

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 388/2007 (X v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Mrs Elisabeth Palm,  
Mr Angelo Clarizia,  
Mr Hans G. Knitel, Judges,

assisted by:

Mr Sergio Sansotta, Registrar,

has delivered the following decision after due deliberation.

### PROCEEDINGS

1. The appellant lodged her appeal on 19 February 2007. The appeal was registered on the same day as file 388/2007. At the appellant's request, the Chair granted her anonymity.
2. On 13 April 2007, the appellant's lawyer, Professor Piquemal, filed a supplementary memorial.
3. On 4 June 2007, the Secretary General submitted his observations on the appeal. The appellant filed a memorial in reply on 4 July 2007.
4. As the parties were prepared to waive their right to oral proceedings, the Tribunal decided that it was unnecessary to hold a public hearing.

### THE FACTS

#### I. THE CIRCUMSTANCES OF THE CASE

5. The appellant is a permanent B grade staff member of the Council of Europe.
6. Following a job classification study in the Council, in March 2006 the Secretary General announced that a significant number of posts would be upgraded. After a further

classification exercise, on 9 November 2006 the Secretary General adopted decision no. 3400, in which he announced the regrading of several permanent posts.

7. On 23 November 2006, upgrading notices were published on the Council's intranet site.

8. After comparing the decision and the upgrading notices, the appellant noted that the latter concerned more posts than the number of posts identified in the decision.

The appellant observed that, in practice, some of these posts had not been regraded but were filled by staff on lower grades than those pertaining to the posts. Following publication of these notices, these staff were promoted to the higher grades.

In the proceedings before the Tribunal, the appellant has provided a list of these posts, which cannot be exhaustive because of the limited and imperfect information at her disposal. She has therefore asked the Secretary General to complete the list.

9. On 5 December 2006, the appellant lodged an administrative complaint under Article 59 of the Staff Regulations challenging the upgrading notice for staff assigned to posts on a higher grade than their own. The complaint stated (translation):

“The notices of upgrading published several days ago on the Council's intranet portal refer both to posts that have been upgraded in the true sense and to ones that have never been upgraded. In practice, the Administration has taken advantage of this exercise to promote, contrary to any rules in the Staff Regulations and the most elementary ethical principles, staff who were made permanent in 2003 and placed temporarily in posts on a higher grade than their own. This applies, for example, to post 151 in the DGAP and post 1444 in the CLRAE.

As far as the operation as whole is concerned, I can only express my surprise and indignation. However, in the case of B3 and B4 posts, I consider that I have suffered personally and directly. These are posts for which I could have requested a transfer or promotion. I have been deprived of these options by a ploy that takes no account of the staff rules and regulations on promotion.

Moreover, the very fact of defining an operation where a post is not upgraded as “upgrading” is nothing but deceitful and as such is in breach of the general principle of good faith.

This is why I am lodging this complaint requesting you to annul the associated notices of “upgrading”, and all attendant operations, such as decisions of the Appointments Board, appointments to specific grades and so on.”

10. On the same day, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution of the procedure for filling regraded posts to which she might seek to be transferred or promoted.

11. On 20 December 2006, the Chair dismissed the application.

12. On 21 December 2006, the Secretary General dismissed the administrative complaint. He stated (translation):

“You request the annulment of the upgrading notices ‘published several days ago on the Council's intranet portal’ and of ‘all attendant operations, such as decisions of the Appointments Board, appointments to specific grades and so on’.

You consider that some of the posts concerned have never been upgraded and that 'the Administration has taken advantage of this exercise to promote ... staff who were made permanent in 2003 and placed temporarily in posts on a higher grade than their own.' As examples you quote post 151 in the DGAP and post 1444 in the CLRAE. As a result, you consider that you have been deprived of the option of requesting a transfer or promotion to B3 and B4 grade posts. Finally, you maintain that defining an operation in which a post is not upgraded as upgrading is in breach of the general principle of good faith.

It appears from your observations in reply to the Secretary General's observations of 7 December 2006 in the context of your first request for a stay of execution that you are asking for the annulment of published upgrading notices which, according to you, concern posts that have never been regraded, in particular those that you cite (Nos. 151 and 1444).

It should be noted that the relevant part of Article 59.1 of the Staff Regulations reads:

*'Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them. The expression 'administrative act' shall mean any individual or general decision or measure taken by the Secretary General'*

Under this provision, the condition for taking action is that a staff member has 'a direct and existing interest' in submitting 'a complaint against an administrative act adversely affecting' him or her.

It also defines the notion of victim and specifies the conditions in which individuals concerned by an act or omission in dispute are entitled to take action. They must show that the interest concerned is a direct one, in other words is personal and existing. In this connection, see the decision handed down by the ATCE in appeals nos. 268-282: *'This provision therefore defines the notion of a victim and lays down the circumstances in which a person affected by the act or omission in dispute is entitled to take action. The interest which the person concerned must demonstrate must be direct, i.e. it must be capable of having an impact which is personal and actual (cf. ABCE Nos. 79-93/1983, Buhler and others v. Secretary General, decision of 1 March 1985, para. 69; Nos. 94-99/1983, Nouari and others v. Secretary General, decision of 1 March 1985, para. 73; No. 114/1985, Baljégo v. Secretary General, decision of 25 October 1985, para. 56; see also ATCE No. 226/1996, Zimmermann v. Secretary General, decision of 24 April 1997, para. 26; and No. 241/1998, Tonna v. Secretary General, decision of 9 November 1998, para. 36). The Tribunal has to state forthwith that a member of staff cannot bring an action in the interests of lawfulness or of the organisation. As a ground of appeal, staff members can solely rely on prejudice they have suffered personally (cf. the above-mentioned Zimmermann and Tonna decisions).'*

In this case you have failed to show that you are personally concerned by an administrative act adversely affecting you, since the decisions that you are challenging have no effect on your situation and do not cause you detriment. Since these posts were not notified as vacant, no staff member, including yourself, could apply for them and therefore no staff member has suffered any detriment, pecuniary or otherwise. Such notices of upgrading of posts cannot be regarded as acts adversely affecting you.

It needs to be pointed out that the Staff Regulations and other relevant rules do not grant staff any entitlement to promotion or transfer. The fact that these vacant posts might have been opened to internal competition rather than being regraded, as they were, does not give any staff member a direct and existing interest to take action.

For such an interest to have existed in this case, it would have been necessary for the posts to be opened for internal competition and for you to have had the required qualifications and to have submitted an application. If during this process your candidature had been unlawfully rejected, you might have been adversely affected by the relevant decisions and could then have claimed a direct interest in taking action. The non-regrading of these posts in fact offered no prospect of promotion or transfer for you.

Everyone applying for a post that the Organisation has decided to fill by competition is entitled to have his or her application examined in good faith and in accordance with the basic principles of fair competition between applicants, regardless of his or her actual prospects of obtaining the post, but this clearly does not apply in this case. There were no posts to be filled, therefore no applications from staff,

let alone any examination of applicants' merits. You cannot therefore validly claim that there has been any diminution of your promotion or transfer prospects or any breach of a general principle of law.

You consider that the upgrading of the advertised posts has reduced your promotion or transfer prospects. Clearly, any international organisation is empowered to reorganise some or all of its departments or units, which may entail abolishing posts, establishing new ones and redeploying staff. An inevitable consequence of restructuring is that certain posts that have been deleted or redeployed are no longer 'accessible' to Council staff. Such an outcome cannot be considered unlawful or irregular.

It is established case-law that an international organisation necessarily has power to restructure some or all of its departments or units, including by the abolition of posts, the creation of new posts and the redeployment of staff (see, *inter alia*, judgments 2510, 1614 and 269 of the ILOAT).

Moreover, the Secretary General, who has the power to make appointments, has discretionary powers with regard to personnel management. In exercising these powers, he is authorised to identify and assess the needs of the service and the professional skills of staff. The Administrative Tribunal has also made this point in connection with appeal 77/1981: *'The higher authority alone is responsible for the organisation of the departments which it must be able to determine and modify according to the exigencies of the service .... without prejudice to the rights which servants enjoy under their Staff Regulations and which they can ask the [Board] to enforce.'*

In addition, pursuant to Article 21 paragraph 5 of the Regulations on Appointments (Appendix II of the Staff Regulations), if the Appointments Board considers that a post holder does not satisfy the requirements for promotion, the post shall be opened for internal competition. You can therefore apply for any posts that are opened for such internal competition. Similarly, posts held by staff members who have been promoted as part of this exercise will become vacant once these staff leave, for example as a result of promotion, transfer or retirement. You will then be perfectly free to apply and these 'upgraded' posts therefore offer you greater career prospects.

Turning to the alleged breach of the principle of good faith, you consider that defining as upgrading an operation where a post is not upgraded is nothing but deceitful. According to international administrative case-law, bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose.

In this case, it again needs to be stated that all the posts were published, and the procedure specified in Article 21, paragraph 5 of the Regulations on Appointments (Appendix II of the Staff Regulations) was fully complied with: *'In the event of a post being upgraded, the Board shall consider whether the incumbent meets the requirements for promotion. If the incumbent does not satisfy the requirements for promotion, the post shall be opened for internal competition. The Secretary General shall establish, by a General Rule, the modalities for and conditions under which this provision will be applied.'*

Having regard to these factors, it is clear that in this case there has been no breach, either in the regulations or in practice, of the general principles of law.

Your administrative complaint therefore has to be ruled inadmissible and/or unfounded and must be dismissed. Pursuant to Article 60 of the Staff Regulations, you may challenge this decision before the Administrative Tribunal, in writing within sixty days of notification of this decision."

13. On 19 February 2007, the appellant lodged this appeal challenging the decision of 21 December 2006.

## II. THE CURRENT LAW

14. The rules governing internal competitions appear in Article 21 of the Regulations on Appointments (Appendix II of the Staff Regulations). Paragraph 5 is concerned with the upgrading procedure and in the version applicable to this case states:

“5. In the event of a post being upgraded, the Board shall consider whether the incumbent meets the requirements for promotion. If the incumbent does not satisfy the requirements for promotion, the post shall be opened for internal competition. The Secretary General shall establish, by a General Rule, the modalities for and conditions under which this provision will be applied.”

15. In accordance with this provision, on 24 November 2006 the Secretary General issued Rule No. 1263 on promotion following the upgrading of a post:

“1. When a post is upgraded, the Secretary General shall decide whether to promote the incumbent or not on the basis of a recommendation by the Appointments Board.

2. The Appointments Board shall examine whether the incumbent meets the requirements for promotion in the light of, on the one hand, the duties attaching to the post, the conditions for eligibility and the qualifications required and, on the other, the incumbent’s curriculum vitae and his/her appraisal report(s).

3. When the incumbent has not yet been confirmed in post, the Appointments Board may only recommend him/her for promotion when s/he successfully completes the probationary period.

4. If the Secretary General considers that the incumbent does not meet the requirements for promotion, the upgraded post can only be filled in accordance with the relevant rules, after the incumbent has been appointed to another post or position.

5. This rule does not concern promotions to A7 and A6 posts.

6. This rule shall enter into force on the first day of the month following its signature by the Secretary General.”

## **THE LAW**

16. In her appeal, the appellant asks the tribunal to annul decisions to promote staff members promoted to posts unlawfully described as upgraded. She maintains that there has been a violation of Article 21, paragraph 5, of the Regulations on Appointments (Appendix II of the Staff Regulations) and of the general principles of law concerning good faith, equal treatment for all staff members and the prohibition of abuse of process. The appellant also asks for 6 000 euros in respect of the costs of the present proceedings.

17. The Secretary General asks the Tribunal to declare the appeal inadmissible or, alternatively, declare it unfounded and dismiss it.

### **I. THE PARTIES’ ARGUMENTS**

#### **A. The admissibility of the appeal**

18. The Secretary General argues that the appeal is inadmissible for two reasons: some of the requests are new and in the case of the others, the appellant has no interest in taking action.

19. With regard to the first reason, the Secretary General states that the appellant’s requests have varied somewhat, and it is not easy to define them.

20. As a result, it is difficult to determine which posts are concerned. He states that (translation) “in her administrative complaint, the appellant asks for the annulment of the upgrading notices for posts 151 and 1444 and of the upgrading notices for other unspecified posts that, according to her, should not have been upgraded.”

In the appeals form, the appellant says that she seeks to obtain (translation) “the

annulment of the Secretary General's decisions to promote a certain number of B2 staff to B3 and B3 staff to B4 using the exceptional procedure for regradings and publishing 'upgrading notices' concerning posts that have not been upgraded on the intranet site."

Finally, in her supplementary memorial, the appellant explicitly abandons the reference to post 1444 and the regradings of B4 posts and focuses her application on eleven C3, B3 and B5 posts.

21. The Secretary General says that it is even more difficult to determine which decisions the appellant is asking to be annulled. The administrative complaint was concerned with the upgrading notices and decisions to promote staff members to posts that she denies had been upgraded. She is now only concerned with decisions to promote staff members to posts that she denies have been upgraded.

22. The Secretary General concludes from this that the appellant's request for the annulment of decisions to promote staff to the posts to which she refers should be dismissed as being a new one. In accordance with its case-law, while the Tribunal may sometimes accept new arguments and occasionally new grounds, it does not accept new requests.

23. The Secretary General argues secondly that the appellant has no interest in taking action. There are two aspects to this: that the appellant is asking for the annulment of decisions that do not directly affect her and that she cannot demonstrate any practical or precise interest.

24. Regarding the former, the Secretary General states that under Article 59, paragraph 1, of the Staff Regulations:

"Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them. The expression 'administrative act' shall mean any individual or general decision or measure taken by the Secretary General."

25. According to the Secretary General, the appellant is asking for the annulment of decisions that do not directly affect her. She refers in her introductory appeal to her loss transfer and promotion prospects. However, the upgradings in question concern posts none of which have been advertised as vacant since 2003. Moreover, the appellant does not occupy any of these posts. This is therefore a management decision that has no consequences for the appellant, and in accordance with the Tribunal's case-law the appellant can only challenge acts that affect her personally. The regrading decisions concerned do not personally concern the appellant and have no effect on her legal situation, so the actions she challenges do not affect her adversely.

26. The Secretary General also maintains that the appellant has not shown any practical or precise interest. At no time has she shown any real desire to perform the duties associated with any of the posts referred to in her various requests.

She has produced no evidence to show that her right to apply for a transfer or promotion has been violated. The appellant has not applied for any of the posts that have been opened to internal competition since November 2006, nor indeed for any post since 1999. She has therefore made it perfectly clear that she had no intention of using her right to apply for a transfer or promotion.

27. The appellant herself maintains that she has fully demonstrated that she has a “direct and existing interest” in this matter. She refers in this context to the Tribunal’s case-law (application no. 287/2001, *Boltho von Hohenbach*, decision of 17 October 2002). She states that in promoting certain staff members to higher grades the Secretary General acted unlawfully. In particular, he used the regrading procedure in Article 21§5 of the Regulations on Appointments (paragraph 25 above) in breach of the factual and legal conditions specified in this provision. The unlawful – in the absence of regrading – filling of a significant number of posts adversely affected the appellant’s legitimate interests and her right to apply for a transfer or promotion.

28. In her memorial in reply, the appellant states that she has had the same object throughout the proceedings. In her administrative complaint she asked for “the annulment of the upgrading notices” and of “all attendant operations, such as decisions of the Appointments Board, appointments to specific grades and so on”, and at the appeal stage, the annulment of “decisions to promote staff members promoted to posts unlawfully ... upgraded”. As for the grounds advanced by the appellant, she maintains that while the appeal does present arguments that were not adduced in the complaint, this is merely intended to clarify the same grounds as those specified in the complaint. These can be summarised as the unlawfulness of the upgrading notices and of the procedure for filling regraded posts.

Moreover, it appears from the wording of the decision to dismiss the administrative complaint that the Secretary General was perfectly aware that the appellant intended to challenge the entire procedure pertaining to posts unlawfully described as upgraded. Indeed, in the same decision the Secretary General was careful to note that the posts referred to were cited as examples.

The appellant also considers that this was not a decision relating to the Secretariat’s general organisation, since the would-be regraded posts were all occupied, but one that concerned the careers of staff members appointed to unlawfully upgraded posts.

The appellant concludes by stating that she is not seeking promotion but is asking for decisions on promotions relating to posts to which she might have been promoted or transferred - in accordance with a career project that is a personal matter - to be fully lawful and taken in accordance with the relevant rules and regulations and the principles of the international public service. The appellant considers that her interests have been harmed because the Secretary General’s ploy reduced her promotion or transfer prospects. This represents a loss of opportunity that justifies legal protection in the form of an appeal to the Administrative Tribunal.

## **B. The merits of the appeal**

29. The appellant presents two grounds for appeal. She alleges violations of Article 21, paragraph 5, of the Regulations on Appointments and of the general principles of law concerning good faith, equal treatment for all staff members and the prohibition of abuse of process.

30. The Secretary General maintains that the procedure was conducted lawfully. He acknowledges that staff members have been assigned to posts on higher grades than their own without receiving a salary higher than that corresponding to their grade or a compensatory allowance. He adds that if, by any remote chance, the Tribunal does find that

there has been an irregularity, according to international administrative case-law a procedural irregularity should still only result in the annulment of administrative decisions if the irregularity was a substantial one and was likely to cause real harm. In fact, the appellant has suffered no pecuniary or non-pecuniary damage.

31. Moreover, the appointments in question concerned staff members in a situation that was quite unique in the Organisation, in that they had been assigned on a long-term basis to posts on higher grades than their own. In using the contested procedure, the Secretary General was not in breach of the principle of equality between staff. Finally, the Secretary General denies that he has committed an abuse of process and that he has not acted in good faith.

## II. THE TRIBUNAL'S ASSESSMENT

### A. The admissibility of the appeal

32. With regard to the first objection to admissibility, the Tribunal notes that the appellant claims that it would be impossible for her – or any other staff member – to identify the posts that have been improperly upgraded because of the brevity of the information published on the Council's intranet site. However, the Tribunal also notes that the appellant could have submitted a request for information to the Secretary General – if necessary, using the procedure laid down in Article 59, paragraph 1 *in fine* of the Staff Regulations – to obtain the information she required to determine whether she was adversely affected by the procedures of which she lacked details.

33. Admittedly, in her administrative complaint the appellant asked for “the annulment ... of all attendant operations”. However, it is not possible to challenge a decision that cannot be identified in advance, since otherwise the Tribunal does not see how it could exercise its power of annulment.

34. The Secretary General's objection is therefore well founded, and any consideration of the appeal can only concern disputed decisions that have been properly identified by the appellant in the proceedings and are likely in her view to have an adverse effect on her, particularly as some of the posts in question could not have interested the appellant because of the grade concerned.

35. In his second objection, the Secretary General denies in substance that the disputed administrative acts adversely affected the appellant, thus giving her a direct interest.

36. This objection must be applied to posts in connection with which the appellant might have been adversely affected.

37. The Tribunal notes that in this case the appellant is not claiming a right to promotion but rather, as she says in her observations in reply, is complaining about the loss of a promotion prospect.

38. While it is clear that there is no entitlement to promotion, it is equally evident that there are career expectations that cannot be ignored. Career ambitions are also one of the driving forces of organisational development and promotion prospects can contribute to this development.



39. The Tribunal (formerly the Appeals Board) has already found in an earlier appeal that a staff member “was entitled to hope that his career there might lead him to the highest post in his profession” (Appeal No. 41/1975, William Worsdale v. Secretary General, 3 March 1976, The Law – as to admissibility). It therefore concluded that there was thus “a certain relationship between [the] career hopes [of the staff member in question] and the situation which arose following the individual decision relating to him taken by the Secretary General” (ibid). The Tribunal had then found that the appeal was admissible.

In reaching this conclusion, the Tribunal acknowledged that loss of promotion prospects – which, as already pointed out, is different from a so-called right to promotion – justified the legal protection offered by an appeal.

40. However, the Tribunal has declared two appeals challenging decisions to upgrade two posts and downgrade one inadmissible (ATCE, joint appeals Nos.366/2006 and 367/2006 – Veronica Jeannin (III) and Monique Becret (III) v. Secretary General, 19 January 2007). In this case, the Tribunal noted that the upgradings and downgrading did not concern posts for which any appointment procedure had been started in connection with the previous grading, let alone the posts, occupied by the appellants. It considered that it was dealing with a management decision not concerned with the appellants, even though – indirectly – it did affect them. It therefore concluded that the appellants had no direct interest in the classification of the posts and thus had not directly or immediately suffered any harm entitling them to bring contentious proceedings.

41. In this case, the Tribunal considers that the situation resembles the one that gave rise to appeals 366 and 367, even though the details of fact are slightly different since in this case there has been no change in the grading of posts but rather the use of the upgrading procedure to promote staff.

The Tribunal does not think that the appellant can reasonably maintain that the disputed decisions were administrative acts that caused her direct harm. Clearly, therefore, she cannot claim to be the victim of such a situation.

42. The limited number of differences between this appeal and appeals 366 and 367 are not sufficient to persuade the Tribunal that this case does not involve a management decision that solely concerns the regraded staff members with no direct influence on the appellant.

43. The fact that in her second ground the appellant also complains of unequal treatment between all staff members is no reason to reach a contrary conclusion. Thus, according to the information supplied to the Tribunal by the parties, the appellant does not appear to have been concerned in any way by the post classification exercise or, prior to that, by the integration exercise.

It must therefore be concluded that the appellant has no direct interest, within the meaning of Article 59 of the Staff Regulations, to justify proceedings to challenge the contested decisions.

44. Having reached this conclusion, the Tribunal cannot consider the merits of the case. In particular, it is unable to rule on whether or not the Secretary General acted correctly by choosing to use the regrading machinery to rectify the situation of staff who had been assigned to higher grade posts.

For these reasons,

The Administrative Tribunal:

Declares appeal No. 388/2007 inadmissible;

Dismisses it;

Orders that each party bear its own costs.

Delivered at Strasbourg on 10 December 2007, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

E. PALM