CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 530 and 531/2012 (Françoise PRINZ (II) and Alfonso ZARDI (II) 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 first appellant, Ms Françoise Prinz (the 1st appellant), lodged her appeal on 4 July 2012. The appeal was registered the same day under number 530/2012.

2. The second appellant, Mr Alfonso Zardi (the 2nd appellant), lodged his appeal on 11 July 2012. The appeal was registered the same day under number 531/2012.

3. On 9 August 2012, the two appellants (the appellants) each filed pleadings.

4. On 10 September 2012, the Secretary General submitted two documents containing his observations on the two appeals.

5. On 11 October 2012, the 1st appellant filed a memorial in reply. The 2nd appellant filed his on 12 October 2012.

6. Having been authorised by the Chair to intervene in the proceedings (Article 10 of the Statute of the Tribunal) and to file written observations confined to the issue of the execution

in good faith of the Tribunal's decisions, the Council of Europe Staff Committee filed written observations on 24 October 2012.

7. These observations having been forwarded to the parties for any written comments, the Secretary General submitted his on 31 October 2012.

8. The public hearing in this appeal took place in the Administrative Tribunal's hearing room in Strasbourg on 9 November 2012. The 1st appellant was represented by Nathalie Verneau, a Council of Europe staff member, and the 2nd appellant by Maître Carine Cohen-Solal, a barrister practising in Strasbourg, while the Secretary General was represented by Mr Manuel Lezertua, legal adviser, Director of Legal Advice and Public International Law, assisted by Ms Maija Junker-Schreckenberg and Ms Sania Ivedi, of the Legal Advice Department.

9. During the written proceedings, the 2nd appellant requested that the Tribunal ask the Secretary General, if necessary in an interlocutory decision, to provide the Tribunal and himself with two documents (a memorandum of 2 February 2012 from the Director of Human Resources and a written evaluation by an outside consultant which had been communicated to the Panel). The Secretary General filed the first document of his own accord. The Tribunal considered it unnecessary to order the production of the second document.

THE FACTS

I. THE FACTS OF THE CASE (common to both appeals)

10. The appellants are both permanent members of the Council of Europe staff. They both hold grade A5. At the time of the facts at issue, the 1st appellant was assigned to the Directorate General of Administration and Logistics while the 2nd appellant worked in the Directorate General of Democracy.

A. Background (the first appeals)

11. In 2010, the Organisation published vacancy notice no. e46/2010 for the purpose of filling, in accordance with the external recruitment procedure, the post of Director of Programme, Finance and Language Services (grade A6) in the Directorate General of Administration and Logistics.

The holder of that post was to be responsible, under the responsibility of the Director General of Administration and Logistics, for questions relating to programme and finances throughout the organisation, and for overseeing the operation of the language services.

The text of the vacancy notice stated, with regard to professional and technical qualifications, that the professional experience required was:

> "at least 12 years' relevant professional experience in one or more of the following fields: policy development, programme management, budgetary and financial management".

12. The appellants submitted applications and both were selected for oral interviews with the Panel.

13. Following that interview and after two candidates (other than the appellants) selected by the Panel had met the Secretary General, the latter decided to recruit a candidate other than the appellants.

B. The Tribunal's decision

14. The appellants contested this appointment by lodging appeals (nos. 474/2011 and 475/2011) which the Tribunal heard jointly. In a decision delivered on 8 December 2011, the Tribunal declared the appeals well-founded and annulled the impugned decision.

15. The paragraphs of the decision giving rise to the present appeals read as follows:

> "83. The Tribunal therefore arrives at the conclusion that the chosen candidate did not have the requisite qualifications and thus that his candidature was inadmissible under Article 8 of the Regulations on Appointments. For this reason his appointment must be set aside.
>
> 84. The appellants having requested annulment of 'the recruitment procedure relating to vacancy notice no. e46/2010', the Tribunal points out that it must be annulled only to the extent that it is affected by an established irregularity.
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> 85. With regard to the appellants' request that the Tribunal 'order that a new recruitment procedure in conformity with vacancy notice no. e46/2010 be set in motion', the Tribunal points out that under Article 60 of the Staff Regulations it is empowered only to annul the act complained of. Consequently, it cannot instruct the Secretary General to set a new recruitment procedure in motion. On this point, the Tribunal recalls its case-law, which has ruled out the possibility of having a judgment aimed at obtaining a finding (ATCE, formerly ABCE, appeal no. 179/1994, - Fuchs v. Secretary General, decision of 12 December 1994). In the opinion of the Tribunal the same must apply where it receives a request seeking not to establish a particular form of conduct but to impose a particular form of conduct on the Secretary General.
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> 86. According to Article 60 § 6 of the Staff Regulations, the task of enforcing the Tribunal's decisions falls to the Secretary General. He will be free, in due course, to give effect to this decision by deciding on the stage in the procedure from which the recruitment procedure is to be resumed or recommenced and, as appropriate, with which candidates. If the appellants consider that the manner in which the Secretary General gives effect to this decision is prejudicial to them, they will be able to resort to the judicial means at their disposal and challenge that manner, as other appellants have done in other disputes."

16. On 26 January 2012, the Secretary General informed the Tribunal of the execution of the decision (Article 60, paragraph 6, second sentence, of the Staff Regulations). He stated that he had decided to start a fresh recruitment procedure and, pending its outcome, he had asked the person whose appointment had been set aside to perform the duties of the post in question on an interim basis.

17. This information was communicated to the appellants, who did not approach the Tribunal.

C. The circumstances of the case

18. On 26 January 2012, the Secretary General appointed as acting Director the person whose appointment had been set aside by the Tribunal.

19. On 27 March 2012, the Secretary General published a new vacancy notice (no. e86/2012) for a post with the same grade and title as in vacancy notice no. e46/2010 (paragraph 11 above). The job mission was identical, as were the key activities, with the exception of one addition. The vacancy notice stated that the postholder would also be responsible for "[collaborating] with the Director General of Programmes in preparing the biennial programme of intergovernmental and operational activities of DGI and DGII".

20. Under "Competencies", the new vacancy notice required the following professional experience:

> "at least 12 years of professional experience at the level of, or equivalent to, that of an Administrator (category A) at the Council of Europe, including management, conceptual and research duties in one or more of the following fields: intergovernmental work, policy development, programme management, preparation and implementation of budgets and financial management".
>
> This wording differed from that of vacancy notice no. e46/2010 (paragraph 12 above)

21. On 13 April 2012, the appellants both submitted an administrative complaint to the Secretary General under Article 59, paragraph 2, of the Staff Regulations, asking him to withdraw vacancy notice no. e86/2012 and replace it with vacancy notice no. 46/2010, or to resume the earlier procedure at the stage he considered most appropriate, as the Tribunal had invited him to do.

22. On 16 April 20112, the appellants both made an application to the Chair of the Tribunal to stay the execution of the decision complained of (Article 59, paragraph 9, of the Staff Regulations). They asked him to "suspend the recruitment procedure relating to vacancy notice no. e/862012 with immediate effect, and in any event by 26 April 2012, the closing date for applications".

23. In two orders issued on 27 April 2012, the Chair dismissed the two requests for a stay of execution.

24. On 14 May 2012, the Secretary General dismissed the two administrative complaints as unfounded.

25. Following the procedure set in motion by vacancy notice no. e86/2012, the Secretary General appointed the new Director: this was the same person whose appointment had been set aside by the Tribunal in its decision of 8 December 2011 and who had been appointed acting Director on 26 January 2012 (paragraphs 14 and 18 above). In the course of the procedure, written evaluations had been produced for each candidate.

26. The appellants lodged their appeals on 4 and 11 July 2012 respectively.

27. In the course of the proceedings, the 1st appellant submitted two administrative complaints to the Secretary General. In the first, she complained of the interim appointment to the post in question of the person whose appointment had been set aside by the Tribunal, and in the second she complained of the manner in which the second recruitment procedure had been conducted (paragraph 25 above). She did not lodge an appeal with the Tribunal against the Secretary General's two negative decisions.

II. RELEVANT PROVISIONS

28. Article 12, paragraphs 1 and 2, of the Staff Regulations reads as follows:

Article 12 – Recruitment policy

"1. Recruitment should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity, with due regard to a fair geographical distribution of posts and positions, in accordance with relevant decisions of the Committee of Ministers. In addition, the Secretary General shall seek to ensure a fair distribution of appointments between the sexes.

2. When vacancies are being filled, due allowance shall be made for the qualifications and experience of serving staff members and the desirability of bringing in fresh talent."

29. Regarding execution of the Tribunal's decisions, Article 60, paragraph 6, of the Staff Regulations provides as follows:

"Decisions of the Administrative Tribunal shall be binding on the parties as soon as they are delivered. The Secretary General shall inform the Tribunal of the execution of its decisions within thirty days from the date on which they were delivered."

THE LAW

I. AS TO THE JOINDER OF THE APPEALS

30. In view of the related nature of appeals nos. 530/2012 and 531/2012, the Administrative Tribunal decided that they be joined in accordance with Rule 14 of its Rules of Procedure.

II. EXAMINATION OF THE APPEALS

31. The 1st appellant seeks the annulment of the recruitment procedure based on vacancy notice no. e86/2012.

She further requests that the Tribunal call on the Secretary General to execute the decision of 8 December 2011 in good faith either by starting a new recruitment procedure on the basis of vacancy notice no. e46/2010 or by resuming the 2010 procedure at the stage he considers most appropriate.

32. The 2nd appellant seeks the annulment of vacancy notice no. e86/2012 and, consequently, of the whole of the second recruitment procedure, including the decision to appoint another candidate.

He also seeks annulment of the decision to dismiss the administrative complaint.

33. The Secretary General, for his part, asks the Tribunal to declare the two appeals partially inadmissible and ill-founded and to dismiss them.

III. THE SUBMISSIONS OF THE PARTIES

A. The Secretary General's objection of partial inadmissibility

a) Submissions of the parties

34. The Secretary General points out that, in their appeals, the two appellants refer to facts which pre- and post-date those forming the subject of the present appeal and which, in the case of the 1st appellant, were contested in two administrative complaints which were not followed by appeals to the Tribunal. He adds that the present appeals seek only the annulment of vacancy notice no. e86/2012 and that, consequently, only the grounds of appeal directed against that vacancy notice are submitted for assessment by the Tribunal. He further contends that these grounds of appeal were out of time.

35. At the hearing, the Secretary General maintained his position.

36. The appellants, for their part, accept that the object of the appeal is the annulment of vacancy notice no. e86/2012 and emphasise that the other facts adduced constitute specific, objective and consistent evidence which is adduced in order to prove a misuse of authority.

37. This position was reconfirmed at the hearing.

b) The Tribunal's decision

38. The Tribunal comes to the conclusion that it is clear from the appellants' statements that they are not asking the Tribunal to rule on matters other than the annulment of vacancy notice no. e86/2012. Consequently, assuming the Secretary General's objection to be a genuine objection of inadmissibility, there is no doubt that it must be dismissed; on the other hand, it is true that the examination of the appeal must be confined to this ground of appeal, for which purpose, however, account should also be taken of the other elements in respect of which the Secretary General believes a specific ground of appeal cannot be raised in these proceedings.

39. As to the Secretary General's objection to the late filing of the appellant's submissions which he regards as separate grounds of appeal but which the appellants regard as arguments in support of their main ground of appeal, the Tribunal notes that, following the above finding, there is no need to consider these objections..

B. The merits of the appeals

a) The 1st appellant's submissions

40. The 1st appellant argues that, after the disputed appointment had been set aside by the Tribunal, the Secretary General was under an obligation to fill the post as quickly and efficiently as possible so as not to cause any lengthy disruption to the operation of a key Council of Europe department. He should therefore have opted for the least time-consuming solution, in other words the resumption of the procedure at the stage which seemed most appropriate. The 1st appellant observes in this connection that, in addition to the time for which an advertisement is posted, time is needed for shortlisting, which is usually the longest stage in the procedure because the Directorate of Human Resources has to examine all the applications to see if they meet the criteria. If the Secretariat had been concerned for the interests of the Organisation, he would have taken up the procedure again after this shortlisting stage, which, in the first procedure, had in fact led to the shortlisting of several candidates who fully satisfied the various criteria. Instead he opted for the solution which was most costly to the Organisation in terms of time and money. The 1st appellant notes that nearly eight months elapsed between the Tribunal's decision and the final appointment which is now being contested, whereas the Secretary General could have filled the post much sooner if he had let himself be guided solely by the "interests of the service and, above and beyond that, those of the Organisation".

41. Supposing there had been valid reasons for publishing a new vacancy notice, on the grounds, for example, that notice no. e46/2010 was too old and a new selection of candidates was justified, the 1st appellant observes that there was in any event no reason to issue a new vacancy notice setting new requirements. In particular, the substance of the duties to be performed by the postholder had not changed in any way between the publication of the two vacancy notices, and hence there was no justification for changing the experience required or any of the competencies required because the post was still exactly the same. It would therefore have been sufficient to re-issue vacancy notice no. e46/2010.

42. In the 1st appellant's view, the execution of the decision therefore did not call for a brand-new procedure or for the publication of a new, "made-to-measure" vacancy notice, but required resuming the procedure at an appropriate stage, or starting it again from the beginning, on the basis of the same vacancy notice. The Secretary General therefore gave the words "resume or recommence" used by the Tribunal an interpretation which is justified neither by any objective element nor by the interests of the Organisation, and which is even contrary to the decision of 8 December 2011.

43. The 1st appellant further notes that the conditions set in the new vacancy notice are greatly simplified in relation to what is normally required for a post of Director and that, for this reason, they do not satisfy the requirements of Article 12 of the Staff Regulations, which seeks to ensure the recruitment of staff of the highest ability to the post in question. In particular, she considers that the lowering of the criterion of experience required to the level of that of an administrative officer is not justified by any objective circumstance and could therefore be equated with a measure intended to allow a particular candidate to accede to the post in question, which is also contrary to the Staff Regulations.

44. In the 1st appellant's opinion, the decision by the Secretary General to lower the experience requirement is particularly inappropriate in the light of paragraph 81 of the

Tribunal's decision, where it says that "the conditions - such as professional experience - which have implications for the admissibility of a candidature should be defined more precisely". It is clear from this sentence and from the argument of which it forms part that the Tribunal, far from saying that the experience requirement should be made even more general (which is the case with vacancy notice no. e86/2012, which simply requires "at least 12 years of professional experience at the level of, or equivalent to, that of an Administrator (category A) at the Council of Europe, including management, conceptual and research duties in one or more of the following fields: intergovernmental work, policy development, programme management, preparation and implementation of budgets and financial management"), was, on the contrary, inviting the Secretary General to give the experience requirement a precise definition consistent, of course, with the level of responsibility which the post in question entailed. On the contrary, the Secretary General set an experience requirement that was so vague and so unambitious in relation to the responsibilities involved in the post that several hundred A-grade staff of the Organisation could have applied.

45. It follows from the above that, in arbitrarily changing the experience requirement so that a particular applicant could be chosen, the Secretary General actually went against the Tribunal's decision and, furthermore, failed to comply with two major obligations, namely to act in the interests of the Organisation for which he is responsible and to ensure equal treatment of candidates in a competition.

46. Lastly, the 1st appellant observes that the bad faith marking the execution of the decision can also be seen in the fact that the very person whose appointment had been set aside by the decision a few weeks previously was appointed to the post on an interim basis. In re-appointing him to the post until the end of the procedure, the Secretary General not only showed blatant disregard for the decision of the Tribunal, which had just found that the person in question did not satisfy the requirement of "12 years' relevant experience" to be appointed to the post in question. He also allowed that staff member to acquire experience to which he should never have been able to lay claim because, according to the decision, he was ineligible for the post and should never have been appointed to it, even provisionally. The decision to appoint him on an interim basis further increases the inequality of treatment between the candidates, to the advantage of the staff member appointed and to the detriment of the appellant.

47. To sum up, the 1st appellant considers that to execute the decision in good faith it would have been necessary to resume the procedure at an advanced stage in order to fill the post as quickly as possible. On the contrary, without any justification, the Secretary General chose the option which took longest (over six months between the Tribunal's decision and the second appointment) and was the costliest for the Organisation, by appointing in the interval the staff member whose appointment had been set aside, and what is more on an interim basis. Far from putting right a situation found by the Tribunal to be unlawful, this choice shows clearly that the Secretary General persisted in the attitude of favouritism which pervades the whole case.

48. The 1st appellant concludes that by appointing as acting Director the person whom the Tribunal had just found to be ineligible for this post, then publishing a new vacancy notice with a new experience requirement allowing that person to re-apply for the same post under the new procedure, the Secretary General respected neither the letter nor the spirit of the decision delivered by the Tribunal on 8 December 2011. On the contrary, his unjustifiable and unjustified choice can be equated with a manœuvre designed to circumvent the decision

he was supposed to execute and succeed despite everything in appointing the candidate whose appointment had been set aside by the Tribunal.

49. The 1st appellant adds that the new recruitment procedure was not transparent and fair, but, on the contrary, was marked by irregularities.

b) The 2nd appellant's submissions

50. The 2nd appellant raises three arguments relating to the failure to execute the decision of 8 December 2011: non-conformity of vacancy notice e86/2012 with that decision, manifest misuse of procedure and, lastly, infringement of Article 12 of the Staff Regulations.

51. First, the 2nd appellant emphasises that the decision of 8 December 2011 annulled the disputed appointment, but not the procedure. Paragraph 84 of the decision states as follows: "The appellants having requested annulment of 'the recruitment procedure relating to vacancy notice no. e46/2010', the Tribunal points out that it must be annulled only to the extent that it is affected by an established irregularity." Yet the Secretary General, on the basis of paragraph 86 of the decision, executed it in a manner which disregards what is stated in paragraph 84. Furthermore, in executing the decision, he adopted a radical and erroneous position which needs to be tempered in the light of international case law. However, the Secretary General's power of execution is not absolute or unconditional, and still less arbitrary.

According to the 2nd appellant, the Secretary General was required to resume or recommence the recruitment procedure under the vacancy notice, and not issue a new vacancy notice. In view of the discretionary power vested in him, it was possible for him to choose the stage from which the procedure would be resumed, but by deciding to issue a new vacancy notice, he compromised the proper execution of the Tribunal's decision. The 2nd appellant submits that the Secretary General's decision was not consistent with proper execution of the Tribunal's decision and must be set aside.

52. He further submits that, in issuing a new vacancy notice to fill the same post, the Secretary General misused and abused his power of appointment with the sole aim of re-appointing the person whose appointment had been set aside by the Tribunal.

He mentions a whole series of facts which, in his view, constitute objective, relevant and consistent evidence of a misuse of authority for a purpose other than the proper execution of the decision of 8 December 2011. He argues that the Secretary General misused his discretionary power by organising a sham procedure for the sole purpose of legitimising the appointment of the candidate he wished to impose.

53. Lastly, the 2nd appellant contends that the requirements of the new vacancy notice in terms of qualifications and experience were not consistent with Article 12 of the Staff Regulations (paragraph 28 above).

Indeed, unjustifiably, they fell far short of those which can be stipulated for a post of Director at grade A6. In fact, the qualifications required for this post were, he argues, inconsistent with those set out in a vacancy notice for a post of the same grade issued the same day, and the arguments put forward by the Secretary General to justify the discrepancy were unconvincing.

C. The Secretary General's submissions

a). In the case of the 1st appellant

54. As to the 1st appellant's first ground of appeal, namely her contention that the Administrative Tribunal's decision did not allow him to recommence the recruitment procedure in question by issuing a new vacancy notice, the Secretary General feels obliged to point out that she gives an unduly narrow and, moreover, totally incorrect interpretation of that decision. He asserts that he executed the decision while having due regard to all the reasons which led the Tribunal to give its decision and duly complied with the framework laid down by the Tribunal.

55. In his opinion, paragraph 84 of the decision must be read in conjunction with the following paragraphs of the decision. With reference to the words "*or recommence*" in paragraph 86 of the decision (paragraph 15 above), the Secretary General stresses that the verb *recommencer* in French ("to recommence") is defined as "to start something again from the beginning" and that, contrary to what is stated by the 2nd appellant, the first stage in any recruitment procedure is the publication of a vacancy notice.

56. He submits that it is wrong to argue, as does the 1st appellant, that the word "recommence" used by the Tribunal did not allow the Secretary General to issue a new vacancy notice in the context of this recruitment procedure. Her interpretation is tantamount to denying the alternative nature of the relevant part of the decision, which states that it is for the Secretary General to "resume *or* recommence the recruitment procedure". This interpretation might have been correct if the Tribunal had merely used the word "resume". But the two words used by the Tribunal could not be clearer, more explicit and more unambiguous and express unequivocally the choice open to the Secretary General: he was free either to resume the recruitment procedure set in motion by vacancy notice no. e46/2010 – at the stage he considered appropriate – or to recommence the recruitment procedure from the beginning.

57. In the event, the Secretary General considered that it was appropriate to recommence the recruitment procedure with the publication of a new vacancy notice, in full conformity with the Tribunal's decision of 8 December 2011.

58. He adds that, in any case, established administrative case law shows that, where an appointment is set aside by a tribunal, there is no obligation to resume the recruitment procedure from the stage it had reached before the annulled decision was taken.

59. Furthermore, the decision did not specify the concrete measures to be taken by the Secretary General for its execution. In particular, the decision in no way stipulated that the Secretary General was obliged to resume the procedure from the stage reached before the annulled decision was taken, or that he was obliged to reconsider the applications submitted in the context of the initial vacancy notice.

60. The Secretary General adds that, as pointed out by the Tribunal in paragraph 86 of its decision, and in line with established international case law, it was for him to draw the implications from the annulment of the disputed appointment and to find the best way of executing the Tribunal's decision, having due regard to the needs of the service.

61. When he decided to issue a new vacancy notice, the Secretary General was not bound by the wording of the previous vacancy notice. It is the Secretary General's role to assess the interests of the service and, in particular, to define the specific requirements of a vacant post, even in the event of a recruitment procedure organised following an annulment decision. For this purpose, he has a wide discretionary power and was therefore free to draft a vacancy notice setting criteria appropriate to the requirements of the post.

62. Furthermore, the Secretary General complied with paragraph 81 of the Tribunal's decision, in which it said that "the conditions - such as professional experience - which have implications for the admissibility of a candidature should be defined more precisely". That is indeed the case here because the professional experience requirement is more precise in vacancy notice no. e86/2012 than in the previous vacancy notice.

63. According to the memorandum which he produced (paragraph 9 above), the Secretary General decided that the new vacancy notice needed to take account of the fact that the holder of this post was responsible for three separate entities doing different jobs: programme, finance and language services. It is obviously unrealistic to aim to recruit a person specialising in each of these three fields. This explains why the Secretary General thought it necessary to attract candidates possessing a broad vision of the Organisation's activities and cross-cutting experience in various fields, while avoiding an unduly technical or targeted approach not meeting the real needs of this post. The Secretary General wanted the chosen candidate to be versatile and to have broad vision and a good knowledge of the operation of international organisations, notably the Council of Europe, and their activities.

64. The Secretary General infers from this that he acted within the limits of the discretionary power vested in him in this regard and in accordance with the terms of the Tribunal's decision of 8 December 2011. The 2nd appellant's ground of appeal is therefore unfounded.

65. As to the 1st appellant's second ground of appeal, concerning the conditions of eligibility set out in vacancy notice no. e86/2012, the Secretary General submits that these were drafted in such a way as to meet the specific requirements of the vacant post.

66. He argues that the aim was that they should reflect the real needs of the service.

67. Contrary to the 1st appellant's claims, these were not conditions "falling far short of those which may be stipulated for a post of Director at grade A6". For example, vacancy notice no. e205/2011 for the recruitment of a Director of Political Advice (grade A6) published in September 2011 contained the following experience requirement: "relevant experience of management of human and financial resources at a high level, preferably in an international context; in-depth knowledge of the Council of Europe's fields of activity". When the post requires a broader and more cross-cutting vision, the requirements set out in the vacancy notice reflect that need.

68. As regards vacancy notice no. e87/2012 for the recruitment of a Director of Logistics (grade A6), the experience criterion is indeed more technical because it corresponds to the post to be filled, which is concerned exclusively with the field of logistics.

69. Regarding the 1st appellant's third allegation, namely that the wording of the vacancy notice reflects a desire to favour one or more candidates, the Secretary General strongly rejects such accusations.

70. He observes that, according to established case law, misuse of authority or procedure occurs where an administrative authority uses its powers for a purpose other than that for which they were conferred upon it. A decision is only vitiated by misuse of authority or procedure if it is found, on the basis of specific, objective and consistent evidence, to have been taken for purposes other than those stated.

71. It is therefore not sufficient merely to refer to certain facts in support of allegations. It is necessary to adduce evidence of a specific, objective and consistent nature to corroborate the veracity of the allegations or, at the very least, their probability.

72. Contrary to the 1st appellant's allegations, and as demonstrated above, the vacancy notice was not worded in such a way as to favour one or more candidates.

73. In conclusion, the Secretary General notes that none of the arguments raised by the 1st appellant proves that the decision of 8 December 2011 was not executed in good faith or calls into question the necessary and justified nature of each of the decisions relating to its execution. On the contrary, the above considerations show that the execution of the Tribunal's decision meets the Organisation's best interests and the Secretary General's obligation to comply with the terms of the Tribunal's decision.

b) In the case of the 2nd appellant

74. As to the 2nd appellant's first ground of appeal, namely the alleged non-conformity of vacancy notice no. e86/2012 with the decision of 8 December 2011, the Secretary General asserts that the 2nd appellant also gives an unduly narrow and, moreover, incorrect interpretation of the above-mentioned decision.

The Secretary General then sets out identical arguments to those put forward in the case of the 1st appellant.

75. As to the 2nd appellant's second allegation, namely a misuse of procedure because the wording of the vacancy notice allegedly reflected a desire to favour one or more candidates, the Secretary General strongly rejects such accusations.

76. The Secretary General sets out similar arguments to those used to counter the 1st appellant's third ground of appeal and states that, contrary to the 2nd appellant's allegations, and as demonstrated above, the vacancy notice was not worded in such a way as to favour one or more candidates.

77. As to the 2nd appellant's third ground of appeal, concerning the conditions of eligibility laid down in vacancy notice no. e86/2012, the Secretary General submits that these were drafted in such a way as to meet the specific requirements of the vacant post.

78. The Secretary General sets out similar arguments to those relating to the 1st appellant's second ground of appeal.

79. In his opinion, it should be concluded that the 2nd appellant in no way proves that the qualifications and competencies required in vacancy notice no. e86/2012 were inappropriate in relation to the interests of the service.

80. The Secretary General notes that none of the arguments raised by the 2nd appellant proves that the decision of 8 December 2011 was not executed in good faith or calls into question the necessary and justified nature of each of the decisions relating to its execution. On the contrary, the above considerations show that the execution of the Tribunal's decision meets the Organisation's best interests and the Secretary General's obligation to comply with the terms of the Tribunal's decision.

D. Submissions of the intervening third party

81. According to the intervening third party, the Secretary General pretended to execute a decision – assuming, but without conceding the point, that the resumption of the procedure from scratch was consistent with the decision – while preserving his main interest, which was to appoint to the post the staff member whose appointment had been set aside following appeals nos. 474/2011 and 475/2011.

82. It further alleges that the Secretary General got around the problem by removing a condition of eligibility which might once again have hindered his plan. However, in circumventing the Tribunal's decision, the Secretary General failed to execute it and committed a misuse of authority. Indeed, in the Staff Committee's opinion, the Secretary General used his power of execution, which left him a margin of discretion, to create the most favourable conditions so that "his" candidate would not be faced with any preliminary obstacles, i.e. at the eligibility stage. The intervening third party is convinced that there is specific evidence of this in the file and that the Tribunal should set aside this new appointment in order to punish a misuse of authority of which the staff of the Organisation are not unaware and which is likely to undermine the credibility of the Organisation's system of external competitions (and hence, *a fortiori*, its internal competitions).

83. For this reason, the intervening third party asks the Tribunal to uphold the appellants' submissions with respect to the appointment made following the recruitment procedure based on vacancy notice no. e86/2012.

IV. THE TRIBUNAL'S ASSESSMENT

84. The Tribunal believes that, before considering the appellants' arguments, it should focus its attention on the meaning and scope of its decision of 8 December 2011, given that the parties referred to it to support their arguments concerning whether or not it was possible for the Secretary General to execute that decision by publishing a new vacancy notice with a different job description in relation to the first vacancy notice.

85. The Tribunal notes that, in its reasons for the decision, it first of all came to the conclusion that "the chosen candidate did not have the requisite qualifications and thus that his candidature was inadmissible under Article 8 of the Regulations on Appointments. For this reason his appointment must be set aside" (paragraph 83 of the decision of 8 December 2011). It then ruled on a request which the appellants had made to it in their submissions.

86. This request concerned the annulment of "the recruitment procedure relating to vacancy notice no. e46/2010" (paragraph 84 of the decision). The Tribunal pointed out that this recruitment procedure "must be annulled only to the extent that it is affected by an established irregularity" (*ibid*).

87. Next, in reply to another request from the appellants, namely to "order that a new recruitment procedure in conformity with vacancy notice no. e46/2010 be set in motion", the Tribunal pointed out that, under Article 60 of the Staff Regulations, it was empowered only to annul the act complained of. It added that it could not instruct the Secretary General to set in motion a new recruitment procedure because it was not empowered to impose a particular form of conduct on the Secretary General. It continued by stating that it was for the Secretary General to choose the manner of executing the decision, for the appellants to challenge it if they disagreed and, lastly, for the Tribunal to rule on the lawfulness of the measure actually taken to execute the decision.

88. In the light of these indications, it is wrong to interpret the relevant passages of the decision of 8 December 2011 by stating that the Tribunal specified at that stage in what way – that claimed by the Secretary General or that claimed by the appellants – the decision was to be executed, and hence to conclude on the basis of the decision that the new procedure ordered by the Secretary General was either lawful or unlawful, as the case may be. Since it was not empowered to give a ruling on the request to "order that a new recruitment procedure in conformity with vacancy notice no. e46/2010 be set in motion", *a fortiori* the Tribunal was not empowered to give any indications as to the manner of executing the decision. In this connection, the Tribunal notes that it has had to deal in the past with requests concerning situations on which it was unable to give a ruling owing to the scope of Article 60, paragraph 2, of the Staff Regulations, and it neither gave a ruling nor provided any indications. Without prejudging anything, it merely drew the Secretary General's attention to the desirability of considering a particular situation in order to resolve it or reminded him, that despite previous indications, he had not done so.

89. Accordingly, the question which the Tribunal must now answer is not so much whether the Secretary General followed the Tribunal's indications in the proper way – and hence complied with an operative part of its decision – but rather whether the manner in which he acted was in conformity with the regulations and with the principles which may be identified regarding the execution of the decisions of an international court. For this reason, the question, discussed by the parties, of the interpretation to be given to the words "or recommence" used by the Tribunal in paragraph 86 of its decision of 8 December 2011 is of no importance in settling the present dispute.

90. In this connection, the Tribunal notes from the outset that the regulations provide no indication on the basis of which the decisions taken by the Secretary General might be found to be in conformity with those texts or not. It follows that the Tribunal must look into the question of compliance with the principles which may be identified concerning the execution of decisions.

91. It is true to say, therefore, that although the Secretary General possesses a margin of discretion in the execution of decisions, that power is not unlimited. Where a decision in a recruitment procedure is set aside by the Tribunal, and it is necessary to resume the procedure, it is true that the Secretary General can assess whether it is desirable to continue the contested procedure or end it and start another one. This possibility derives from his

powers in the matter of recruitment. However, he must exercise this power in accordance with the rules and without attempting to circumvent binding legal rulings or appearing to wish to do so. If that were not the case, the decisions taken would be unlawful and would have to be censured.

92. The Tribunal notes first of all that, in its first decision, it did not annul the recruitment procedure but only the final decision to appoint a candidate who did not possess the professional experience stipulated in the vacancy notice. Hence, only the subsequent decisions lost their effectiveness, while the previous decisions in the procedure retained theirs.

93. Plainly, the decision to publish a new vacancy notice setting new, less strict conditions with regard to professional experience enabled the candidate chosen in the first procedure – whose appointment had been annulled because he failed to meet the conditions of eligibility – to participate in the new procedure.

94. However, the arguments submitted by the Secretary General to justify this "lowering" of the level of professional experience fail to convince the Tribunal that it was now necessary to have a person with a different profile from that sought in the first vacancy notice. It may be seen from a comparative analysis of the two vacancy notices that only one new job mission was added in the second notice: "[collaborating] with the Director General of Programmes in preparing the biennial programme of intergovernmental and operational activities of DGI and DGII". This new job mission cannot justify the change made in the professional experience requirements. Admittedly, the wording of these new requirements was much more detailed than in the first vacancy notice. Clearly, however, the level of professional experience required was lower than in the first vacancy notice. If that had not been the case, the candidate whose appointment is challenged by the appellants could not have been selected in the second procedure either. Nevertheless, the change made in the job missions cannot justify such a lowering of the relevant experience; on the contrary, it argues in favour of raising the level of professional experience.

95. This finding is such as to raise doubt as to any real desire to set in motion a new procedure without favouring the candidate whose appointment had been set aside by the Tribunal, contrary to the spirit of the decision delivered. Furthermore, the discretionary power and margin of discretion which the Secretary General possesses cannot justify this approach. The Tribunal therefore has before it specific, objective and consistent evidence – which, according to the Secretary General himself (paragraph 70 above), is the basis for a finding of misuse of authority – which vitiates the approach adopted by the Secretary General.

96. Although the present appeal is not concerned with this question, the Tribunal feels it is worth pointing out that the Secretary General kept in office, albeit on an interim basis, the person whose appointment had been set aside, and this measure was even taken as part of the execution of the Tribunal's decision (paragraph 16 above). The Tribunal cannot but express its surprise at this approach, which, in its opinion, cannot be justified, and above all was not necessitated, by the Directorate's operational imperatives. It is not a question of compliance with the form of the Tribunal's decision, but rather of respect for its substance.

97. As regrettable as this may seem, the disputed appointment was maintained until the incumbent's final confirmation in post following a new recruitment procedure.

98. The Tribunal therefore has before it specific, objective and consistent evidence – which, according to the Secretary General himself (paragraph 70 above), is the basis for a finding of misuse of authority – which vitiates the approach adopted by the Secretary General.

99. Having reached this conclusion, the Tribunal has no need to examine in detail the various grounds of appeal submitted by the appellants, whose arguments coincide to arrive finally at the same conclusion as the Tribunal.

100. In conclusion, the Secretary General's decision to publish a new vacancy notice is unlawful and must be annulled. The same therefore applies to all the decisions which ensued, including, as requested by the 2nd appellant, the disputed new appointment.

101. However, as it has pointed out several times, the Tribunal is not empowered to "call on the Secretary General to execute the decision of 8 December 2011 in good faith either by starting a new recruitment procedure on the basis of vacancy notice no. e46/2010 or by resuming the 2010 procedure at the stage he considers most appropriate" (paragraph 31 above). The choice of how to execute this decision lies with the Secretary General and, if the appellants are not satisfied, they will be able to challenge his new decision by bringing fresh proceedings.

As to the claim for damages and the costs of proceedings

102. Each appellant asks the Tribunal to award the sum of 50 000 euros by way of damages. The 1st appellant, who was represented by a colleague, claims 500 euros to cover all the costs to which this appeal gave rise, while the 2nd appellant, who was represented by counsel, claims 5 000 euros.

103. The Secretary General considers that the appellants have not suffered any non-pecuniary damage and, where costs are concerned, asks the Tribunal to dismiss the related claims.

104. In the matter of damages, the Tribunal considers that the 1st appellant should be awarded 10 000 euros and the 2nd appellant 5 000 euros.

105. As to the costs of proceedings, the Tribunal considers that it is reasonable for the Secretary General to reimburse the sums claimed by each appellant (Article 11, paragraph 2, of the Staff Regulations).

Conclusion

106. In conclusion, the appeals are well-founded and the impugned decision must be annulled. The Secretary General must pay the 1st appellant the sum of 10 000 euros and the 2nd appellant the sum of 5 000 euros by way of damages and reimburse 500 euros to the 1st appellant and 5 000 euros to the 2nd appellant.

For these reasons, the Administrative Tribunal:

Orders the joinder of appeals nos. 530/2012 and 531/2012;

Declares the appeals well-founded and annuls the impugned decision;

Rules that the Secretary General must pay the 1st appellant the sum of 10 000 euros and the 2nd appellant the sum of 5 000 euros by way of damages;

Rules that the Secretary General must reimburse the sum of 500 euros to the 1st appellant and the sum of 5 000 euros to the 2nd appellant in respect of costs and expenses.

Adopted by the Tribunal in Strasbourg on 6 December 2012 and delivered in writing pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 6 December 2012, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. ROZAKIS