee and understand the calculation method employed by the Administration.

39. In short, this ground of complaint must also be dismissed as being unfounded.

For these reasons, the Administrative Tribunal:

Declares the appeal unfounded and dismisses it;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg on 29 January 2015 and delivered in writing pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 30 January 2015, the French text being authentic.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

C. ROZAKIS