

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 541/2013 (Giovanni PALMIERI (VIII) v. Secretary General)

The Administrative Tribunal, composed of:

Mr Giorgio MALINVERNI, Deputy Chair,
Mr Jean WALINE, Judge,
Mr Serkan KIZILYEL, Deputy Judge,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Giovanni Palmieri, lodged his appeal on 25 September 2013. It was registered the same day under number 541/2013.
2. On 7 October 2013 the Secretary General forwarded his observations on the appeal.
3. The appellant submitted a memorial in reply on 17 October 2013.
4. As the Chair had authorised the Staff Committee of the Council of Europe to intervene in the proceedings as a third party (under Article 10 of the Tribunal's Statute), the Staff Committee submitted written observations on 23 October 2013. On 4 November 2013 the third party sent the Tribunal a request for reimbursement of the fees of the external consultant who had drafted its intervention.
5. The Secretary General forwarded his comments on this request on 12 November 2013.

6. On the evening of 18 December 2013, five members of the Staff Committee asked the Tribunal to disregard the Staff Committee's intervention in the present appeal. The Tribunal therefore only learned of this request the evening before the hearing.

7. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 19 December 2013. The appellant conducted his own defence. He was assisted by Ms Carol Kendall, member of the Staff Committee and President of the European Civil Service Federation. The Secretary General was represented by Mr Jörg Polakiewicz, legal expert and Head of the Directorate of Legal Advice and Public International Law, assisted by Ms Maija Junker-Schreckenber and Ms Sania Ivedi, both from the same department.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The appellant is a permanent member of the Council of Europe's staff and an Italian national. His grade is A5 and since June 2011 he has been seconded to the Organisation's Staff Committee, having been elected as its Chair. He has also, since 2003, chaired the Committee of Staff Representatives of the Coordinated Organisations.

On 19 December 2013 the appellant reached the age of 65.

The present appeal concerns the Secretary General's decision not to prolong the appellant's employment under Articles 24 and 24 *bis* of the Staff Regulations (paragraph 20 below).

9. In the elections to the Staff Committee on 7 June 2013, the appellant was re-elected to the Staff Committee, polling the highest number of votes.

10. On 21 June 2013 the new Committee re-elected the appellant as its Chair, a position he had already held during the Committee's previous term.

11. On 21 June 2013 the appellant asked for a meeting with the Deputy Secretary General and told her of his wish to avail himself of the measure provided for in Article 24, paragraph 2 of the Staff Regulations (paragraph 20 below), which allows the Secretary General to prolong a staff member's employment beyond the age of 65 for a maximum of two further years.

12. That same day the appellant sent the Secretary General a memorandum asking to be seconded and implicitly raising the question of his contract's extension beyond 31 December 2013.

13. On 11 July 2013 the appellant had a second meeting with the Deputy Secretary General. He quotes her as saying that the Secretary General would be refusing his request and that, in her words, he could expect to receive written notification of this towards the end of August.

14. In a memorandum dated 12 July 2013, however, the Secretary General informed the appellant that he would be seconded up to 31 December 2013, the date of his retirement from the Organisation. He added (English original):

“As regards your request that your employment be continued beyond your current retirement date, I have carefully considered this request. Having regard to the fact that the Staff Committee may appoint another Chairperson from among its members, all of whom have been given a mandate to serve as staff representatives during the recent elections – as indeed the Staff Committee has done in previous cases where a Chair or Vice-Chair has not been in a position to continue in these roles for various reasons – I do not consider that the circumstances in hand warrant an exceptional decision on my part to prolong your contract beyond the usual retirement age. I nonetheless thank you for your willingness to continue to serve the Organisation in this way.”

15. On 10 August 2013 the appellant lodged an administrative complaint with the Secretary General under Article 59, paragraph 2 of the Staff Regulations, asking him to reconsider the decision which had been given to him on 12 July 2013.

16. On 29 August 2013 the appellant applied to the Chair of the Tribunal for a stay of execution of the administrative decision of 12 July 2013 under Article 59, paragraph 9 of the Staff Regulations.

17. The Chair rejected this application on 13 September 2013.

18. Meanwhile, on 10 September 2013, the Secretary General had deemed the administrative complaint to be ill-founded and rejected it.

19. The appellant lodged the present appeal on 25 September 2013.

II. APPLICABLE LAW

A. Age limit

20. Up to 31 December 2012 staff members were obliged to retire from the Organisation upon reaching the age of 65. This age limit also applied to staff on fixed-term contracts and to temporary staff members. The relevant article of the Staff Regulations was Article 24, which at that time consisted of a single paragraph 1 (see next paragraph).

21. Following an amendment introduced on 12 December 2012, staff members may now remain in employment, in certain circumstances, up to age 67. Resolution CM/Res (2012)47 of the Committee of Ministers added a paragraph 2 to this Article 24 and introduced a new Article 24 *bis*. The wording relevant to this case now reads as follows:

Article 24 – Age limit

“1. A staff member shall retire on reaching the age of 65 years.

2. By way of exception, the Secretary General may, on a case-by-case basis and in the sole interests of the Organisation, ask a staff member to remain in service beyond the age of 65 years, under the conditions laid down in Article 24 *bis* [of the Staff Regulations]”.

Article 24 *bis* – Service beyond the age limit

“1. Staff members who meet the physical requirements of the employment may exceptionally be retained in service up to the age of 67 years at most.

2. Regarding the conditions of employment and remuneration, such staff members shall be treated as if they had not reached the age limit for retirement. In particular, the staff members concerned shall continue to be entitled to step advancements, indemnities and allowances under the same conditions as if they had not reached the age limit. They shall also benefit from leave entitlement and part-time work arrangements under the same conditions. They shall nonetheless not be entitled to benefit from unpaid leave nor can they apply for transfer or promotion.

3. Staff retained in service beyond the age limit shall acquire no additional pension rights after reaching that age. No contribution to the Organisation's pension schemes shall be levied. The Organisation shall moreover pay no contributions to any other pension scheme for the benefit of the staff members concerned. Pension benefits shall be payable only after termination of service. The calculations of pension benefits – retirement pension, reversion or orphan's pension or leaving allowance – and family allowances to which a recipient of a pension is entitled shall be made by reference to the staff member's employment situation, for example his/her grade, step and length of service, at the date when the staff member reached the age limit, and his/her family situation at the date of departure.

4. Health insurance cover shall be maintained.

5. An absence for health reasons lasting more than 90 days shall constitute a ground for terminating the contract without notice and shall entail the immediate award of the pension benefits.

6. Staff retained in service beyond the age limit shall not be eligible for an invalidity pension, an indemnity for loss of job or measures for termination of service.

7. The procedure shall be determined by the Secretary General in a rule.”

B. Applications of Article 24, paragraph 2 of the Staff Regulations

22. According to the information supplied to the Tribunal, the Secretary General has applied this provision only once since the new rules came into effect on 1 January 2013. Having himself offered an extension to the staff member in question, he retained her in service for a period of six months, seconding her to a different post from the one she held. The Secretary General refused three other requests from staff members.

C. Appeal costs and other provisions of the Tribunal's Rules of Procedure

23. Article 11 of the Tribunal's Statute deals with the matter of appeal costs and it reads as follows:

“Article 11 – Costs of the appeal

1. The Tribunal may, if it considers that an appeal constituted an abuse of procedure, order the appellant to pay all or part of the costs incurred.

2. In cases where it has allowed an appeal, the Tribunal may decide that the Council shall reimburse at a reasonable rate properly vouched expenses incurred by the appellant, taking the nature and importance of the dispute into account.

3. In cases where it has rejected an appeal, the Tribunal may, if it considers there are exceptional circumstances justifying such an order, decide that the Council shall reimburse in whole or in part properly vouched expenses incurred by the appellant. The Tribunal shall indicate the exceptional circumstances on which the decision is based.

4. The Tribunal may decide that the Council shall reimburse justified travel and subsistence expenses incurred by witnesses who have been heard, within the limits of the rates applicable to staff on official journeys.”

24. Rule 35 of the Tribunal's Rules of Procedure deals with these matters and paragraph 3 reads as follows:

“3. Judgments of the Tribunal shall also include an order for costs in accordance with Article 11 of the Statute.”

25. Under Rule 42 of the Rules of Procedure,

“All matters not provided for in the present Rules shall be dealt with by decision of the Tribunal or, when it is not in session, by decision of the Chairman, which shall be binding only in respect of the particular case.”

THE LAW

26. In his form of appeal the appellant asks the Tribunal to annul the decision not to apply to him Article 24, paragraph 2 of the Staff Regulations so that he can continue to perform his duties as Chair of the Staff Committee up to 30 June 2015. In his grounds of appeal, lodged at the same time as the appeal, the appellant asks the Tribunal to annul the Secretary General's decision of 12 July 2013 and its consequent effects on his own personal situation.

I. SUBMISSIONS OF THE PARTIES

27. The parties' submissions may be summarised as follows.

A. The appellant

28. The appellant submits six arguments in support of his request: manifest error of assessment, change in the reasons given to the appellant, facts ignored by the Secretary General, no involvement at all of the Staff Committee in the investigation of the case, superficial and truncated presentation by the Secretary General of the facts of the case, and breach of the principle of proportionality.

a) *Manifest error of assessment*

29. The appellant advances this argument in two stages.

30. To begin with he says he will seek to show by his other arguments that the Secretary General did not take account of all the relevant facts and that incorrect conclusions were drawn from the documents in the file, so that the impugned decision was vitiated by a manifest error of assessment. He will also seek to show that the Secretary General failed to apply the criteria which he himself had set for defining and guiding his discretionary power in the matter.

31. Having developed arguments b) to e) below, the appellant returns to this argument and fleshes it out further (paragraphs 51-53 below).

b) *Change in the reasons given to the appellant*

32. The appellant claims that he had, in his administrative complaint, pointed to a manifest error of assessment, emphasising in particular that in his view the impugned decision had been influenced by a legal error, "namely by the incorrect, indeed irrational, way in which the relevant provision was interpreted".

33. The wording and substance of the Secretary General's decision of 12 July 2013 left no room for doubt: the fact that the appellant's post, like that of any other member of the Organisation's staff, could be filled by someone else was given as the reason for the Secretary General's refusal to extend his employment. The appellant relies here on the following passage from the Secretary General's decision (English original):

"Having regard to the fact that the Staff Committee may appoint another Chairperson from among its members... I do not consider that the circumstances in hand warrant an exceptional decision on my part to prolong your contract beyond the usual retirement age."

In the appellant's view, that interpretation of Article 24, paragraph 2 of the Staff Regulations "is such as to deprive the provision in question of any useful effect".

34. In his view, the Secretary General, in his decision rejecting the administrative complaint, introduced a concept which did not feature in his decision of 12 July 2013. He mentioned for the first time that he “thought that the need to ensure continuity of service – a valid reason to prolong a staff member’s employment beyond the retirement age limit – was not an issue in [his] case”.

35. The appellant claims that this was a change from the reason initially given to justify the decision he is challenging. The Secretary General, in his decision of 12 July 2013, referred to the legal possibility of replacing the appellant and mentions no other criterion. In his decision to reject the appellant’s request, however, he refers to account being taken of something not mentioned at all in the decision of 12 July, namely the “need to ensure continuity of service”.

36. International case-law, the appellant claims, disapproves of changes of this kind. According to the appellant, an organisation must be held to the reason initially given to justify a decision which is adverse to the interests of a staff member and cannot later seek to justify its actions on other grounds (cf. ILOAT Judgment No. 2092 (2002), *Spaans*, paragraph 2 and Judgment No. 2355, *Kraanen* (2004), paragraph 9).

37. As proof of his claims regarding the various factors in the alleged manifest error of assessment, the appellant cites a series of important elements which were ignored by the Secretary General and points to the instances of inaccuracy and inconsistency which he claims influenced the reasons given in the decision to reject his request.

c) *Facts ignored by the Secretary General*

38. The appellant says that his departure from the office of Chair of the Staff Committee is likely to disrupt the conduct of the Committee’s business, at a particularly awkward time when the Staff Committee faces an unprecedented number of important upcoming events and challenges. All the dossiers of which the appellant gives details, and which do not need to be summarised here, are concerned with the overall reform of the Staff Regulations, and the reform of the judicial protection afforded by the Tribunal. They need to be addressed in detail and resolved before the end of his term of office.

39. The appellant adds that it is easy to verify that no other member of the Staff Committee knows as much as he does about international civil service law and litigation.

40. He believes that it is definitely useful, not just for the staff but for the Organisation as a whole, to have a Staff Committee that is knowledgeable and thorough in the performance of its advisory remit. And no other member of the Staff Committee has experience even remotely close to his in matters of international civil service litigation.

41. The appellant adds that it should be borne in mind that three dossiers of the utmost importance to staff of the Organisation will be addressed shortly in Coordination and will then be referred to the Council of Europe’s Committee of Ministers for decision: introduction of the single scale and two questions regarding the Coordinated Pension Scheme.

42. If these issues are to be addressed competently and efficaciously, a sound knowledge is required both of the Coordinated Pension Scheme and of international civil service law.

d) No involvement at all of the Staff Committee in the investigation of the case

43. The appellant argues that the rule required in Article 24 *bis*, paragraph 7 of the Staff Regulations (paragraph 20 above) should contain details of the procedures and arrangements for dealing with requests for prolongation, regardless of whether they are initiated by administrative entities or by the staff member concerned.

44. Even in the absence of a rule, he adds, it is significant that the Secretary General in no way involved either the Staff Committee or himself at any stage of the procedure. No consultation was held in any shape or form prior to the decision of 12 July 2013. Given this situation, the appellant wonders if his request was investigated at all.

45. In the appellant's opinion the Secretary General made no attempt at any time to ascertain the views of the Staff Committee and/or its Chair, to obtain a better picture of what was needed to ensure continuity. The hasty way in which he rejected the appellant's request was not consistent with the principle of cooperation between Secretary General and Staff Committee, a principle which is reflected at least in the spirit of the Staff Regulations and other relevant official texts.

46. The appellant concludes from this that the procedure followed is certainly not one which would have enabled the Secretary General to have an accurate and exhaustive understanding of the issue and it is thus a major factor in the errors of assessment which vitiate his decision.

e) Secretary General's superficial and truncated presentation of the facts of the case

47. In the appellant's view, the decision to reject his administrative complaint contained not the slightest echo of the facts he had quoted, but six considerations which he examines in detail and refutes. These concern the replacement of the Chair of the Staff Committee by another member, replacement of the Chair of the Committee of Staff Representatives of the Coordinated Organisations, his claim to be the person best suited to represent the Staff Committee, the interest pursued (which was not the appellant's own interest but the interest of bringing a number of dossiers to completion), the competing lists within the Staff Committee and a statement by the appellant's trade union made in an exchange on the intranet with the opposition's list. The appellant does, however, agree with the Secretary General that it is not for the Secretary General to decide who is the person best suited to represent the Staff Committee.

f) Conclusions regarding the manifest error of assessment

48. To the appellant, the weakness of the Secretary General's arguments, together with their superficial and sometimes biased nature, reflect a use of his discretionary power that is vitiated by a manifest error in the assessment of the relevant facts.

49. The appellant claims in particular that the circumstances to which he drew attention constitute "a threat to the smooth progression of important events" (upcoming events in the calendar of the Staff Committee and Committee of Staff Representatives). Yet it is precisely this kind of threat which, in the Secretary General's eyes, can warrant a staff member being retained

in service in the interests of the Organisation. So the Secretary General is not applying the criteria which he himself set and which he names for the first time in his decision rejecting the appellant's request. Indeed, the circumstances described – which are common knowledge – were ignored by the Secretary General altogether and replaced by seemingly incontrovertible but incorrect statements.

50. Moreover, the lack “of any investigation of the request for prolongation in liaison with the Staff Committee (or with the interested party) is the root cause of the manifest error of assessment. This combination of aggravating circumstances shows that the Secretary General used his discretionary power in an arbitrary fashion.”

g) Breach of the principle of proportionality

51. Lastly, the appellant also voices doubts as to whether the principle of proportionality was upheld. He states that all legal systems share a common need – to consider respective interests in cases where discretionary power has to weigh a right or legitimate interest of a legal person against the general interest. This type of analysis is increasingly taken into account by the courts in their rulings on matters of administrative and social law. The appellant believes that the manifest error of assessment and the elements associated with this are likewise indicative of a breach of the principle of proportionality, which was detrimental to his interest.

52. The lack of an implementing rule, and the inconsistency in the reasons given between the decision of 12 July 2013 and that of 10 September 2013, are indicative of the Secretary General's intention to exercise a potentially limitless discretionary power in this case. But nothing in these decisions suggests any willingness to assess the various facets of the Staff Committee's interest and, indirectly, for the reasons stated, of the Organisation's interest. According to the appellant, the breach of the principle of proportionality is manifest in this attitude of the Secretary General.

53. In conclusion, the appellant asks the Tribunal to annul the Secretary General's decision of 12 July 2013 and its consequent effects on his own personal situation.

B. The Secretary General

54. The Secretary General asks the Tribunal to declare the appeal ill-founded and to dismiss it.

55. The Secretary General states at the outset that the appellant has no entitlement to an extension of his employment, even if he believes that the continuation of his activities would be solely in the interests of the Organisation. He replies as follows to the appellant's various arguments.

a) Manifest error of assessment

56. In reply to the appellant's claim that there was a manifest error of assessment, the Secretary General maintains that when he justified his decision by the fact that the Staff Committee could elect a new Chair from amongst its members after the appellant had left, he thought that the need to ensure continuity of service was not an issue in the case in question. Thus

the Organisation's interest did not warrant an exceptional decision to maintain the appellant in his post beyond the age limit of 65.

57. According to the Secretary General it is necessary to refute the appellant's allegations that the criterion applied would result in systematic refusal to derogate from the age limit laid down in the Staff Regulations. He takes due account of the need to ensure continuity of service. This need might, in certain cases, warrant extending a staff member's employment, for example if important events such as a conference or other major occasion are upcoming, or if expertise needs to be passed on from an old to a new staff member in a department. The need to benefit from a staff member's expertise for a specific task in a different sector can also be taken into account when a decision is taken to prolong a staff member's employment.

58. After giving his views on the circumstances – which he describes as exceptional - which prompted the only derogation he had granted to date, the Secretary General stressed that there were no such considerations to be taken into account here. The appellant offered no proof of any legal error in the decision not to extend his employment. He was simply substituting his own assessment of the facts and of the supposed interest of the Organisation for that of the authority that was competent to judge this, namely the Secretary General. The Secretary General saw no threat to the Organisation's interest in this case, since the Staff Committee could elect a new chair to replace the appellant, without any weakening of the safeguards in place for staff members or any threat to their interests.

b) Change in the reasons given to the appellant

59. The Secretary General denies changing the reasons for his decision not to continue the appellant's employment beyond age 65. In his reply of 12 July 2013 to the appellant's request, he had said that the circumstances did not warrant an exceptional decision to extend the appellant's contract. He had based himself on the fact that the Staff Committee could elect a new Chair. And if the Chair can be replaced, continuity of service is ensured.

60. The Secretary General adds that, in his reply to the appellant's administrative complaint, he had given a more detailed explanation of the reasons for his impugned decision, and those reasons included the fact that the Staff Committee could elect a different Chair. There had been no change in the reasons underlying the decision, but rather a further explanation of the Secretary General's reasons, given that the appellant had not understood them. It was thus inappropriate for the appellant to complain about the further details he had been given, which allowed him to determine his course of action on the basis of a clearer understanding.

61. Regarding the appellant's complaint that there had been no rule as required in Article 2 *bis*, paragraph 7 of the Staff Regulations, the Secretary General admitted that the draft rule in question had not yet been referred to the Committee of Ministers for consultation, because of the absolute priority being given to finalising texts on contractual policy, but the rule was on the point of being finalised. That being the case, according to the very clear wording of the paragraph in question, the rule simply determined the procedure by which a staff member could ask, on his or her own initiative, for the Secretary General to consider an extension of his employment beyond age 65.

Articles 24 and 24 *bis* were sufficiently clear and comprehensive as to render unnecessary any other provisions regarding the criteria to be applied by the Secretary General in taking his decisions. Thus, a rule would not have helped the appellant in this instance; adopting measures on the procedure to be followed would have made no difference because the Secretary General had already considered the appellant's spontaneous request. Thus, the lack of a rule on this specific point could not adversely affect the appellant.

c) Facts ignored and superficial and truncated presentation by the Secretary General of the facts of the case

62. The Secretary General deals with these two arguments together. The appellant, he says, also claims that he had ignored the facts and given a superficial and truncated presentation of the facts of the case, prompting him to take an ill-informed decision.

After answering the appellant's claim to be the person best suited to represent the Staff Committee and his thoughts on the role of the Chair of the Staff Committee and his participation in the Committee of Staff Representatives, the Secretary General argued that the appellant was inclined to confuse his own interest with the interest of the Staff Committee and of the Organisation's staff. He was trying to show that it would be in the interest of the Organisation itself to extend his employment. But the Secretary General pointed out that the appellant would be able, as a retired staff member, to take part in the work of the Staff Committee's working groups.

d) No involvement of the Staff Committee

63. Regarding the alleged absence of any Staff Committee involvement in "investigating the case", the Secretary General said that the Committee had not approached him and the appellant had not mentioned in his request that the Staff Committee was supporting him. The Secretary General also wonders about the appellant's claim that he ought to have involved the Staff Committee in "investigating the case", when the appellant does not appear to have seen fit to seek the Staff Committee's opinion on the matter before telling it that he planned to request an extension of his employment contract.

64. In any case there is no provision in the rules, neither is it appropriate, for there to be consultation of the members of the Staff Committee and, more generally, of staff of the department in which a staff member wishing to extend his employment works. Such consultation in this case would have set a precedent for other requests of this kind, and it was not for staff members of a particular department to say what was or was not in the Organisation's interest. That was a matter for the discretionary power of the Secretary General, the person best placed to know where the Organisation's interest lay.

e) *Prolongation requested for two reasons*

65. The Secretary General emphasises that the appellant gives two reasons in support of his request for prolongation: the “exceptional nature of the current climate” and the wish “to bring to completion a number of dossiers, internal and coordinated, on which decisions are to be taken during the period in question”. But for him, these reasons are not of themselves such as to warrant an extension of contract beyond the official retirement age.

66. By way of example he says that the Staff Regulations were radically reformed between 2004 and 2006 in respect of a number of areas: contractual policy, recruitment procedures, competency assessment and management, and job classification. There were also major reforms in Coordination, such as the establishment of the Coordinated Pension Scheme in 1974, regular salary adjustment method and reports on allowances. It cannot reasonably be claimed that these matters are less important than the subjects alluded to by the appellant. It is also worth mentioning that the dossier on contractual policy has been finalised and that the Staff Regulations will be amended before the end of the year, so before the appellant’s departure.

67. Regarding a plan to reform judicial protection, it should also be noted here that this matter has been addressed many times over the years, notably in 2001-2002. The then Chair of the Staff Committee, the Registry of the Tribunal and the Tribunal itself were consulted and delivered an opinion on this plan. In any case, when the appellant raised this matter at the end of a meeting of the Joint Committee, the Deputy Secretary General simply said that the matter was interesting and that the Joint Committee might return to it at a future meeting. She was fully aware that the appellant was retiring at the end of the year and naturally she did not make her agreement conditional on this matter being considered by the Committee, with the appellant present, after 31 December 2013.

68. The Secretary General adds, giving examples, that the staff representatives possess first-rate expertise in all the areas mentioned and are perfectly well equipped to defend staff interests, even without the appellant.

69. He concludes from this that the current climate is not exceptional but that, on the contrary, each year brings new dossiers and challenges and that the dossiers to which the appellant refers will be more than adequately dealt with by the members of the Staff Committee, regardless of who its Chair is. In his view, the appellant’s departure will not prevent important events from proceeding smoothly, in contrast to the appellant’s claim.

70. In conclusion, the Secretary General repeats that in deciding not to agree to extend the appellant’s employment beyond age 65 he was mindful of the fact that this type of decision had to remain the exception and his view was that the Organisation’s interest did not in the event warrant a departure from the terms of the Staff Regulations, which had to remain the norm.

71. The Secretary General concludes from the above considerations that he has not breached the Staff Regulations or any related texts, or the practice or general rules of law. Neither has there been any incorrect assessment of the relevant facts, any conclusions wrongly drawn, or any misuse of power.

72. In the light of these considerations the Secretary General asks the Tribunal to declare the appeal ill-founded and to dismiss it.

II. SUBMISSIONS OF THE THIRD PARTY

73. The Staff Committee, authorised to intervene in the proceedings as a third party (paragraph 4 above), submits the following observations which were drafted by an external consultant.

74. In the view of the third party, the Secretary General justified his refusal to retain the appellant in service because he was not inclined to extend the contracts of staff members who could be replaced, and he subsequently changed the reasons he had given initially. The third party then looks at the question of the failure to consult the Staff Committee. Lastly, it considers the merits of the impugned decision, criticising the arguments put forward by the Secretary General to the effect that it was inappropriate to extend the appellant's employment.

75. The third party then states that even discretionary acts may be scrutinised by the Tribunal for their "procedural and substantive legality". In the case in point there were inherent faults which transformed a discretionary decision into an arbitrary one, namely the legal error, the change in the reasons initially given and a series of inaccuracies.

76. The third party concludes by asking the Tribunal to grant the appellant's request.

77. In a memorandum submitted on 31 October 2013 the third party asks the Tribunal to order the reimbursement of fees for the external consultant it had used to prepare its intervention. The third party puts this figure at 1 800 euros and is happy to provide the Tribunal with any further information required.

78. It was not until the evening before the hearing that five members of the Staff Committee asked the Tribunal to disregard this intervention (paragraph 6 above). Their arguments were based on facts internal to the workings of the Staff Committee and on Article 2, paragraph 2 of the Staff Committee's Rules of Procedure.

III. THE TRIBUNAL'S ASSESSMENT

79. The Tribunal must rule first on the point of procedure put to it by five members of the Staff Committee, namely that the Committee's observations should be disregarded.

80. It is not necessary for the Tribunal to pronounce on whether these five members were entitled to submit their request to the Tribunal, and the Tribunal points out that the issues which the five members raise derive from the internal workings of the Staff Committee, in which the Tribunal cannot interfere. It merely notes that the request made by the Staff Committee to the Chair was formally correct and consistent with the terms of Article 10 of the Staff Regulations.

81. The Tribunal will thus take account of these observations.

82. Regarding the merits of the appeal, the Tribunal notes that the parties agree on the fact that the impugned decision was one which was a matter for the Secretary General's discretionary power. Thus the Tribunal must consider whether the Secretary General, in taking his decision, exceeded the inherent limits on that discretionary power and, if he did not, whether his decision nevertheless suffered from a defect which compromised its legality.

83. Before examining the appellant's various allegations, however, the Tribunal thinks it may be useful to consider the concept of discretionary power, the way it has been applied in case-law, and the conclusions that can be drawn from this in the present appeal.

84. This question must be examined with due regard for the fact, which the appellant acknowledges, that Article 24 of the Staff Regulations does not give staff members a right to be retained in service, but simply a legitimate interest.

A. Discretionary power of the Secretary General

85. Legal theorists have exhaustively defined the concept of discretionary power and its boundaries. The Tribunal, for its part, has already been called upon in the past to rule on appeals relating to the Secretary General's discretionary power. These appeals have been concerned, for example, with the career path of staff members, disciplinary matters, salaries and the execution of Tribunal judgments, areas in which the Secretary General, like any other head of an international organisation, has a varying range of powers.

86. On the matter of career progression, the Tribunal has not had occasion to rule on issues of retirement on reaching the age limit, but it has dealt with matters concerning the length of a temporary contract (ATCE, Appeal No. 240/1997, *van Loon*, decision of 23 April 1998, Appeal No. 308/2002, *Levy*, decision of 28 March 2003); the end of a temporary staff member's contract (ATCE, Appeal No. 390/2007, *X v. Secretary General*, decision of 7 March 2008); and the dismissal of a temporary staff member (ATCE, Appeal No. 353/2007, *C.G. v. Secretary General*, decision of 5 September 2006). In these circumstances the Tribunal has always upheld the legal theory that it is not for the Tribunal to substitute its assessment for that of the Secretary General; its role is simply to verify whether he took his decision without exceeding the limits of his discretionary power and with due regard for the principle of legality.

87. The view of the Tribunal is that in this case the Secretary General did not exceed the limits of his broad discretionary power. Next it must check whether he exercised this discretionary power with due regard for the principle of legality. To this end the Tribunal will examine the various arguments put to it by the appellant and will also consider those of his arguments which, though they are concerned with the exercise of discretionary power, may nevertheless have a bearing on the legality of the procedure.

B. The appellant's various arguments

a) Manifest error of assessment

88. The Tribunal finds that the evidence put forward by the appellant is not such as to prove that the Secretary General used his discretionary power in a manner vitiated by a manifest error in the assessment of the relevant facts.

89. The Tribunal notes at the outset that the rule is for staff members to retire at age 65 and that retention in service beyond that age is an exception, allowed by the Staff Regulations only on three essential conditions: it must be “by way of exception”, “in the sole interests of the Organisation” and “on a case-by-case basis”.

90. Regarding the first condition, it is clear that there must be an event which, by its nature, warrants this exception to the general rule. But the appellant's submissions do not provide proof that his departure from the Organisation would leave the Staff Committee in a position of difficulty. It is true that the appellant has over the years acquired a wealth of experience – especially in the legal field – which is beneficial to the Staff Committee and thus indirectly to the Organisation, its staff and the Coordination bodies of which the appellant is a member. However, whilst his experience might be missed, the bodies concerned would not cease to function. Indeed, the appellant does not claim that his departure would be detrimental; he merely talks of a “threat to the smooth progression of important events” (paragraph 52 of his grounds of appeal).

91. With regard to the second condition, the Tribunal notes the wording of Article 24 of the Staff Regulations, which says that the exception in question must be granted in the sole interests of the Organisation but does not place the Secretary General under an obligation to grant such exceptions systematically whenever the interests of the Organisation require them. Admittedly, the appellant, as Chair of an official staff representation body, exercises functions which by their nature might have led the Secretary General to ask himself the question in terms different from those appropriate to an operational post in the Secretariat. In any case, since the Secretary General did not do that, the Tribunal cannot conclude that there was any breach of the written rules or any exceeding of his margin for discretion.

92. As regards the third condition, it is clear that the Secretary General considered the appellant's case and, although the Tribunal was given only summary details, he investigated the request submitted to him. In order to have a correct assessment of the scope of Article 24 and the need to consider requests on a case-by-case basis, the Tribunal notes that this article does not provide expressly for the possibility of a staff member requesting retention in service beyond the age limit, because the procedure concerned is for the Secretary General to initiate; given the wide discretionary power which the Secretary General enjoys here, it is thus not possible to conclude that a staff member is entitled to have his request granted.

b) Change in the reasons given to the appellant

93. The Tribunal does not agree with the appellant's argument that the reasons given to the appellant were changed. It believes that the arguments advanced in the response to the administrative complaint constitute different facets of the reply given on 12 July 2013 to the

administrative request of 21 June 2013. The Tribunal also notes in passing that the appellant did not substantiate his administrative request either, but merely asked to be seconded to the Staff Committee; as he himself acknowledges (paragraph 11 of his further pleadings), he raised the question of his retention beyond 31 December 2013 only implicitly. The Tribunal does not see how one can require an exhaustive reply to a request that is insufficiently substantiated.

c) Facts ignored and superficial and truncated presentation by the Secretary General of the facts of the case

94. The Tribunal believes that these two arguments can be dealt with together.

95. It is true that the appellant, in his administrative complaint, raised the issue of upcoming events in the Organisation that were of particular importance to staff and that the Secretary General did not take account of this argument in his reply. But the Secretary General did raise the matter of continuity of service for the Staff Committee; thus the Tribunal considers that the Secretary General implicitly answered this question. Moreover, his reply also mentioned alternative ways in which the appellant might work with the Staff Committee and so continue to lend it the benefit of his experience.

96. The Tribunal makes the point that the Staff Committee is not an administrative entity of the Organisation's secretariat, but a representative body chosen by the staff on the basis of candidacies and an election. So a different approach may be warranted. The way in which the Secretary General acted did not infringe the rights which the appellant could claim to have in this case.

d) No involvement of the Staff Committee

97. It is not necessary to draw conclusions from the absence of an explicit request by the Staff Committee and the later absence of an administrative complaint, but the Tribunal must perforce note that, as far as it is aware, the Staff Committee, which clearly knew all the implications of a possible refusal to prolong the appellant's employment, made no approach to the Secretary General to outline its position. Intervention before the Tribunal under the terms of Article 10 of its Statute would not have the same effect since the Tribunal's current rules on intervention do not allow a third party to put forward conclusions of its own.

98. The Tribunal believes that consultation of the department concerned, even if it was not mandatory under the rules, could only have been helpful to the Secretary General in reaching his decision and, consequently, consultation of this kind cannot be deemed inappropriate.

99. In any case, the Tribunal's view is that this lack of consultation did not in the event affect the lawfulness of the procedure followed.

e) Breach of the principle of proportionality

100. The appellant sees this breach as the consequence of a failure to weigh discretionary power against either a right or a legitimate interest of an individual or the general interest. He

believes that the manifest error of assessment and the elements associated with this are likewise indicative of a breach of the principle of proportionality.

101. Not having identified any manifest error of assessment, the Tribunal does not see how it could now conclude that there has been a breach of the principle of proportionality.

f) CONCLUSION

102. In conclusion, the appeal is unfounded and must be dismissed.

IV. COSTS AND EXPENSES

103. On the matter of costs, the Tribunal notes that no application has been made to it by the parties. Thus it does not need to rule on the matter.

104. The third party, on the other hand, has asked for its consultant's costs to be reimbursed. But it does not say who should reimburse the consultant's costs or on what basis.

105. On this point the Secretary General considers that there should be no reimbursement, whereas the appellant argues that there should.

106. The Tribunal notes that the matter of appeal costs is governed by Article 11 of the Tribunal's Statute and by Rule 35, paragraph 3 of its Rules of Procedure. But none of these provisions allows for reimbursement of the third party's costs, whether by the Organisation or by a party to the proceedings. Moreover, as far as the Tribunal is aware, the applicable texts make no stipulation on the funding of measures which the Staff Committee may be prompted to take in defence of its interests and the rights it enjoys under the Staff Regulations and other official texts. Rule 42 of the Rules of Procedure states, however, that "All matters not provided for in the present Rules shall be decided by decision of the Tribunal or, when it is not in session, by decision of the Chairman, which shall be binding only in respect of the particular case". On the basis of this provision the Tribunal deems itself competent to rule on this application for reimbursement.

107. The Tribunal observes that the third party took part in the proceedings at its own request, without being asked to do so by the Tribunal. Consequently, even though the Tribunal agreed to its intervention, there can be no question of charging these costs to the Tribunal's budget. It remains to be decided whether they can be charged to one of the parties appearing and if so, which.

108. Under Article 10, paragraph 2 of the Tribunal's Statute, "Submissions made in an intervention shall be limited to supporting the submissions of one of the parties". Thus the third party cannot make submissions in its own interest.

Consequently the Tribunal cannot order the reimbursement in question.

V. CONCLUSION

109. In conclusion, the appeal is unfounded and must be dismissed.

110. The Tribunal will not order reimbursement of the third party's costs.

For these reasons

The Administrative Tribunal

Rules that account shall be taken of the Staff Committee's intervention in the present appeal;

Declares the appeal to be unfounded and dismisses it;

Orders each party to bear its own costs and the third party likewise.

Adopted in Strasbourg on 20 December 2013 and delivered in writing that same day pursuant to Rule 35, paragraph 1 of the Tribunal's Rules of Procedure, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

G. MALINVERNI