CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 540/2013 (Staff Committee (XIV) 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 Staff Committee of the Council of Europe lodged its appeal on 12 July 2013. The appeal was registered the same day under No. 540/2013.

2. On 11 September 2013, the appellant submitted a supplementary memorial.

3. On 31 October 2013, the Secretary General forwarded his observations on the appeal.

4. On 25 November 2013, the appellant filed a memorial in reply.

5. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 30 January 2014. The appellant was represented by Mr Giovanni Palmieri, assisted by Mr Giovanni Celiento, Chair of the Staff Committee. The Secretary General was represented by Ms Christina Olsen, from the Legal Advice Department in the Directorate of Legal Advice, assisted by Ms Maija Junker-Schreckenberg and Ms Sania Ivedi, from the same department.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. In a decision of 6 December 2012, the Administrative Tribunal of the Council of Europe annulled the Secretary General's decision to publish vacancy notice No. e86/2012 for the recruitment (grade A6) of a Director of Programme, Finance and Linguistic Services (ATCE, Appeals No. 530/2012 – Prinz (II) and No. 531/2012 – Zardi (II)). Consequently, the appointment of the candidate recruited as a result of that procedure was also annulled. That decision had been preceded by another cancelling a first appointment of the candidate to the same post (ATCE, Appeals No. 474/2011 – Prinz and No. 475/2011 – Zardi, decision of 8 December 2011).

7. In the light of that decision, on 6 May 2013 the Secretary General adopted *ad personam* decision No. 6186 assigning the candidate whose appointment had been cancelled, as of 1 January 2013, to an A5 post (which had been the candidate's grade prior to the disputed appointment) and stipulating that, in order to avoid the person suffering prejudice as a result of the Administrative Tribunal's cancellation of his appointment to the A6 post of Director of Programme, Finances and Linguistic Services, he would receive a salary corresponding to step 7 of grade A5 as from 1 January 2013 and to step 8 of grade A5, as from 1 April 2013. The following reasons were given for that decision: "*In order to ensure that Mr ... does not suffer prejudice due to the decision of the Administrative Tribunal, he will receive step 7 of grade A5 as from 1 January 2013 and step 8 of grade A5 on 1 April 2013*".

8. On 3 June 2013, the appellant submitted an administrative complaint to the Secretary General under Article 59, paragraph 2 of the Staff Regulations, claiming in particular that the decision complained of had infringed its "powers under the Regulations".

9. On 14 June 2013, the Secretary General rejected that administrative complaint, arguing that:

> "It must be stated at the outset that your complaint is inadmissible within the terms of Article 59 of the Staff Regulations, since it is not related either to an act of which you are subject or an act directly affecting your powers. You provide no proof of any direct interest in bringing legal proceedings against an *ad personam* decision concerning the personal administrative situation of a member of staff.
>
> Although your complaint is in any event inadmissible, please find below some indications in reply regarding the merits.
>
> As a reminder, Article 6, paragraph 1, of the Regulation on staff participation states: *The Secretary General and the Staff Committee shall consult each other on any draft that either intends to submit to the Committee of Ministers on matters which come within the competence of the*

Committee of Ministers under Article 16 of the Statute of the Council of Europe and which relate to:
- alteration or amendment of the Staff Regulations,
- alteration, amendment or adoption of other regulations concerning the staff."

However, the aim of the decision you contest is not to alter or amend the Staff Regulations or to alter, amend or adopt other regulations concerning the staff. There was therefore no reason to submit a draft amendment to the Committee of Ministers, let alone to consult the Staff Committee.

The decision in question was taken on the basis of the general principle that a person whose promotion to a post has been cancelled as the result of a decision must be safeguarded from any prejudice. That decision was taken in strict compliance with the regulations as well with the practice applied in similar cases in the past.

Quite clearly, therefore, there has been no violation of any rules, regulations, general principles of law or of legal practice, or any error of form or procedure.

Consequently, your administrative complaint must be considered inadmissible and/or ill-founded, and be dismissed. (…)"

II. APPLICABLE LAW

10. Article 59, paragraphs 2 and 8 of the Staff Regulations defining the conditions for lodging an administrative complaint – and hence for an appeal before the Administrative Tribunal – state:

"2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression "administrative act" shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.

(…)

8. The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*:
(…)

c. to the Staff Committee, where the complaint relates to an act of which it is subject or to an act directly affecting its powers under the Staff Regulations;

(…)"

11. Article 5, paragraph 3 of the Regulation on staff participation (Appendix I to the Staff Regulations), entitled "Matters within the competence of the Secretary General", states:

> "The Secretary General shall consult the Staff Committee on any draft provision for the implementation of the Staff Regulations. He or she may consult it on any other measure of a general kind concerning the staff."

12. Article 6, paragraph 1 of the same Regulation, entitled "Regulations within the competence of the Committee of Ministers" reads as follows:

> "The Secretary General and the Staff Committee shall consult each other on any draft that either intends to submit to the Committee of Ministers on matters which come within the competence of the Committee of Ministers under Article 16 of the Statute of the Council of Europe and which relate to:
>
> - alteration or amendment of the Staff Regulations,
> - alteration, amendment or adoption of other regulations concerning the staff."

13. Article 7, paragraphs 1 and 2 of that Regulation, entitled "Relations with the Committee of Ministers", states:

> "1. The Staff Committee may communicate to the Committee of Ministers any proposal on the matters referred to in Article 6, paragraph 1.
>
> 2. The Committee of Ministers may consult the Staff Committee in the most appropriate manner in any proceedings relating to the matters referred to in Article 6, paragraph 1."

14. Article 3 of the Regulation governing staff salaries and allowances (Appendix IV to the Staff Regulations), concerning advancement by steps, reads as follows:

> "1. Each staff member, confirmed in employment, shall advance up the scale for his or her grade by the steps shown.
>
> 2. Such advancement shall be continuous, from one step to the next, starting on the first day of the first quarter.
>
> 3. For category A staff, advancement to steps 2 to 5 (grades A7 and A6) and 2 to 7 (grades A5, A4, A3 and A2) shall take place after twenty-four months of service in the step immediately below and advancement to steps 6 (grade A7), 6 to 8 (grade A6) and 8 to 11 (grades A5, A4, A3 and A2) after forty-eight months of service in the step immediately below.

4. For category L staff, advancement to the next step shall take place after thirty-six months of service in the step immediately below.

5. For staff in categories B and C, advancement to steps 2 to 8 shall take place after twenty-four months of service in the step immediately below, and to steps 9 to 11 after forty-eight months' service.

6. For the advancements under this Article, only those years of service in which the staff member's appraisal certifies that s/he at least fully satisfied the requirements of his/her post or position shall be taken into account."

THE LAW

15. The appellant lodged this appeal in order to obtain the annulment of the Secretary General's *ad personam* decision No. 6186 of 6 May 2013.

16. The Secretary General asks the Tribunal to declare the appeal totally or partially inadmissible and/or ill-founded, and to dismiss it.

I. SUBMISSIONS OF THE PARTIES

17. The submissions of the parties may be summarised as follows.

A. The appellant

18. The appellant, with reference to Article 59, paragraph 8 of the Staff Regulations, claims the right to contest "an act of which it is subject" or "an act directly affecting its powers under the Staff Regulations". It contends that it is not a matter of knowing the nature or title of the disputed act but rather of determining whether or not that act directly affects the Staff Committee's powers. In fact, the answer to that question is a matter of substance and not of admissibility. The appellant therefore maintains that its appeal is admissible.

19. On the merits, the appellant claims that there is no statutory rule allowing the Secretary General to depart from the application of *erga omnes* provisions for the benefit of an individual member of staff. If the Secretary General deemed on duly substantiated grounds that a category of staff members was entitled to different treatment, he should have submitted to the Committee of Ministers a draft amendment to Appendix IV to the Staff Regulations. The Staff Committee would then automatically have been consulted under Article 5, paragraph 3 of Appendix I to the Staff Regulations. However, the Secretary General decided to make an exception for an individual staff member by means of an *ad personam* decision. The appellant stresses that the purpose of *ad personam* decisions is to apply a general provision to an individual member of staff and not to derogate from a general provision for the benefit of a member of staff.

20. Regarding the argument put forward by the Secretary General in his rejection of the administrative complaint, that his decision had been taken "in strict compliance with the regulations as well with the practice applied in similar cases in the past", the appellant maintains that this rejection explicitly violates Article 3 of Appendix IV to the Staff Regulations. Moreover the appellant is not aware of the existence of the practice that the Secretary General refers to.

21. The appellant notes, finally, that the Secretary General derogated from the regulations without requesting authorisation from the Committee of Ministers. It therefore asks the Administrative Tribunal to annul the decision complained of, on the grounds that it affects the Staff Committee's rights and powers under the Staff Regulations.

B. The Secretary General

22. The Secretary General states at the outset that the present appeal does not relate to an act of which the appellant is subject, and that it is therefore inadmissible. Neither does it relate to an act that directly affects the appellant's powers under the Staff Regulations. Indeed it relates to a measure that is individual in scope and directed at the candidate whose appointment had been challenged. The decision was taken in execution of a decision by the Tribunal and was designed to address the personal administrative situation of that staff member, who was not a party to the contentious procedure in question and who had been directly affected by the above-mentioned annulment decision. The aim was to execute the Tribunal's decision while at the same time safeguarding the candidate whose appointment had been cancelled from any prejudice caused by the cancellation of his appointment to a higher-grade post, an appointment that he had accepted in good faith.

23. In this regard the Secretary General refers to the Tribunal's decision on Appeal No. 305/2002 (Staff Committee VII v. Secretary General, 16 May 2003) concerning the annulment of a decision of the Secretary General, also described as *ad personam*, aimed at allowing a permanent member of staff having reached the age of 65 to continue being employed beyond the 65-year age limit as a temporary member of staff. The Staff Committee argued, in particular, that the Secretary General had violated Article 24 of the Staff Regulations, whereby "A staff member shall retire on reaching the age of 65 years."

24. The Secretary General notes that it follows from a teleological interpretation of Articles 5 and 6 of the Regulations on staff participation (paragraphs 11 and 12 above) that the obligation to consult the Staff Committee is limited to acts that are general in scope, whereas the decision complained of by the appellant is of a purely individual nature and the appellant has no direct interest in bringing proceedings. Consequently, the Secretary General deems the appeal to be inadmissible.

25. On the merits, the Secretary General argues that the disputed decision constitutes an individual measure for the execution of an annulment decision delivered by the Tribunal

against a third party not involved in the contentious procedure in question. In fact the measure was adopted in order to maintain the salary of the candidate whose appointment had been cancelled at the level to which he would have been entitled had his appointment not been challenged. It was adopted in derogation of Article 3 of the Regulations governing staff salaries and allowances, concerning advancement by steps (paragraph 14 above), but in compliance with the Organisation's obligations towards the candidate whose appointment had been cancelled, in application of the general principles of law governing the relations between an international organisation and a staff member who has suffered prejudice as the result of an irregularity committed by the Administration and established by the Tribunal.

26. In conclusion, the Secretary General considers *ad personam* decision No. 6186 to be legal, well-founded and substantiated, free of error, either *de facto* or *de jure*, and in keeping with his discretionary powers. Consequently he considers this appeal to be ill-founded.

II. THE TRIBUNAL'S ASSESSMENT

27. The Tribunal is of the opinion that the Secretary General's objection of inadmissibility is closely related to the merits of the case. It therefore finds it appropriate to join it to the merits.

28. The Tribunal notes to begin with the Secretary General's assertion that the present dispute concerns the lawfulness of the decision (*ad personam* decision No. 6186) delivered by the Secretary General in derogation of Article 3 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations).

29. The Tribunal observes that the first question needing answering is whether that decision constitutes an act of which the appellant was the subject or which directly affected its powers under the Staff Regulations within the terms of Article 59, paragraph 8 of those Regulations (see paragraph 10 above) and, consequently, if the appellant has a direct interest in bringing proceedings in this specific instance.

30. While the appellant maintains that the decision directly affects the powers of the Staff Committee, the Secretary General argues that this measure is individual in scope and directed at a specific member of staff. The Tribunal, like the Secretary General, takes the view that this decision is not an act of which the Staff Committee is subject. However, although the decision affects only one person, it also derogates from the provisions of the Staff Regulations and consequently concerns the Staff Committee by virtue of Article 5, paragraph 3 of the Regulations on staff participation (Appendix I to the Staff Regulations).

31. The Tribunal recalls that it has already had occasion to address the issue of the Staff Committee's interest in bringing proceedings in regard to an *ad personam* decision. At the time, the dispute – recalled by the Secretary General in his memorial – related to the granting of a temporary contract to a member of staff who had passed the 65-year age limit to enable her to continue working for the Organisation (ATCE, Appeal No. 305/2002 – Staff

Committee (VII) v. Secretary General, decision of 16 May 2003). At the time the Tribunal, before declaring the appeal inadmissible, gave the following reasons for its decision:

> "35. In the Tribunal's view the appointment of one person as a temporary staff member, in a departure from the rules in force, cannot in itself be regarded as distorting the functioning of the staff representative bodies in such a manner as to affect the Staff Committee's constitution or work. Further, the Staff Committee is a body quite distinct from the General Meeting of Staff, even though it derives its legitimacy from the General Meeting.
>
> Consequently it must be concluded that the Staff Committee has no direct interest, for purposes of Article 59 of the Staff Regulations, in challenging the disputed decision through the complaints machinery."

32. The Tribunal is of the opinion that there are two differences between the present case and the one that gave rise to above-mentioned Appeal No. 305/2002. These differences lead the Tribunal to the conclusion in the instant case that there is an anomaly in the functioning of the staff bodies that has consequences for the Staff Committee's constitution or work (*ibid*, paragraph 35).

33. First of all, in Appeal No. 305/2002, it was a matter of an *ad personam* amendment made in accordance with the procedure for amending the text in question (*ibid*, paragraph 27), i.e. an amendment of the Secretary General's decision No. 821 in consultation with the appellant (*ibid*, paragraphs 5 and 7). However, the Tribunal notes that in this instance there was no consultation.

34. Secondly, that amendment – which by nature is equivalent to the derogation at issue in the present appeal – was to a text issued by the Secretary General himself, while in this instance, the relevant text – Appendix IV to the Staff Regulations – was approved by the Committee of Ministers of the Council of Europe. The Committee of Ministers is one of the Council of Europe's two organs (the other being the Parliamentary Assembly), while the Secretary General is the head of the Secretariat, which has the task of serving the two above-mentioned organs (Article 10 of the Council of Europe Statute). It would therefore have been all the more necessary to consult the Staff Committee.

35. In view of these differences it has to be recognised that, although the disputed decision in this instance constitutes, *stricto sensu*, an *ad personam* decision, the impact of that decision justifies the conclusion that this was an act that directly affected the powers of the Staff Committee under the Staff Regulations, since, as explicitly acknowledged by the Secretary General, it derogated from the statutory texts. The fact is that those texts may be amended only after consultation by the Secretary General.

36. In any case, in the absence of any delegation by the Committee of Ministers to the Secretary General, it is clear – although the appellant does not argue this point, but on the contrary seems to accept the idea that the Secretary General could effect that derogation without the authorisation of the Committee of Ministers, provided he consulted the appellant

– that in accordance with the principle of the hierarchy of sources of law, the Secretary General could not depart from norms derived from a source of law hierarchically superior to his own.

37. The Secretary General having argued that he had acted in execution of the Tribunal's decision of 6 December 2012 on Appeals No. 530 and 531/2012 - Prinz (II) and Zardi (II), the Tribunal must point out that the Secretary General did not give it any indication concerning the disputed decision in the information which Article 60, paragraph 6 of the Staff Regulations requires him to provide. Moreover, Appeals Nos. 530 and 531/2012 related solely to the contested promotion and did not concern the administrative situation of the person whose promotion the appellants had requested be annulled. That being the case, he needed only to be returned to his original grade in compliance with the statutory rules, including the Regulation on advancement by steps.

38. Finally, the Tribunal also observes that even if in the past the Secretary General had engaged, in the same disputed fashion as complained of in this instance, in the attribution of steps to staff members returning to their original grade after the cancellation of a promotion, the fact remains that this procedure has not been not contested before the Tribunal which has not had the occasion to rule on its lawfulness.

39. That being the case, these elements pertaining to the execution of the decision of 6 December 2012 and to the method that was applied for that purpose cannot be used to justify the legality of the disputed measure.

40. The Tribunal acknowledges that the candidate appointed at the end of the contested recruitment procedure (see paragraph 6 above) could have suffered certain prejudice due to the cancellation of his appointment and that the Secretary General, deeming it appropriate to remedy that prejudice, therefore decided, via an *ad personam* decision, to give the candidate a salary corresponding to step 7 of grade A5 as from 1 January 2013 and to step 8 of grade A5 as from 1 April 2013 (see paragraph 7 above).

41. It is true that the Secretary General was pursuing a legitimate aim in wishing to remedy the pecuniary and/or non-pecuniary damage suffered by the candidate whose appointment had been cancelled and that the procedure applied was the simplest in order to rapidly achieve that aim. However, contrary to what is claimed by the Secretary General with reference to the case law of the Administrative Tribunal of the International Labour Organisation, the Tribunal considers that there is no general principle of law by virtue of which a candidate whose appointment is cancelled must be safeguarded from "any prejudice" that might result from that cancellation. If that were not the case, the Tribunal would find it hard to understand how a disputed appointment could be cancelled rather than ordering that compensation be paid to the person contesting it. Whatever the case may be, a staff member can only be safeguarded from prejudice by legal means. The Tribunal recalls, in that regard, that a decision of an administrative nature delivered by an authority of the Organisation, including the Secretary General, is a declaration that has external legal effects for an individual case. It also recalls that "the Council of Europe, by its very nature and the values it defends, has a duty to be an organisation upholding the rule

of law, that is to say, it must fully honour staff rights in the context of legal relations between the administration and staff" (see Recommendation 1488 (2000) on the nature and scope of the contractually acquired rights of Council of Europe staff, Article 4). Yet in his *ad personam* decision No. 6186, the Secretary General gives no indication of the method of calculation he used to determine the salary in question as from the dates of 1 January 2013 and 1 April 2013 respectively. Furthermore, insufficient grounds are given for that decision, which refers solely to avoiding any prejudice to the staff member whose appointment had been cancelled (see paragraph 7 above). That person could, moreover, have availed himself of the means of recourse that the Organisation makes available to staff members in order to remedy circumstances causing them prejudice.

42. In the light of those observations, the Tribunal considers that in this instance it was the Secretary General's duty to proceed in a clear and transparent manner, so as to ensure full compliance with the above-mentioned principles and avoid any unclearness regarding the procedure applied. This is all the more true in view of the fact that he was aware that his action constituted a departure from the provisions of the Staff Regulations.

43. The Tribunal therefore concludes that *ad personam* decision No. 6186 adopted by the Secretary General must be construed as a *de facto* amendment to the Staff Regulations. The Secretary General could have chosen, after consulting the Staff Committee, to propose an amendment to the text of Article 3 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations), and the Committee of Ministers would then quite naturally have had the possibility of adopting the proposed amendment. He could also have asked that Committee for an *ad hoc* derogation.

44. However, the Secretary General followed the procedure that has given rise to the present dispute. Article 6 of the Regulation on staff participation (Appendix I to the Staff Regulations) is couched in sufficiently broad terms to require its application to the contentious procedure, inasmuch as a departure from that text constitutes an alteration or amendment to it (ATCE, Appeal No. 215/1996 – Staff Committee (II) v. Secretary General, decision of 2 July 1996, paragraph 40).

45. Hence, the procedure adopted was unlawful.

46. The Tribunal adds that the appellant states that it does not question the competence of the candidate whose appointment was cancelled but has raised a question of principle in the general interest.

47. The Tribunal recalls that it has already ruled that the appellant, as a statutory body of the Council of Europe, enjoys "powers" – mentioned in Article 59, paragraph 6 c) of the Staff Regulations – that in fact are to be construed as genuine rights, possible non-observance of which may be the subject of an appeal by the Staff Committee (see ATCE, decision No. 160/1990, Staff Committee v. Secretary General, of 27 September 1990, paragraph 46; and decision No. 215/1996; Staff Committee v. Secretary General, of 2 July 1996, paragraph 41). Furthermore, the "exceptional" nature of the derogation does not rule out the possibility that the same situation could arise in the future.

48. Therefore, the observed irregularity cannot be considered as a purely technical irregularity: owing to non-compliance with the statutory texts the Staff Committee has suffered real prejudice that it is necessary to remedy. In particular, the lack of consultation of the Staff Committee about the procedure adopted deprived it of exercising the power guaranteed to it under paragraph 1 of Article 7 of the Regulation on staff participation.

49. Consequently, the Tribunal dismisses the objection of inadmissibility raised by the Secretary General, declares the appeal to be founded and orders the annulment of the contested decision in the part complained of before the Tribunal.

III. CONCLUSION

50. The appeal is founded and the disputed decision must be annulled in the part complained of before the Tribunal.

For these reasons the Administrative Tribunal:

Dismisses the objection of inadmissibility raised by the Secretary General;

Declares the appeal to be founded;

Annuls the decision of 6 May 2013 in the part complained of before the Tribunal.

Adopted by the Tribunal in Strasbourg on 13 March 2014 and delivered in writing on 14 March 2014 pursuant to Rule 35, paragraph 1 of the Tribunal's Rules of Procedure, the French text being authentic.

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