

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 352/2005 (Staff Committee of the Council of Europe Development Bank (III) v. Governor of the Council of Europe Development Bank)

The Administrative Tribunal, composed of:

Mr Kurt HERNDL, Chair,
Mr José da CRUZ RODRIGUES,
Mr Angelo CLARIZIA, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Marialena TSIRLI, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The Staff Committee of the Council of Europe Development Bank lodged its appeal on 16 August 2005. It was registered on 23 August 2005 under number 352/2005.
2. On 11 October 2005, Professor M. Piquemal, the appellant's representative, filed his pleadings.
3. On 14 November 2005, the Governor forwarded his observations on the appeal. The appellant submitted observations in reply on 2 January 2006.
4. As the Chair had authorised the Council of Europe Staff Committee to intervene in the proceedings (Article 10 of the Tribunal's Statute), it filed written observations on 10 January 2006.
5. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 19 January 2006. The appellant was represented by Professor M. Piquemal, and the Governor by Maître J.-M. de Forges. After the oral proceedings, the Governor's counsel

submitted, with the Tribunal's leave, a note for the deliberations and the appellant's representative submitted a reply.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The appellant is the body representing the staff of the Council of Europe Development Bank. It lodged this appeal to challenge certain changes introduced, consisting in the replacement – for new staff members and those already in service who accept this change – of the system of automatic advancement up the salary scale by seniority increments with a system of advancement based on merit. This change goes hand in hand with the suppression – for all staff members of the Bank – of the disciplinary measure of temporarily suspending advancement up the salary scale.

7. On 1 April 2003, the Bank sent the appellant a memorandum with a view to consulting it on this proposed reform of the automatic advancement system.

8. On 11 April 2003, the appellant asked the Governor to transmit a number of documents, principally including the minutes of the relevant meetings of the Bank's Administrative Council.

As the appellant did not obtain satisfaction, it submitted the reform proposals to an extraordinary general meeting of the staff, held on 14 April 2003, which rejected them by 84 votes to 1, with 1 abstention.

On 22 April 2003, the appellant gave its opinion which was unfavourable. It further asked that this opinion be brought to the Administrative Council's attention.

9. On 24 November 2004, the Bank consulted the appellant again on proposed amendments to the Staff Regulations relating to the same question, which the Governor was about to submit to the Administrative Council. The Bank asked the appellant to submit its opinion by 16 December 2004.

10. In reply to a question from the appellant and to requests to extend the above-mentioned deadline as well as to provide documents (minutes of certain of the Administrative Council's meetings), on 6 December the Bank's Director of Human Resources indicated that it was not possible to extend the deadline in question nor, in the absence of the express agreement of the Administrative Council, was it possible to provide the requested documents.

At the same time, the Director confirmed that the procedure was a consultation pursuant to Article 6, paragraph 1 of Appendix I to the Staff Regulations which is worded as follows:

Article 6 – Regulations within the competence of the Committee of Ministers

“1. 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.”

11. On 14 December 2004, an extraordinary general meeting of staff was held: 85% of the staff voted against the draft revision, 13% voted for and 2% left the ballot blank.

The next day, the Staff Committee gave its opinion to the Governor: it criticised the substance of the proposed amendments and made a number of proposals. It further asked that its opinion be notified to the Administrative Council.

12. On 19 January 2005, the Director of Human Resources sent the Staff Committee a copy of a memorandum from the Governor to the Administrative Council whereby he submitted a draft amendment to Article 54 of the Staff Regulations and Article 3 of Appendix III thereto (Regulations on the Table of Posts).

13. On 25 January 2005, the Staff Committee sent an open letter to the Governor. It raised questions regarding both substance (noting that the draft which was to be submitted to the Administrative Council did not take into account the criticisms made by the Staff Committee on 15 December 2004) and the procedure (entry into force of the Resolution without it being submitted to the Committee of Ministers of the Council of Europe and without the Staff Committee being consulted on this procedure).

On this last point, it claimed that “the agreement of the Committee of Ministers of the Council of Europe must be sought in order to comply with Article 63 of the Staff Regulations and the previous practice of the Bank’s Administrative Council.” It pointed out that the third paragraph of the preamble to Administrative Council Resolution 1391 (1996) is worded as follows:

“insofar as they modify the Council of Europe Staff Regulations, the provisions in question must be adopted by the Committee of Ministers in accordance with Article 63 of the Council of Europe Staff Regulations.”

Lastly, the Staff Committee maintained that it had not been consulted on the procedure to be followed. It regretted that it had been unable to give its opinion on a very important matter of both procedure and substance – namely, the Administrative Council’s desire to free itself from the supervision of the Council of Europe Committee of Ministers by not transmitting the resolution to it so that it might, in turn, adopt it. The Staff Committee expressed its fears that such a situation would breach its prerogatives, as it had not been permitted to give its opinion on the Administrative Council’s intention not to comply with the provisions of Article 63 of the Staff Regulations.

14. On 27 January 2005, the Administrative Council adopted Resolution 1488 (2005) whereby it amended Article 54 of the Staff Regulations and inserted in Appendix IV (Regulations governing staff salaries and allowances) to the Staff Regulations, an Article 3 *bis* entitled “step advancement for staff members recruited on or after 1 February 2005 or having opted for an advancement by merit”.

15. On 28 January 2005, the text of this Resolution was disseminated to all staff members.

16. On 22 February 2005, the Staff Committee submitted a request to the Governor in accordance with Article 59, paragraph 1 *in fine*. It asked the Governor to refrain, as an interim measure, from applying Resolution 1488 (2005).

17. On 20 April 2005, the Bank's Director of Human Resources replied that it was not possible to grant this request. He pointed out that it was inconceivable that the Governor, who was statutorily under the general supervision of the Administrative Council, should fail to apply one of its resolutions. The Director added that the Administrative Council's exclusive competence to amend certain aspects of the Staff Regulations could not be called into question. On this point, he referred to Article XI, Section 1 d) of the Bank's Articles of Agreement.

18. On 19 May 2005, the appellant lodged an administrative complaint against the decision rendered on 9 February 2005. It requested the quashing

- of the decision, dated 20 April 2005, to reject the request of 22 February 2005;
- of the Governor's decision to "supplement and amend the Staff Regulations by deleting letter c from Article 54 'disciplinary measures', and by inserting an Article 3 *bis* in Appendix IV to these Regulations;
- of any other decision or administrative act implementing Administrative Council Resolution 1488 (2005), whether carried out or under preparation."

19. On 17 June 2005, the Director of Human Resources informed the appellant that the Governor had rejected its administrative complaint. He noted that the complaint advanced no grounds justifying the annulment of the reply given on 19 April 2005 whereby the Governor had deemed that he could not decide to refrain from implementing a resolution adopted by the Administrative Council. Moreover, there was no "act of an administrative nature" on his part, in the sense of Article 59, paragraph 1 of the Staff Regulations, aimed at amending or supplementing those Regulations. He argued that this part of the complaint was inadmissible.

20. On 16 August 2005, the appellant lodged this appeal.

II. THE BANK'S INTERNAL REGULATIONS

21. The Council of Europe Development Bank (the Bank) – formerly the Social Development Fund and, before that, the Council of Europe Resettlement Fund – was set up in 1956 under a Council of Europe Partial Agreement.

In its decisions of 29 September 1995 in Appeals Nos. 189 and 195/1994, 190, 196, 197/1994 and 201/1995, the Tribunal provided an overview of this institution and the rules governing its functioning.

It need but be recalled here that under Article XI, Section 1 d) of the Bank's Articles of Agreement, the Council of Europe Staff Regulations are applicable to the Bank's staff in any matter not covered by a specific decision of its Administrative Council.

Furthermore, Article 63 of the Staff Regulations reads "[t]hese Regulations may be added to or amended by the Committee of Ministers. Unless otherwise decided, alterations so made to the

Regulations shall apply to all staff.” This provision does not contain any specific indications as to amendments concerning the Regulations as applicable to the Bank.

THE LAW

22. By its appeal, the appellant is challenging all the decisions taken by the Governor to enforce the Bank’s Administrative Council Resolution 1488 (2005), including:

- a) the decision to reject the Staff Committee’s request to the Governor not to implement the above-mentioned Resolution 1488 (2005);
- b) the Governor’s decision to supplement and amend the Staff Regulations by deleting letter “c” from Article 54 (disciplinary measures) and by inserting an Article 3 *bis* in Appendix IV (Regulations governing staff salaries and allowances), which introduces step advancement based on merit;
- c) the amendment to Article 1 of the employment conditions set out in contracts between the Bank and its staff to whom Article 3 *bis* applies, as well as any other administrative act implementing this resolution, whether it has been carried out or is in preparation.

The appellant is also seeking 4 000 euros by way of reimbursement of all costs relating to these proceedings.

23. The Governor requests that the Tribunal dismiss all of the appellant’s petitions. He argues, primarily, that the appeal is inadmissible, and subsidiarily, that it lacks merit.

I. SUBMISSIONS OF THE PARTIES

A. On the admissibility of the appeal

24. The Governor points out that an appeal lodged against general and impersonal statutory provisions is inadmissible. He argues that in this case, the appeal was lodged against a statutory measure taken by the Administrative Council and not by him. The Governor adds that, contrary to what the appellant claims, he has taken no decision detachable from Resolution No 1488 (2005) against which an appeal would be admissible.

As a result, the Tribunal’s case law referred to by the appellant (appeals Nos. 182-185/1994 – Auer and others v. Secretary General, decision of 26 January 1996, paragraph 21) is not applicable to this case. The Governor adds that, in that decision, the Tribunal ruled on its jurisdiction and not on the admissibility of the appeal. Moreover, as already mentioned, he took no decision which is detachable from Resolution 1488 (2005): he merely replied to the Administrative Council’s requests for information. Furthermore, when he informed staff about the adoption of this Resolution, he took no decision as to its implementation or non-implementation, nor did he take any decision when he sent his memorandum of 20 April 2005 to the Staff Committee, pointing out that it was unimaginable that he might decide not to implement a resolution adopted by the Administrative Council.

Finally, the Governor underlines the fact that the appellant is also asking, in advance, that acts which are being prepared and which, thus, do not concretely exist, be annulled. However, according to the wording of Articles 59 and 60 of the Staff Regulations, this request would undoubtedly be inadmissible.

25. For its part, the appellant states that it is aware that, according to the provisions applicable in this matter and to international case law, it is not authorised to contest a general, abstract decision. However, in this case, the Governor took a decision to amend and supplement the Staff Regulations in order to insert in them measures decided by the above-mentioned Resolution. This is borne out by the fact that the Governor published the contentious changes on the Bank's Intranet site. This suggests that he "recognises and intends to have recognised the statutory nature of the text posted on the Intranet site. (...) These changes are assuredly tantamount to a decision by the Governor to enforce the Administrative Council's decision." This proves that, following the Administrative Council's decision to amend the Staff Regulations, the Governor himself decided to insert the amendments in a text posted on the Bank's Intranet site and to apply these rules, which entail the implementation of Resolution 1488 (2005). The appellant maintains that "under these circumstances, the administrative act which it challenges in its complaint and which the Governor denies, has an obvious legal existence."

In conclusion, the appellant asks the Tribunal to reject the objection as to the appeal's admissibility.

B. On the merits of the appeal

26. The appellant raises two grounds: a breach of Article 6, paragraph 1 of Appendix I to the Staff Regulations (Regulations on staff participation) and a breach of the general principles of law governing consultation of the Staff Committee.

27. As concerns the first ground, the appellant considers that there has been a dual violation of Article 6, paragraph 1, in that the Governor did not consult it as to his intention to propose to the Administrative Council that it derogate from Article 63 of the Staff Regulations. This provision is worded as follows:

Amendments

"These Regulations may be added to or amended by the Committee of Ministers. Unless otherwise decided, alterations so made to the Regulations shall apply to all staff."

28. The appellant concludes from this that in the Council of Europe's institutional system and legal order, the Committee of Ministers is the only "legislator" empowered to enact provisions affecting the Staff Regulations. It adds that Article XI, Section 1 d) of the Bank's Articles of Agreement does not confer on the Administrative Council any legislative power as concerns the Staff Regulations (paragraph 20 above). Indeed, this provision empowers the Administrative Council to adopt amendments only on condition that they are submitted to the Committee of Ministers for approval.

As it was not consulted on the very important point of adopting the statutory amendment

without statutory approval, the Committee may claim that its prerogatives have been breached. The Committee also alleges that there has been a series of breaches in relation to the fact that it was not consulted about certain measures which are the subject of the revision.

29. Lastly, the appellant claims a breach of general principles of law, as the consultations to which it was party did not satisfy the requirements of the general principles governing questions of staff consultation.

30. In conclusion, the appellant asks the Tribunal to annul the following decisions taken by the Governor in pursuance of Resolution 1488 (2005): the decision of 22 February 2005; the decision supplementing and amending the Staff Regulations, and finally the decision to amend the clauses relating to working conditions which, as a result of the statutory amendment, are henceforth applicable to new staff members; the appellant further asks the Tribunal to annul any other act which has already been carried out or is in preparation with a view to implementing the contentious Resolution.

31. For his part, the Governor submits several arguments aimed at proving that the grounds of appeal are without foundation. In particular, he maintains that the Bank's Administrative Council has real decision-making powers regarding the Staff Regulations applicable to the Bank, which rule out the need for approval by the Committee of Ministers of the Council of Europe for such regulations to be valid and enter into force.

32. The Governor also considers that the general principles of law governing this matter have been respected in this case.

33. In conclusion, the Governor asks the Tribunal to dismiss the appellant's appeal.

II. ARGUMENTS OF THE THIRD PARTY

34. The Chair of the Tribunal authorised the Council of Europe Staff Committee to intervene in the proceedings (Article 10 of the Tribunal's Statute – Appendix XI of the Staff Regulations).

In its written observations in support of the appellant's conclusions, that Committee argues that the appeal is admissible *ratione materiae* and is well-founded.

III. THE TRIBUNAL'S ASSESSMENT

35. During the preparatory phase of the appeal, the parties addressed the issue whether the "legislative" process for adopting Resolution 1488 (2005) – as followed in this case in accordance with standard practice – was lawful, since the appellant contended that the process was illegal in relation to the statutory texts governing the role of the Administrative Council in this matter.

36. The Tribunal deems that it does not have to rule on this question, as it is not empowered to carry out a "constitutional review" of the positive law applied within the Organisation.

37. As concerns the admissibility of the appeal, the Tribunal notes that the Governor only raised an objection of inadmissibility *ratione materiae*. However, it is necessary to verify whether

the appellant has the competence *ratione personae* to lodge this appeal. The Tribunal must proceed thus rather than examining the Governor's objection since, with its appeal as brought before the Tribunal, the appellant is not directly challenging the Administrative Council's decision, but complaining about an administrative decision taken by the Governor, namely the refusal not to decide to suspend the execution of an act "with legislative content" and other manifestly administrative acts. A decision on these questions – and thus on the merit of the complaints – is a matter more of the substance of the appeal than of admissibility.

38. The Tribunal recalls that under Article 59, paragraph 6 c) of the Staff Regulations,

"The [administrative] complaints procedure shall be open [to all staff members] 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."

The Tribunal notes that, by its request pursuant to Article 59, paragraph 1 *in fine* (paragraph 15 above) and, above all, by its administrative complaint of 19 May 2005 (paragraph 17 above), the Staff Committee complained that it had not been consulted about the fact that the matter had not been referred to the Committee of Ministers of the Council of Europe; the Staff Committee challenged the reform itself and referred to the modalities of implementation which, it alleges, were carried out in breach of its rights. However, the resolution in question does not breach the rights of the Staff Committee, which is not its subject (as it governs the careers of the Bank's staff members), nor does it infringe its powers. The point in dispute does not relate to the preliminary consultation which should take place at the stage of the draft Resolution, but to a matter which concerns the procedure after its adoption by the Administrative Council. The situation would have been different if it had been expressly indicated in the Resolution that Article 6 of Appendix I to the Staff Regulations did not cover this phase. The Staff Committee would then have been able to argue that its prerogatives had been breached.

The Governor has, admittedly, not gone into the question of admissibility *ratione personae* as he only raises an objection of incompetence *ratione materiae*. If the appellant's grievance had concerned the adoption of statutory amendments, it would doubtless have been considered inadmissible *ratione materiae*, as it is not possible to challenge directly, through Article 59, an act "with legislative content", because only its administrative application can be challenged (see paragraph 35 above and, more generally, the Tribunal's case law on the assessment of appeals against administrative acts by the Secretary General when implementing the Committee of Ministers' decisions).

However, the appellant is only formally challenging, before the Tribunal, administrative acts which were allegedly adopted after the revision in dispute. The acts being formally challenged by the appellant are those whose administrative nature within the meaning of Article 59 of the Staff Regulations can be contested. Be that as it may, even if it is accepted that some of these acts are administrative in nature, the fact nevertheless remains that the Staff Committee does not have standing to challenge them through the complaints procedure, within the meaning of Article 59, as it is not the subject thereof.

As a result, it must be concluded that the Staff Committee has no direct interest within the meaning of Article 59 of the Staff Regulations to challenge, through the complaints procedure, the decision contested by its administrative complaint of 19 May 2005.

Consequently, this appeal must be declared inadmissible.

39. Having reached this conclusion, the Tribunal need not rule on the other objections of inadmissibility. Moreover, the Tribunal cannot examine the substance of the case either.

For these reasons,

The Administrative Tribunal:

Declares appeal No. 352/2005 inadmissible;

Rejects it;

Decides that each party shall bear its own costs.

Delivered in Strasbourg, on 5 September 2006, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

K. HERNDL