

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 413/2008 (Nathalie VERNEAU v. Secretary General)

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Hans G. KNITEL, Judge,
Mr José da CRUZ RODRIGUES, Deputy Judge,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Nathalie Verneau, lodged her appeal on 16 June 2008. It was registered the same day as File No. 413/2008.
2. On 7 July 2008, the appellant filed a supplementary memorial.
3. On 29 July 2008 the Secretary General submitted his observations on the appeal. The appellant filed observations in reply on 12 September 2008.
4. The public hearing of the appeal, initially scheduled for 26 November 2008, was postponed at the request of the Secretary General. It took place finally in the Administrative Tribunal's hearing room in Strasbourg on 28 January 2009. The appellant represented herself and the Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, Directorate of Legal Advice and Public International Law. The hearing also dealt with Appeal No. 415/2008 – Maria Oreshkina – which covered issues similar to those raised by the present case.
5. During the proceedings the Tribunal received from the Secretary General, without having requested it, the report of the Appointments Board meeting at which the rejection of the

appellant's application had been reconsidered. As this document was classified as confidential under Article 9, paragraph 1 of the Regulations on Appointments (Appendix II to the Staff Regulations), the Tribunal, in line with its customary practice, did not disclose it to the appellant. In any event, the Tribunal did not take account of this document.

6. In the course of the hearing the appellant gave the Tribunal information about her professional experience and the Secretary General submitted his comments.

THE FACTS

A. The circumstances of the case

7. The appellant is a permanent member of the Council of Europe's staff and a French national. She has had both linguistic and legal training. Appointed on 1 January 1995 as a translator, she is a member of the linguistic staff, with grade LT3. She is currently working as a translator in the registry of the European Court of Human Rights. Since October 2005, however, she has spent half her time working as a lawyer and half as a translator.

8. The appellant applied to sit the general external competitive examination for the recruitment of administrative officers (grade A1/A2), open to nationals of all the Council of Europe member states (vacancy notice e84/2007).

9. A first decision to reject the appellant's application to take part in this competitive examination was reconsidered, but on 13 February 2008 the appellant was told by the Directorate of Human Resources that the Appointments Board had upheld its recommendation that her application should be rejected.

10. The appellant asked for clarification.

11. On 18 February 2008 the appellant received the following reply from the Directorate of Human Resources (original in French):

“It is the view of the Board's members that you do not satisfy the criterion regarding professional experience. They believe that your professional experience, gained in the field of translation, does not match one of the profiles stipulated in the vacancy notice. They found that you do not have sufficiently long experience, at the requisite level, in the legal field.”

12. On 7 March 2008 the appellant addressed an administrative complaint to the Secretary General against the decision of 13 February 2008 rejecting her candidature.

In the circumstances the appellant asked to be allowed to sit the written part of the examination on a provisional basis. On 17 March 2008 she was told that the Secretary General had agreed to this.

The written part of the examination took place on 4 April 2008. The appellant was subsequently notified that she had attained the average mark required for admission to the oral examination. This has not yet been held because the Secretary General decided to suspend the procedure, pending the outcome of this appeal and the other appeals lodged in respect of the same competitive examination.

13. In a communication dated 7 April 2008 and sent to her on 17 April 2008 the appellant was told that her administrative complaint had been rejected.

14. On 16 June 2008 she lodged the present appeal.

B. Applicable provisions

15. The power to lodge an administrative complaint is governed by Article 59 of the Staff Regulations. The relevant parts of it are as follows:

“1. 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.

If the Secretary General has not replied within sixty days to a request from a staff member inviting him or her to take a decision or measure which he or she is required to take, such silence shall be deemed an implicit decision rejecting the request. The sixty-day period shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.

2. The complaint must be made in writing and lodged via the Head of the Human Resources Division:

a. within thirty days from the date of publication or notification of the act concerned; or

b. if the act has not been published or notified, within thirty days from the date on which the person concerned learned thereof; or

c. within thirty days from the date of the implicit decision rejecting the request as mentioned in paragraph 1.

The Head of the Human Resources Division shall acknowledge receipt of the complaint.

In exceptional cases and for duly justified reasons, the Secretary General may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.

(...)

6. The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*.

- a. to former staff members;
- b. to persons claiming through staff members or former staff members, within two years from the date of the act complained of; in the event of individual notification, the normal time-limit of thirty days shall apply;
- c. to the Staff Committee, where the complaint relates to an act of which it is subject or to an act directly affecting its powers under the Staff Regulations;
- d. to candidates outside the Council, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure.
(...)"

THE LAW

16. The appellant asks the Tribunal:

- to annul the Secretary General’s decision of 7 April 2008 in which he rejects her administrative complaint and confirms the decision of the Appointments Board to exclude her from participation in competition No. e84/2007;
- to order that the appellant’s candidature be re-examined by the Appointments Board, applying the same selection criteria as those used in processing the applications of other candidates;
- in order to ensure that the appellant does not miss an irretrievable opportunity, to order that her written papers be marked on the same basis as those of the other candidates and that she be allowed to take part in the oral examination if she passes the written papers.

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

A. SUBMISSIONS OF THE PARTIES

1. Admissibility of the appeal

18. In the Secretary General’s view it is important to ascertain whether the present appeal meets the admissibility criteria laid down by the Staff Regulations in Article 60, paragraph 1 and Article 59, paragraph 6 d).

19. He argues that because the competitive examination advertised in vacancy notice e84/2007 was an external recruitment procedure, the appellant’s application was governed by the rules in place for external applications.

20. In view of the aforementioned provisions, then, since the appellant’s application to take part in the competitive examination in question had been rejected, she was not entitled under the

Staff Regulations to lodge a complaint against the decision to reject her candidature or, *a fortiori*, to appeal when her complaint was dismissed.

21. Indeed, not only do the Staff Regulations allow that right solely to candidates whose application to sit the examination has been accepted; any complaint or appeal by them must relate “to an irregularity in the examination procedure”. But the appellant’s application to sit the examination in question was not accepted. And her appeal, seeking recognition that she satisfied all the criteria set out in the vacancy notice, does not challenge any irregularity in the examination procedure.

22. Given these circumstances the Secretary General considers that the present appeal is inadmissible because the appellant is not entitled to bring her case before this Tribunal.

23. The Secretary General also considers that the appellant is wrong to claim that she is entitled to lodge the present appeal by virtue of her status as a Council of Europe staff member under Article 59, paragraph 1 of the Staff Regulations.

24. The concept of a staff member’s direct and existing interest has been established by the case-law of the international administrative courts: this requires staff members to show that their legal position has been adversely affected. In the instant case, the appellant is not claiming any breach of the statutory provisions and regulations applicable to her as a staff member of the Organisation. The Secretary General points out here that the status of a member of staff does not, in itself, imply a right to apply, or even a legally protected interest in applying, to take part in an external recruitment procedure since eligibility to take part is governed exclusively by the criteria set out in the vacancy notice.

25. The Secretary General states that the competition advertised by vacancy notice e84/2007 did not treat candidates employed by the Council of Europe differently from those who were not so employed at the time of making their applications. The appointments procedure chosen was from this point of view an ordinary external recruitment procedure based on and governed by the Staff Regulations. Things would have been different if, for example, this had been an exceptional procedure aimed at making temporary Council staff into permanent staff.

26. Consequently, any attempt to base this appeal on Article 59, paragraph 1 of the Staff Regulations because the appellant is a staff member misunderstands the procedure followed and wrongly seeks treatment different from that given to candidates who are not employees of the Council of Europe, in breach of the principle of non-discrimination between candidates.

27. In the light of all these considerations the Secretary General argues that the present appeal is also inadmissible as regards Article 59, paragraph 1 of the Staff Regulations.

28. The appellant for her part observes that she has not lost her status as a staff member solely by virtue of applying to take part in an external recruitment procedure.

29. Regarding the principle of “non-discrimination between candidates” which might be invoked as a result of difference in the treatment of staff members and external candidates in

respect of the ability to lodge an administrative complaint, it should be noted that the relevant case-law of the European Court of Human Rights rules that persons in the same situation must be treated in the same manner. However, the circumstances too must be the same. But the wording of Article 59, paragraph 6 d), which says that “The complaints procedure (...) shall be open on the same conditions *mutatis mutandis* (...) to candidates outside the Council, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure”, clearly shows the contrary: from this provision it appears that external candidates are not on an equal footing with staff members of the Council of Europe and that they, unlike staff members, can avail themselves of the Council’s internal dispute settlement system only within strictly defined limits.

30. The appellant argues that staff members of the Council of Europe are governed by Article 59, paragraph 1, where the eligibility criteria are different from those of Article 59, paragraph 6 d). As a staff member the appellant’s situation is not the same as that of an external candidate, even in the context of an external recruitment competition. She believes that Article 59, paragraph 1 requires her to have a “direct and existing interest” in seeking the annulment of the “act complained of”, namely the decision to exclude her from the competitive examination which she had applied to sit.

31. The appellant states in this connection that she had such an interest in pursuing the opportunity offered by this competition: this was the first time since she had joined the Council of Europe fourteen years previously, in 1994, that she could entertain the hope of working “officially” as an administrative officer since, as she reminds the Tribunal, her original training was as a lawyer, not as a translator. It was, moreover, her legal qualifications that had enabled her to work successfully as a legal translator in the secretariat of the European Commission of Human Rights, to begin with, and thereafter in the registry of the European Court of Human Rights. Translating the Court’s decisions and judgments demands a sophisticated understanding of its reasoning and jurisprudence, and for this a legal training is if not essential, then at least extremely valuable. The appellant also states that she has, since October 2005, occupied two half-time posts at the European Court of Human Rights, one as a translator and the other as a lawyer. She had expressed the wish some time ago to return to purely legal work, and the head of the registry had accommodated her wish, allowing her to work 50% of her time initially in the Case-law Information and Publications Division, and subsequently in a division handling applications.

For the appellant, the natural progression here would be to move across totally to the legal division. But she cannot, administratively, apply for a lawyer’s post in the registry of the European Court of Human Rights, even though she is doing the job and has the requisite profile. Hence her “direct and existing interest” in applying for the competitive examination, in an effort to gain administrative officer status “officially” and so escape from the ambiguity of her current administrative position.

32. As a result of the above the appellant believes that her complaint of 7 March 2008 and the present appeal must be deemed admissible.

2. Merits of the appeal

33. Regarding the merits, the appellant considers that the Appointments Board does not have absolute power but must comply with certain rules in respect of every recruitment decision.

34. She argues that the first of these rules is the principle of non-discrimination between candidates during the process of selecting candidates. Although staff members of the Council of Europe and external candidates are not governed by the same provisions on the admissibility of administrative complaints and appeals, all applications for a given competitive examination should nevertheless be reviewed on the basis of the same criteria by the body tasked with assessing them.

35. The appellant alleges that this was not done, since the experience of “internal candidates”, acquired in-house in the performance of L-grade duties (her case) was arbitrarily disregarded as irrelevant, no consideration being given to the nature of the work done by L-grade staff generally and the appellant in particular. The Appointments Board’s arbitrary exclusion of all staff of grade L (and all of grade B3 and lower), without looking at what the people in question actually did, constitutes discrimination against them compared with external candidates, to whom the Board could not apply arbitrary criteria of that kind and so had to examine their application forms without preconceived ideas. Contrastingly, external candidates were admitted to the examination purely on the basis of their own statements (no supporting documents being required at this stage) and their own accounts of their professional experience.

36. The appellant adds that this creates a somewhat paradoxical situation in which her fourteen years’ experience, gained in-house from work requiring a high level of technical expertise, in-depth knowledge of the case-law and procedures of the European Convention on Human Rights and close co-operation with the lawyers and judges of the European Court, is deemed *a priori* to be less relevant than the experience of persons who have never worked for the Council of Europe and who, after all, were free to put down whatever they wanted in their application forms. Arbitrary disregard of experience gained in-house at the Council of Europe damages not only the appellant herself but the Organisation as a whole, since this decision implies that a lower value is placed on the skills and qualifications of its own staff. At the very least it would seem inconsistent with current Council of Europe staffing policies, which aim to manage in-house skills effectively and encourage staff mobility.

As for the assessment of her experience outside the Organisation, the appellant still fails to understand why the Appointments Board did not deem that earlier work to be “at the requisite level” stipulated in the vacancy notice, given that she was at the time performing tasks similar to those done by lawyers in the registry (preparation of case-files and pleadings, case-law studies, etc). In the absence of any explanation of the reasons for the Board’s decisions it is impossible to know how it arrived at its conclusion that the appellant’s application should be rejected (see below).

37. According to the appellant, the second rule which the Appointments Board ought to observe is that of substantiating its decisions – however briefly. She refers here to the general principles of law and, more specifically, to the case-law of the European Court of Human Rights

in this matter. None of the communications she received from the Directorate of Human Resources telling her that her application had been rejected contained any explanation, she says. Each time she was obliged to seek clarification of the reasons. Each time, she was simply told that she did not meet the criterion of two years' appropriate experience, with no further details and no response to her argument that her experience gained at and outside the Council of Europe manifestly *was* appropriate.

38. In conclusion the appellant alleges that, at best, the Appointments Board made an error of judgment in her case or, at worst, rejected her application on the basis of criteria that were discriminatory and arbitrary.

39. For his part the Secretary General, replying to the appellant's contention that she had not been given any reasons, says that she was informed, in an e-mail from the Directorate of Human Resources as early as 8 November 2007, that her "professional experience as a lawyer from 2005-2007 counts only for 50%, equivalent to a total period of one year instead of the two years required". Since she had worked only half-time as a lawyer between 2005 and 2007, it is obvious that that experience can only count as 50%, so as one year not two. The appellant was also told in the same e-mail that her "professional experience outside the Council of Europe cannot be taken into account because her responsibilities were not of the level stipulated in the vacancy notice." The Secretary General further maintains that these facts show that the appellant was fully aware of the reasons behind the decision to reject her application and this is evident from the many arguments she has adduced on the subject in both her administrative complaints and the present appeal.

40. He adds that as far as the reasons substantiating these decisions are concerned, what needs to be verified is whether the reasons given, regardless of how they were given, were enough to enable the appellant to challenge them and ask for the relevant administrative decision to be annulled.

41. The Secretary General notes that international administrative case-law generally recognises the principle that the assessment of skills and aptitudes on which administrative decisions by international organisations are based necessitates the exercise of discretionary powers. And there is no doubt, when it came specifically to determining whether the appellant's professional experience could be deemed appropriate within the meaning of vacancy notice e84/2007, that this decision was a matter for the Appointments Board. The Secretary General adds that the Board twice considered the appellant's application and twice concluded that she did not meet the criterion of required professional experience.

42. The Secretary General adds that decisions deriving from the exercise of an international organisation's power of discretion are subject to only limited scrutiny: they can be overturned only if they were taken by a body not competent to take them, were formally or procedurally incorrect, were based on a factual or legal error, failed to consider material facts, entailed an abuse of power or drew conclusions from the case that were patently incorrect.

But the Secretary General says that the appellant claims no mitigating circumstance in respect of any such reason which might invalidate the decision to reject her application. She

views the fact of excluding staff of grade L as discriminatory compared with external candidates who were admitted to the competitive examination purely on the basis of their own statements. Nevertheless the Appointments Board has the power, under Article 14 of the Regulations on Appointments, to “scrutinise all applications; it may draw up a shortlist 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” and thus take the decision not to admit candidates of grade L to a competition for A-grade posts if it thinks that L-grade staff are not best qualified for the posts and positions to be filled.

43. The Secretary General states that it is for the Appointments Board alone to quantify the professional experience laid before it in order to estimate whether or not that experience is of the requisite length and can be deemed to be “two years’ appropriate professional experience in one of the fields mentioned”, as stipulated in vacancy notice e84/2007.

In reply to the appellant’s complaint that the Appointments Board did not reconsider applications in sufficient depth, the Secretary General says that the exercise was precisely that – a reconsideration – and that the Board had already given careful consideration to the appellant’s application (and those of the other candidates concerned). In reconsidering these cases, moreover, the Board needed only to reconsider the criterion on which each of the candidates had failed, their applications having been rejected on first examination. In the appellant’s case, for example, the only issue to be reconsidered was her professional experience (and not all the other criteria).

44. In the light of the foregoing the Secretary General believes that the decision to reject the appellant’s application on the ground that it did not satisfy the criteria of the vacancy notice is not vitiated by any irregularity. There is nothing to suggest, from the arguments outlined by the appellant, that the impugned decision constitutes a breach of the Appointment Board’s power of discretion.

II. THE TRIBUNAL’S ASSESSMENT

A) Admissibility

45. The Secretary General argues in substance that staff members of the Organisation cannot lodge an administrative complaint against a decision to exclude them from written examinations under Article 59, paragraph 6 d) of the Staff Regulations.

46. The Tribunal points out that this issue was dealt with in the Schmitt case (ATCE, Appeal No. 250/1999 – Schmitt v. Secretary General, decision of 9 June 1999). The Tribunal sees no reason to depart from the case-law established by the Schmitt decision.

47. In that decision the Tribunal clearly ruled that staff members taking part in an external recruitment procedure could lodge an administrative complaint against a decision not to admit them to the examination on the basis of an entitlement under paragraph 1 of Article 59, not paragraph 6 d) of that same article (above-mentioned decision in *Schmitt*, paragraph 14.). At the time the Tribunal noted that a situation of discrimination existed between external and internal candidates. But it observed that this discrimination would not be removed by curtailing the

statutory rights of staff members. The Tribunal also pointed out that “[t]he governing bodies of the Council of Europe must take whatever positive steps are necessary” (*ibid.*, paragraph 16) and, referring to the case-law of the European Court of Human Rights, reiterated that “[a]ny persons who consider themselves the victims of decisions adversely affecting them are entitled to initiate legal proceedings” (*ibid.*).

The Tribunal notes that a period of nine years has elapsed without the Organisation’s governing bodies taking the necessary measures. Had this not been the case, the governing bodies could have remedied this *de facto* discrimination created by the Staff Regulations and related texts.

Proper account could then have been taken of the fact referred to by the Secretary General (namely the increase in the number of potential appellants) and the Organisation’s governing bodies could have remedied this *de facto* situation. The fact that no change has been decided on makes the Tribunal disinclined to curtail the rights of staff members in order to ensure equality of treatment with external candidates. Consequently this argument of the Secretary General’s is not sufficiently weighty to persuade the Tribunal to depart from its earlier rulings.

48. For these reasons the plea of inadmissibility must be rejected.

B) Merits of the appeal

49. The appellant is challenging the decision not to admit her to the written examination.

50. The Tribunal notes that it has previously had occasion to look at the matter of the Secretary General’s discretionary power in respect of recruitment (see ATCE, Appeal No. 250/1999, aforementioned decision in *Schmitt v. Secretary General*, paragraphs 25-27). The Tribunal held that the Secretary General, who has the authority to make appointments (Article 36 c of the Statute of the Council of Europe and Article 11 of the Staff Regulations), holds a discretionary power. In matters of recruitment the scope of this power allows him to familiarise himself with and assess the requirements of the service and the professional aptitudes of candidates for a vacant post.

51. As may be inferred from the *Schmitt* decision, this power also covers scrutiny of the competences required by the vacancy notice. But the Tribunal further holds that this power must always be exercised lawfully. Undoubtedly, in the event of a challenge, the assessment of an international court cannot take precedence over that of the Administration. But it has a duty to check that the impugned decision was taken in accordance with the Organisation’s rules and the general principles of law as laid down in the legal systems of international organisations. The Tribunal subsequently found (*ibid.*, paragraph 25) that:

“It must consider not only whether the decision was taken by a competent authority and whether it is legal in form, but also whether the correct procedure was followed and whether, from the standpoint of the Organisation’s own rules, the administrative authority’s decision took account of all the relevant facts, any conclusions were wrongly drawn from the evidence in the file, and there was any misuse of power”.

52. The Tribunal indicated that “in assessing objective qualifications the competent authority naturally makes less use of discretionary power than in assessing subjective qualifications” (ATCE, Appeals Nos. 216/1996, 218/1996 and 221/1996, *Palmieri* (III, IV and V), decision of 27 January 1997, paragraph 43). It added that “assessing each applicant’s qualifications is a different matter from taking the final decision on which applicant to select. Moreover, the stage of considering the admissibility of each application, which is and must remain a preliminary one, by nature allows the Secretary General less latitude for discretion than the assessment of each staff member’s qualifications and capabilities” (*ibid.*).

The Tribunal notes that, with regard to the phase of the competitive examination which follows publication of the vacancy notice, the Secretary General is bound firstly by the law, that is to say the rules of the Organisation, and by the rules on the conduct of competitive examinations, notably those stipulating the criteria for candidates’ eligibility to take part. Only after applications have been received does the Secretary General exercise a power which one may call discretionary, in assessing candidates’ qualifications in relation to the requirements stipulated by the vacancy notice. If the Secretary General does not abide by these rules when exercising this power he is exceeding his discretionary power and his decision may be viewed as a breach of the law.

Having examined the facts available to it, the Tribunal concludes that the Appointments Board reached its decision on the basis of an arbitrary assessment of the appellant’s qualifications. The Board did not take proper account either of the appellant’s experience as a lawyer prior to joining the Organisation or of her experience working as a translator for the Organisation. On the latter point the Tribunal notes that her employment was mostly in the European Commission and Court of Human Rights, where she did highly specialised legal translation work.

53. In deciding not to invite the appellant to sit the competitive examination, the Secretary General breached the law by which he was bound and drew conclusions which were manifestly incorrect regarding the vacancy notice, thus incurring the censure of the Tribunal.

Consequently the appeal is well founded.

54. The appellant asked the Tribunal to annul the Secretary General’s reply to her administrative complaint, which confirmed the decision to exclude her from the written examination. More correctly, however, and in accordance with the Staff Regulations and related texts, the Tribunal must annul the act complained of, namely the decision to exclude the appellant from the written examination.

55. The appellant also asked the Tribunal “to order that the appellant’s application be re-examined by the Appointments Board, applying the same selection criteria as those used in processing the applications of the other candidates.” The Tribunal points out that under Article 60, paragraph 2, second sentence of the Staff Regulations, it merely has the power to annul the act complained of, having unlimited jurisdiction only in disputes of a pecuniary nature. Consequently the Tribunal cannot grant this request. It is for the appellant to assess the Secretary

General's compliance with this decision and to take the measures she deems most appropriate if she is not satisfied.

56. In conclusion, the appeal is well founded and the decision not to allow the appellant to sit the written examination must be annulled.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares it well founded;

Annuls the decision to exclude the appellant from the written part of competitive examination 84/2007.

Adopted by the Tribunal in Strasbourg on 11 March 2009, and delivered in writing pursuant to Article 35, paragraph 1 of the Tribunal's Rules of Procedure on 31 March 2009, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

E. PALM