

# CONSEIL DE L'EUROPE ——— ——— COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeals Nos. 259-260/2000 (Simon TONELLI v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Kurt HERNDL, Deputy Chair,  
Mr José da CRUZ RODRIGUES,  
Mr Helmut KITSCHENBERG, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and  
Ms Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision, after due deliberation.

### **PROCEEDINGS**

1. Mr Simon TONELLI lodged two appeals, the first dated 12 April 2000, the second dated 14 April 2000. On 17 April 2000, these appeals were registered under file Nos. 259/2000 and 260/2000.
2. On 11 February 2000, within the framework of the administrative complaint preceding Appeal No. 259/2000, the applicant had lodged an application with Mr Sibrand Karel MARTENS, the Chair of the Administrative Tribunal at that time, for a stay of execution of the Secretary General's decision to appoint Mrs F as Head of Unit (Grade A4) in the Social Cohesion Development Division. In an order of 25 February 2000, the Chair of the Administrative Tribunal had rejected this application.
3. On 16 May 2000, the applicant's representative, Mr Jean-Pierre CUNY, lodged further pleadings relating to Appeal No. 259/2000, followed, on 9 June 2000, by further pleadings in support of Appeal No. 260/2000.
4. On 31 May 2000, the Secretary General's representative wrote to the Registrar of the Tribunal requesting the joinder of Appeal No. 259 with Appeal No. 260, on the grounds of the close relationship between them, in pursuance of Rule 14 of the Rules of Procedure of the

Administrative Tribunal. In his further pleadings in respect of Appeal No. 260/2000, the appellant's representative supported the Secretary General's request.

5. On 17 July 2000, the Secretary General submitted his observations concerning the appeals. The appellant submitted his observations in reply on 1 September 2000.

6. On 29 August 2000, the Staff Committee, represented by its Acting Chair, Ms Anna TRIGONA, submitted a request to intervene, requesting authorisation to support the conclusions of the appellant.

7. By an Order of the Chair, dated 3 October 2000, in pursuance of Article 10 of the Statute of the Administrative Tribunal, the Staff Committee was authorised to lodge written observations.

8. On 6 October 2000, the Staff Committee lodged its written intervention, which was communicated to the parties to the proceedings.

9. The public hearing in the present appeals took place in the courtroom of the Administrative Tribunal in Strasbourg, on 16 October 2000. The appellant was represented by Mr Jean-Pierre CUNY and the Secretary General by Mr Jörg POLAKIEWICZ, Deputy Head of the Legal Advice Department at the Directorate General of Legal Affairs.

10. Following the death of Mr Martens on 6 January 2001, Mr Kurt HERNDL, Deputy Chair of the Administrative Tribunal, took over from him as Chair of the Tribunal (Article 2 of the Statute of the Administrative Tribunal; Rules 9 (2) and 33 of the Rules of Procedure of the Administrative Tribunal).

## **FACTS**

11. The appellant, a UK national, took up his duties with the Council of Europe on 1 June 1989, with grade A2. He was assigned to the Directorate of Social and Economic Affairs (now Directorate General III - Social Cohesion). On 1 June 1993, he was promoted to grade A3.

### **A. Appeal No. 259/2000**

12. The Second Summit of Heads of State and Government of the Council of Europe, which took place on 10 and 11 October 1997, instructed the Committee of Ministers to define a social strategy to respond to the challenges in society and to carry out the appropriate structural reforms within the Council of Europe. The structural reforms included the setting up of a specialised unit for monitoring, comparing and handling issues linked to social cohesion.

13. Subsequently, until autumn 1999, the appellant played his part in the discussions of implementation of the new social cohesion strategy. He was given duties which required a study of both structural and substantive issues, as well as co-operation with other departments within the Organisation, particularly the Research and Planning Unit and the Private Office of the Secretary General.

At the same time, the appellant was also made responsible for devising and implementing activities within the social sphere in the context of the ADACS (Activities for the Development and Consolidation of Democratic Stability in Europe) programme, as well as for co-ordinating the new programme of co-operation with the Development Bank.

14. In accordance with the action plan adopted by the Second Summit of the Council of Europe, the specialised unit for monitoring, comparing and handling issues linked to social cohesion was set up during the year 1999.

The setting up of this unit was the subject of several meetings of the Committee of Ministers and its subordinate bodies. During its meeting 22 March 1999, the Rapporteur Group on Social and Health Questions (GR-SOC) inter alia discussed issues relating to the setting up of the specialised unit. On the subject of the future head of the unit, the group took the view that “the new working method advocated for the Unit, with its emphasis on research and operation, fully warranted an external recruitment”. Having noted that an A4 post was available within the Directorate as a result of redeployment, and that “the vacant post in this grade ought not, however, to be filled from outside unless it was established that no serving staff member had the requisite profile”, the group indicated its “preference for an A4 appointment from outside”.

15. Before publishing the vacancy notice for the post concerned, the Administration consulted the Staff Committee. In a letter of 28 April 1999 from its Chair, the Staff Committee opposed the plan to appoint a temporary staff member and said that it was unnecessary to call on an outside specialist. It also requested that the draft notice - which did not fundamentally differ from the final notice where the qualifications required were concerned — should be withdrawn and superseded by another relating to the A4 post currently vacant, the description of which, while referring to the duties of the head of the said unit, should no longer contain requirements in terms of qualifications and experience which were such that no permanent staff member could aspire to promotion or transfer.

In his reply of 18 May 1999, the Head of the Human Resources Department explained that the profile of the post concerned reflected the needs of the unit.

He stated that, as the unit comprised a small team which would be required to be operational rapidly, it was vital for its head to have not only the ability to manage a team, but also sound professional experience acquired in the unit’s fields of activities. Without this, he or she would not be in a position to devise or to evaluate the activities of the unit relating to highly specialised fields concerning social cohesion.

As serving staff had no such specialised skills, the aforementioned considerations justified the opening of an external recruitment procedure. They were, however, specific to the nature of the job concerned and should not be interpreted as a sign of a new policy under which this kind of procedure for filling jobs of such a grade would be in general use.

On the other hand, in view of some of the arguments put forward by the Staff Committee, the procedure adopted (temporary recruitment financed by the appropriations linked to the aforementioned post) did not seem to be the most appropriate. Notwithstanding the advantages that the procedure would have entailed, particularly where the urgency of filling the post was concerned, the observations made above called more for the use of the recruitment procedure provided for by Article 6 of the Regulations on Appointments. He said

that the draft notice had accordingly been revised and that both permanent and temporary staff were able to apply. A few amendments had also been made in respect of the qualifications required.

In a memorandum of 22 June 1999 from the new Chair of the Staff Committee, addressed to the Human Resources Department, the Staff Committee reiterated its call for an internal competition procedure.

16. On 5 July 1999, Vacancy Notice No. 50/99 for the post of Head of the Specialised Unit for monitoring, comparing and handling issues linked to social cohesion (grade A4) was displayed. The procedure was an external recruitment one in which permanent and temporary staff who had the requisite qualifications were also allowed to take part.

The first paragraph of the vacancy notice referred to the provisions of Article 7 of the Regulations on Appointments, specifying that:

“On the basis of this competition, a reserve list may be drawn up in accordance with Article 15, para. 3 of the Regulations on Appointments”.

The notice stipulated, in respect of the duties attaching to the post and the qualifications required:

“Duties (Post No. 202)

Under the authority of the Deputy Director of Social and Economic Affairs, the holder of this post will be responsible for the management and activities of the Specialised Social Cohesion Unit. The principal duties of the post holder will be:

- conception, implementation and evaluation of a programme of multi-disciplinary activities of an analytical and developmental character in the field of social cohesion aimed at supporting the work of the European Committee for Social Cohesion and other Council of Europe bodies participating in its social cohesion strategies;
- inception and development of co-operation programmes with external partners in the field of social cohesion, including the conception, implementation, evaluation and financial accounting of activities undertaken within these programmes;
- develop an active policy of external fund raising for the activities of the Specialised Unit in the form of finance and/or expertise/know-how;
- implementation of the joint programme of co-operation with the Social Development Fund of the Council of Europe;
- co-ordination of the social cohesion activities of the Directorate of Social and Economic Affairs with the Executive Secretary of the European Committee for Social Cohesion;
- development and maintenance of high-level relations with national and international organisations and institutions including research bodies, non-governmental bodies and networks;
- submission of written and oral reports on the activities of the Specialised Unit to the European Committee for Social Cohesion and its Bureau;
- management of the human resources of the Specialised Unit.

Qualifications, professional experience, knowledge, skills and language proficiency:

- Good university degree in political or social sciences, economics or law;

- Extensive professional experience, including one or more of the following:
  - conducting and leading research in the social field,
  - developing local projects and/or organising and delivering locally-based services (inter alia to disadvantaged communities),
  - developing social policy at national or international level,
  - intergovernmental co-operation in the field of social policies, involving preferably non-governmental organisations;
- Detailed understanding of the current and emerging issues related to social cohesion and social exclusion in Europe (particularly in the fields of employment, housing, social protection, education and health);
- Very good knowledge of one of the two official languages (English or French); good knowledge of the other; knowledge of other European languages would be an advantage.

Other qualifications:

- Analytical skills and project management skills;
- Ability to work under pressure and on complex and sensitive issues;
- Good oral and written communication skills;
- Initiative, sense of responsibility and discretion;
- Ability to establish and maintain high-level contacts;
- Ability to lead and motivate a multinational team;
- Ability to use computer facilities;
- Availability for official journeys.”

17. On 25 August 1999, the appellant applied for the post. When fourteen candidates, including the appellant, had been short-listed from the 202 applicants, they were invited to take part in written tests on 22 November 1999. The appellant passed the written tests and was, with another three candidates, invited to attend an interview. At its meeting of 23 November 1999, Recruitment Panel I decided to recommend the appointment of Mrs F, a candidate who was not a staff member, to the post of Head of Unit, and to place the appellant on a reserve list drawn up in accordance with Article 15, para. 3 of the Regulations on Appointments.

18. In a letter of 13 January 2000, the appellant was informed that another candidate had been recommended for recruitment, that he himself had been placed on a reserve list and that a post would be offered to him in the event that a similar post became vacant.

19. On 3 February 2000, the appellant lodged an administrative complaint against the decision to appoint Mrs F to the post advertised in Vacancy Notice No. 50/99.

He argued that the Secretary General’s decision was based on a recommendation of the Recruitment Panel in which account had not been taken of the organisation’s general policy and/or practice of filling A4 grade posts through internal promotion or transfer, where the necessary expertise is shown to exist among serving staff. Alternatively, the Panel had failed to give sufficient weight to that practice.

20. On 6 March 2000, the Director General of Administration, acting on behalf of the Secretary General, rejected the appellant’s administrative complaint as ill-founded. The grounds for rejection were that Article 6 of the Regulations on Appointments provided that, when a post was vacant, the Secretary General should decide whether the post in question

should be filled through recourse to the external recruitment procedure or thrown open to internal competition. The discretion thus granted to the Secretary General was exercised in the broadest possible manner, subject to compliance with lawfulness, and provided that his or her decision was not based on a manifest error of judgement or abuse of authority.

It was true that, in taking his decision, the Secretary General had to take into account the provisions of Article 12 of the Staff Regulations, according to which, “when vacancies are being filled, due allowance shall be made for the qualifications and experience of serving staff members”. However, that was one consideration among others, also set out in that article, which guided the Secretary General’s choice of procedure to follow, and not that of a given candidate. Furthermore, serving staff were able to take part in external recruitment competitions. Thus the requirements of Article 12 had been complied with, including the requirement to take account of the qualifications and experience of serving staff members.

In this case, the Secretary General opted for an external recruitment procedure, thereby acting on the recommendations of the Rapporteur Group of the Ministers’ Deputies on administrative and budgetary questions (GR-AB), which had considered the advisability of creating this post. The decision taken in this respect by the Secretary General was not challenged by the appellant. Even supposing that this decision could be considered separately from the rest of the procedure, the structure of the procedure would have required such complaints to be raised at the initial stage of the procedure to fill the post.

With more specific reference to the selection of the appropriate candidate at the end of the external recruitment procedure, the Staff Regulations merely specified that “recruitment should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity”. In the instant case, these provisions did not appear to have been disregarded by the Secretary General in the context of the disputed appointment.

## **B. Appeal No. 260/2000**

21. In the context of the restructuring and strengthening of the social cohesion sector, the Secretary General decided to fill a post of Principal Administrative Officer in Directorate General III – Social Cohesion. This post was opened to competition through an internal competition procedure open solely to permanent staff (Vacancy Notice No. 70/99, dated 26 October 1999).

22. The text of Vacancy Notice No. 70/99 included the following:

“Duties (Post No. 193):

Under the authority of the Executive Secretary of the European Committee for Social Cohesion (CDCS), the postholder will be entrusted with the following tasks:

- support the Executive Secretary in the day-to-day management of the team of officials responsible for the activities of the CDCS and replace him/her in his/her absence;
- implement selected major activities within the social cohesion strategy (which covers social protection, access to social rights and policies for families and children) and act as Secretary to the subordinate committees responsible for carrying them out;
- organise conferences and seminars, including conferences of specialised ministers;
- supervise the work of consultants;

- contribute to the implementation of ADACS activities and other co-operation programmes organised in the framework of the Specialised Unit for Social Cohesion;
- liaise directly with other Council of Europe departments involved in work related to social cohesion;
- represent the Executive Secretary at Council of Europe meetings and at meetings of other organisations on social cohesion questions;
- develop and maintain extensive contacts with national officials, other international bodies, NGOs and academic experts in the areas of work for which he/she is responsible.

Qualifications, professional experience, knowledge, skills and language proficiency:

- good university degree<sup>1</sup>;
- extensive experience in social affairs or related fields;
- extensive experience of acting as a committee secretary;
- very good knowledge of one of the two official languages (English/French) and good knowledge of the other; knowledge of other European languages desirable.

Other qualifications:

- initiative, organising ability and sense of responsibility;
- ability to establish and maintain contacts at all levels;
- aptitude for team work and ability to motivate a team;
- ability to draft clearly and concisely;
- ability to use computer facilities.”

23. The appellant applied for the post advertised in Vacancy Notice No. 70/99 within the time limit. Fifteen members of the permanent staff applied. When it met on 10 December 1999, the Transfers and Promotions Panel decided to recommend the appointment of Mrs A to the post concerned.

24. On 27 January 2000, the appellant was informed that his application had been examined in accordance with the procedure for which the Regulations on Appointments provided and that, in the light of the recommendation made by the Panel after carrying out a comparative assessment of the applications, the Secretary General had decided to appoint Mrs A.

25. On 3 February 2000, the appellant lodged an administrative complaint against this appointment, complaining, inter alia, that the Transfers and Promotions Panel had not, or not sufficiently, taken into account the fact that he had been placed on a reserve list for appointment to similar posts. He took the view that the post of principal administrative officer was similar to the post of Head of the Specialised Unit.

26. In a letter of 6 March 2000, the Director of Administration, acting on behalf of the Secretary General, informed the appellant that his administrative complaint had been rejected. He argued that the Staff Regulations, and the Regulations on Appointments in

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<sup>1</sup> In exceptional cases, this may be replaced by equivalent professional experience in respect of grade A3 staff members appointed after an internal competition under Article 23, para. 2 of the Regulations on Appointments.

particular, made a clear distinction between appointment to a post through recruitment and appointment to a post through promotion. Consequently, a candidate placed on a reserve list could not be appointed to a post except in the framework of an external recruitment procedure.

It had been decided to fill the A4 post of principal administrative officer through an internal competition procedure. The various applications for this post were assessed in accordance with the relevant provisions of the Regulations on Appointments.

In this context there was no reason to believe that due account was not taken – when the respective merits of the candidates were assessed – of the fact that the appellant had passed the tests in the specific competition to recruit a head for the Social Cohesion Unit.

At the end of the comparative assessment of the applications in line with the aforementioned criteria, the Secretary General had decided to appoint another candidate. There was nothing in the administrative complaint enabling it to be established that, in making this appointment, the Secretary General had made incorrect use of the broad discretion at his disposal in the matter of appointments.

## **THE LAW**

27. The appellant appealed against the decisions of the Secretary General rejecting the administrative complaints concerning:

- the decision to appoint Mrs F to the post of Head of Unit (grade A4) in the Social Cohesion Development Division, Directorate General III – Social Cohesion, opened to an external recruitment procedure through Vacancy Notice No. 50/99 (Appeal No. 259/2000) and
- the decision to appoint Mrs A to the post of principal administrative officer (grade A4) in the Social Cohesion Development Division, Directorate General III – Social Cohesion, opened to internal competition through Vacancy Notice No. 70/99 (Appeal No. 260/2000).

He requests the Tribunal to annul the decisions appealed against and to refund to him all the costs arising from the two appeals.

28. The Secretary General invites the Tribunal to rule the complaints made by the appellant in Appeal No. 259/2000 inadmissible as being out of time or, alternatively, to reject it, together with Appeal No. 260/2000, as ill-founded.

29. Given the close relationship between the appeals, the Tribunal decides to join them, in application of Rule 14 of its Rules of Procedure.

### **A. Appeal No. 259/2000**

#### *1. On the admissibility of the appeal*



30. The Secretary General takes the view that the appeal must be rejected as being out of time. He does not deny that the appeal as such meets the conditions laid down in Article 60, para. 3 of the Staff Regulations, but argues that the arguments put forward by the appellant are out of time. The Secretary General states that all the appellant's complaints relate to the Secretary General's decision to make use of the external recruitment procedure. In his opinion, the appellant could and should have raised the complaints as soon as the vacancy notice was published on 5 July 1999. Thus they could have been examined before the recruitment procedure culminated in the appointment of a third party. The structure of the procedure which would have resulted would have prevented a claim from being directed against an appointment made over six months previously, with all the negative consequences of this for the person concerned who had left her previous post and made arrangements to settle in Strasbourg with her family.

31. While the appellant admits that he *could* have challenged the Secretary General's decision to make use of the external recruitment procedure as soon as the vacancy notice was published on 5 July 1999, he disputes that he *should* have done so, if his challenge was not to be out of time. He notes that, in the present case, the said decision has to be described a "preliminary decision" leading to the decision to appoint Mrs F, and he alleges that, in these circumstances, it is open to him, in his appeal against this appointment, an appeal which meets the conditions laid down in Article 60, para. 3 of the Staff Regulations, to raise all the defects of the decision appealed against, including those affecting the preliminary decision.

32. The Tribunal takes the view that it is important, instead of determining the questions relating to the admissibility of the appeal raised by this inter-partes discussion, firstly to consider the merits of the appeal.

## 2. *On the merits of the appeal*

33. The appellant challenges the Secretary General's decision to appoint Mrs F to the post of Head of the Specialised Unit for monitoring, comparing and handling issues linked to social cohesion, on the grounds that it infringes the Staff Regulations and is contrary to the Council of Europe's administrative practice.

34. The appellant takes as his starting point the circumstance that Article 6, para. 1 of the Regulations on Appointments obliges the Secretary General, when he decides whether or not it is appropriate to use the external recruitment procedure, to take account of the provisions of Article 12 of the Staff Regulations.

The appellant then emphasises that it is clear from the reasons given in the memorandum from the Head of the Human Resources Department dated 18 May 1999 (see paragraph 15 above) that the Secretary General's decision to use the external recruitment procedure in this case was based solely on the consideration that no member of the organisation's permanent staff had the skills required in the vacancy notice, so that the other considerations set out in Article 12, para. 2 of the Staff Regulations did not come into play.

The appellant asserts that these reasons are in line with the rule implied in the first part of the first sentence of that paragraph, according to which the Secretary General may decide to make use of an external recruitment procedure only if he is certain that no serving member of staff has the profile for the post which has become vacant, and also with administrative practice, which is that the Secretary General, if he is not certain of this, first

satisfies himself through an internal competition that no serving member of staff does have the said profile. In order to demonstrate the existence of this administrative practice, the appellant adduces information about recruitment procedures relating to posts in grades A4 and LT4 between 1988 and 1999.

35. Against this background, the appellant alleges that, in the instant case, the Secretary General broke these rules both by manifest error and by his obstinate refusal to provide redress.

36. The reason given in the memorandum from the Head of the Human Resources Department dated 18 May 1999 necessarily implies that the Secretary General decided to make use of the external recruitment procedure because, even without a prior internal competition, he was certain that the applicant did not have the skills required by the vacancy notice. In this respect, he committed a manifest error. In practice, not only was the appellant's application deemed admissible, a fact which, in accordance with Article 8, para. 1 of the Regulations on Appointments, indicates that the candidate met the requirements set out in the vacancy notice, but the appellant also passed both the written and the oral tests and was placed on a reserve list.

37. The Secretary General subsequently had opportunities to remedy his manifest error of judgement. The first opportunity arose for him when he became aware that the appellant's application had been declared admissible: at that time, the Secretary General could and should have realised his mistake and therefore cancelled, with immediate effect, the external recruitment procedure which was already under way. He had a second opportunity when he received from Recruitment Panel a list naming two persons who were "perfectly suitable" to perform the duties of Head of the Specialised Unit: at that time he could and should have done exactly the opposite of what he did, namely appointed the appellant to this post and placed Mrs F on a reserve list. The obligation to give preference to internal applicants who are fully qualified stemmed both from the rule implied in the first part of the first sentence of the second paragraph of Article 12 of the Staff Regulations and from the aforementioned administrative practice.

38. The Secretary General takes the view that the decision to make use of the external recruitment procedure was taken in accordance with Article 6, para. 1 of the Regulations on Appointments. This provision gave him discretionary power. In exercising his discretionary power, the Secretary General had to take account of the provisions of Article 12 of the Staff Regulations, which provided *inter alia* that "when vacancies are being filled, due allowance shall be made for the qualifications and experience of serving staff members". In his opinion, however, this was one among several considerations, also set out in this provision, such as the desirability of bringing in fresh talent and the need for posts to be distributed fairly among nationals of the member states.

39. In the Secretary General's view, the procedure for which the Staff Regulations provided in respect of recruitment was properly followed.

He states that he opted for the external recruitment procedure after having taken due account of all the relevant facts and of the interests at issue. The creation of the social cohesion sector, as decided by the Second Summit of Heads of State and Government in 1997, represented a far-reaching innovation in the organisation's social policy. Whereas previously several steering committees had shared the various aspects of social policy, the

new European Committee for Social Cohesion now bore responsibility for the whole field of activity. The Specialised Unit for monitoring, comparing and handling issues linked to social cohesion was a new and quite particular unit which went beyond the organisation's usual framework. Its main function was to contribute to the discussions of the European Committee for Social Cohesion through its field research and analysis activities, covering inter alia pilot projects at local level. The unit was required to operate as the said committee's think tank. There were virtually no other units with a comparable task at the Council of Europe.

The Secretary General therefore based his decision on the premise that the future head of the unit needed to have wide-ranging professional experience of research into, and analysis of, the problems related to social exclusion. He denies having committed an error of judgement when he took the view that such experience was acquired in the field through participation in the preparation of local projects and evaluation of their impact. The decision to use the external recruitment procedure was justified by the specialised profile of the post in question. Consequently, his decision took into account the vital facts and did not involve abuse of authority.

40. The Secretary General challenges the interpretation of Article 12, para. 2 of the Staff Regulations given by the appellant, which he regards as incompatible with the texts of Article 6 of the Regulations on Appointments and Article 12 of the Staff Regulations. Such an interpretation would in fact culminate in the giving of a right of absolute priority to serving members of staff, doing away with the discretion available to the Secretary General in pursuance of Article 6 of the Regulations on Appointments.

41. As for the alleged breach of administrative practice claimed by the appellant, the Secretary General argues that, before carrying out an external recruitment procedure, he satisfied himself, frequently through the holding of an internal competition, that no serving member of staff had the profile for the post which had become vacant. He relied on a list containing all vacancy notices at grades A4 and LT4 displayed between 1988 and 1999. This list showed that the A4 posts with a specialised profile were regularly the subject of an external recruitment procedure. It also showed that it was quite exceptional for an external vacancy notice to be preceded by an internal one: there had been only two cases in the past 12 years.

Administrative practice confirms that the Secretary General is entitled to opt for the external recruitment procedure if the profile of the post to be filled does not, at first sight, correspond to the profiles of serving staff members. In such situations, only an external recruitment procedure enables him to have a wide choice of candidates likely to ensure that the staff taken on are of the highest ability, efficiency and integrity (Article 12, para. 1 of the Staff Regulations). The choice of such a procedure does not constitute discrimination of any kind against serving staff members, who always have the option of taking part in external recruitment procedures on an equal footing.

42. The Secretary General concludes from this that his decision to conduct an external recruitment procedure for the post which was the subject of Vacancy Notice No. 50/99 was taken in strict compliance with the Staff Regulations and with the Regulations on Appointments and did not involve any abuse of authority.

43. The Staff Committee, which was authorised by the Chair to file written pleadings (para. 7 above), considers that compliance with the practice of filling vacant A4 posts through

the internal competition procedure corresponds to the general interests of the staff, interests which the committee is responsible under the Staff Regulations for representing.

The committee takes the view that this practice is not an unqualified one. Any exceptions must be in accordance with those for which Article 12, para. 2 of the Staff Regulations explicitly provides. While, in the present case, the Administration justified the exception to the rule by citing the circumstance that none of the serving staff had the qualifications required for the A4 post which was to be filled, it could not subsequently change its reasoning. It should have realised its manifest error concerning the appellant's qualifications when he was recommended by the Recruitment Panel and should have redressed this.

44. The Administrative Tribunal accepts the starting point adopted by both the appellant (paragraph 35 above) and the Secretary General (paragraph 38 above), namely that Article 6, para. 1 of the Regulations on Appointments obliges the Secretary General, when he decides whether or not it is appropriate to use the external recruitment procedure, to take account of the provisions of Article 12 of the Staff Regulations.

45. The Tribunal also shares the appellant's opinion (paragraph 35 above) that it is clear from the reasons given in the memorandum from the Head of the Human Resources Department dated 18 May 1999 (paragraph 15 above) that the Secretary General's decision to use the external recruitment procedure in the instant case was based on the consideration that none of the organisation's permanent staff had the skills required in the vacancy notice, so that the other considerations set out in Article 12, para. 2 of the Staff Regulations were not apparently, at this stage, taken into account.

46. On the other hand, the Tribunal cannot accept the appellant's argument (paragraph 34 above) that the first part of the first sentence of Article 12, para. 2 of the Staff Regulations implies that the Secretary General may decide to make use of an external recruitment procedure only if he is certain that no serving member of staff has the profile for the post which has become vacant. Nor has the appellant – upon whom the burden of proof fell – demonstrated the existence of administrative practice obliging the Secretary General, if he is not certain of this, first to satisfy himself through an internal competition that no serving member of staff does have the said profile.

47. The Tribunal takes the view that the appellant's argument, for which there is no support in the text of Article 6 of the Regulations on Appointments or in that of Article 12 of the Staff Regulations, attaches too much importance to the interests of serving staff. In this context, the Tribunal points out that Article 12 of the Staff Regulations, setting out the basic principles for recruitment policy, emphasises, by mentioning it first, the principle that any recruitment must fulfil one fundamental condition, namely that it "should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity". This is why, in the Tribunal's opinion, although the second paragraph of this article states that, when vacancies are being filled, "due allowance shall be made for the qualifications and experience of serving staff members", the conclusion cannot be drawn from this that the Secretary General is obliged to decide to use an external recruitment procedure only if he is certain that no serving staff member has the profile for the post which has become vacant. The right of serving staff to a reasonable chance of obtaining other posts in the organisation is sufficiently taken into account if it is accepted that, at the time when the Secretary General has to choose between an external recruitment procedure and an internal competition, he is free to opt for

the former if it is possible for him to believe, in good faith, on the basis of a provisional assessment of the relevant evidence, that no serving staff member has the profile for the post which has become vacant, and if serving staff members will be entitled to participate.

48. Consequently, nor could the Tribunal accept the appellant's argument (see paragraph 34 above) that if, at the end of an external recruitment procedure, a serving staff member who had participated in the procedure seemed to have the profile for the post which was to be filled, the Secretary General is always obliged to give preference to him or her.

49. The Tribunal takes the view that it was possible for the Secretary General, in the light of the specific nature of the duties attaching to the post to be filled, to believe, in good faith, on the basis of a provisional assessment of the relevant evidence, that no serving staff member had the profile for the post concerned. In this context, it should be remembered that the Rapporteur Group on Social and Health Questions (GR-SOC) was clearly of the same opinion (see paragraph 14 above). The same applies to the Staff Committee, which, in the letter of 28 April 1999 from its Chair (see paragraph 15 above), had – in vain – requested that the profile for the post be altered, apparently because it took the view that no serving staff member had the profile concerned.

The Tribunal further notes that, in his exchanges with the Staff Committee, the Secretary General confirmed that his decision in the instant case was not to be interpreted as a sign of a new policy under which this kind of procedure for filling jobs of such a grade would be in general use (see paragraph 14 above).

50. It follows from the considerations above that there is no need to deal with the appellant's arguments about a manifest error by the Secretary General (paragraphs 36 and 37 above). Not only do these disregard the fact that such conclusions could not be drawn from subsequent acts, but they are also based on an erroneous interpretation of Article 12 of the Staff Regulations.

51. Hence the appellant's appeal is ill-founded.

52. In the light of this conclusion, it is unnecessary for the Tribunal to rule on the question of admissibility raised by the Secretary General's preliminary objection, for the appeal has to be rejected in any case (see paragraph 51).

## **B. Appeal No. 260/2000**

53. In respect of the decision to appoint Mrs A to the post of principal administrative officer (grade A4) in the Social Cohesion Development Division, Directorate General III – Social Cohesion, advertised in Vacancy Notice No. 70/99, the appellant alleges a violation of Article 15, para. 3 of the Regulations on Appointments. Following his placement on the reserve list in the context of the procedure for filling the post of Head of the Specialised Unit, advertised in Vacancy Notice No. 50/99 (see paragraph 16 above), he should have been appointed to the post advertised in Vacancy Notice No. 70/99.

54. He takes the view that, according to the text of the regulations, the Secretary General's obligation to appoint an appropriate candidate whose name appears on the reserve list does not cease to exist when he opts for an internal competition procedure, but continues until such time as the post has been filled. In the appellant's view, maintaining

impermeability between the internal competition procedure and the external recruitment procedure would amount to a flagrant injustice.

55. Relying on the case law of the Tribunal (No. 251/1999, decision in the case of *Baechel v Secretary General* of 22 October 1999), he argues that a comparison between the post of Head of Specialised Unit and the post of principal administrative officer, based on their respective descriptions, shows that the two posts are strictly similar.

56. Subordinately, the appellant requests that the Tribunal check whether the Transfers and Promotions Panel satisfactorily met its obligation under the first subparagraph of Article 14, para. 4 of the Regulations on Appointments. The members of the panel individually and the panel as a whole should have attached appropriate importance to the circumstance that he had passed the tests in the competition for the post of Head of the Specialised Unit.

57. The Secretary General believes that Article 15, para. 3 of the Regulations on Appointments is not applicable to this case. This provision applies only to competitions on the basis of tests organised as part of an external recruitment procedure. The present appeal could not therefore be compared with the aforementioned *Baechel* case, in which the Tribunal had to consider two external competitions which had been organised for two posts which it held to be similar.

58. Furthermore, the Secretary General disputes the similar nature of the two posts concerned.

59. As for the appellant's subsidiary argument, the Secretary General emphasises that the Transfers and Promotions Panel did examine all the applications impartially.

60. The Tribunal points out that it appears from Articles 5 and 6 of the Regulations on Appointments that, leaving aside transfers, there are in principle only two procedures for filling a vacant post: the external recruitment procedure and internal competition.

Competitive examinations, which are the subject of Article 15 of the Regulations on Appointments, may be an integral part of either procedure. Article 15, para. 3 more specifically concerns competitive examinations *conducted as part of the external recruitment procedure*. It stipulates when a "reserve list" has to be drawn up, restricts the period of validity of such lists and defines their consequences: in the event of a vacancy relating to a similar post during the period of validity of such a list, a candidate whose name appears on this list is entitled to expect to be appointed to the post concerned (see No. 251/1999, *Baechel v Secretary General*).

However, this preferential right is not an unconditional one. The text of the article specifies that it is to be used only "in the event of a vacancy not being filled by way of internal competition". The context of these words very clearly indicates that they are intended to restrict the said preferential right to those cases in which it would otherwise have been necessary to make use of an external recruitment procedure to fill the similar post concerned. In addition to this text-based argument there is a consideration relating to the system. There is no provision of the Staff Regulations or other regulation which provides for the possibility of such a preferential right in the context of an internal competition. Legal certainty requires such a provision, a formal and clear one, to justify the favouring of a candidate whose name appears on a reserve list, in accordance with the first sentence of Article 15, para. 3 of the

Regulations on Appointments, to the detriment of other serving staff who could have participated in an internal competition.

In short, the said preferential right does not apply in cases where there is reason to hold an internal competition to fill the similar post concerned.

61. The Tribunal concludes from this that the fact that the Secretary General opened the post of principal administrative officer in the Social Cohesion Development Division, Directorate General III – Social Cohesion, to internal competition among serving staff does not constitute a breach of Article 15, para. 3 of the Regulations on Appointments to the detriment of the appellant.

62. As for the appellant's second argument, raised as a subsidiary matter, the Tribunal notes that the appellant expresses doubts as to the appraisal of the merits of all the candidates by the Transfers and Promotions Panel. He refers to the fact that he had passed the competitive examination held as part of the external recruitment procedure for the post of Head of the Specialised Unit.

63. The Tribunal carried out an examination of all the evidence in the case. It inspected inter alia the record of the panel meeting of 21 December 1999, which it examined in the absence of the parties but with the appellant's consent, on account of the confidential nature of this document.

This document reveals that the panel conducted an in-depth examination of the respective qualifications and experience of the candidates in the light of the requirements of the post to be filled. In this context it paid attention to the fact that the appellant's name appeared on the said reserve list.

At the end of its comparative assessment of the applications, the panel recommended, in the first instance, the appointment of Mrs A.

64. On the basis of all the evidence at its disposal, the Tribunal takes the view that the panel's recommendation was based on objective evidence, and the file reveals no infringement of Article 15, paras. 4 and 5 of the Regulations on Appointments.

65. Thus the Tribunal could not find fault with the Secretary General's decision to appoint Mrs A to the post concerned, on the basis of this recommendation.

66. In conclusion, the Tribunal cannot find any illegality.

For these reasons, the Administrative Tribunal:

Decides to join Appeals Nos. 259/2000 and 260/2000;

Declares Appeal No. 259/2000 unfounded;

States that it is therefore unnecessary to issue a ruling on the preliminary objection relating to Appeal No. 259/2000;

Declares Appeal No. 260/2000 unfounded;

Rejects the appeals; and

Decides that each party shall bear its own costs.

Delivered in Strasbourg on 9 March 2001, the French text of the decision being authentic.

The Registrar of the  
Administrative Tribunal

The Deputy Chair of the  
Administrative Tribunal

S. SANSOTTA

K.HERNDL