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

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 392/2007 (Adriana DĂGĂLIŢĂ v. Secretary General)

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Angelo CLARIZIA,
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Ms Adriana Dăgăliţă lodged her appeal on 7 June 2007. The appeal was registered the same day under No. 392/2007.

2. On 9 July 2007, the appellant lodged further pleadings.

3. On 31 August 2007, the Secretary General submitted his observations concerning the appeal.

4. The appellant submitted observations in reply on 3 October 2007.

5. The public hearing in the appeal was held in the Administrative Tribunal courtroom in Strasbourg on 10 December 2007. The appellant represented herself while the Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, Directorate of Legal Advice and Public International Law, assisted by Ms M. Junker-Schreckenberg, an assistant in the same department.

THE FACTS

6. The appellant, a Romanian national, is a permanent member of staff of the Council of Europe and holds the grade A1. She is employed in the Registrar of the European Court of Human Rights. Previously, she had worked in the same department as a temporary lawyer, from 1 February 2001 to 31 January 2005. She had started out as a B1 and ended as a B4.

7. Following a competition for A1/A2/A3 Romanian lawyers (vacancy notice no. 37/2005), on 17 October 2006 the appellant was informed that she had been placed on a reserve list.

8. On 19 December 2006, the Directorate of Human Resources sent the appellant an offer of employment for a fixed-term contract which, although renewable, could not exceed five years. It was stated that the appointment would be made at grade A1, step 1.

9. On 28 December 2006, the appellant signed this offer of employment, added, as requested, the words “read and approved having taken cognisance of the Staff Regulations” and returned the document as constituting acceptance of the offer of employment.

10. The appellant took up her duties on 1 February 2007.

11. The same day, the applicant signed a fixed-term contract of employment. This same contract was confirmed by the Director of Human Resources on behalf of the Secretary General on 19 February 2007.

12. On 7 and 8 February 2007, the appellant sent two e-mails to a member of staff in Human Resources, inquiring about the grade that was to be assigned to her. In the proceedings before the Tribunal, the appellant submitted that these e-mails constituted a perfectly genuine and serious objection to her conditions of employment whereas in the view of the Secretary General, they were merely a request for information.

13. On receiving no reply to her e-mails of 7 and 8 February 2007, even though she had sent a reminder on 23 February 2007, on 28 February the appellant – who in the meantime had received a contract confirmed by the other party – turned to the Administration Division of the Registry of the European Court of Human Rights for clarification. This Division told the appellant that the official reply to her question would come from Human Resources.

14. On 21 March 2007, the appellant lodged an administrative complaint under Article 59, paragraph 1, of the Staff Regulations. She asked the Director of Human Resources to recommend that the Secretary General appoint her to grade A2.

15. On 17 April 2007, the Secretary General dismissed the administrative complaint as inadmissible and ill-founded. He held that the complaint was inadmissible on the ground of lack of interest in bringing proceedings because the appellant had freely consented to the decision complained of. The Secretary General further maintained that the complaint was inadmissible as it had been made out of time: it should have been lodged within thirty days following receipt of the offer of employment at grade A1 (the administrative act complained of). The Secretary General added that even if 1 February 2007 were taken as the starting point of the period for lodging an administrative complaint, the complaint was inadmissible, having been lodged on 22 March 2007. As to the merits of the administrative complaint, the Secretary General held that the appellant did not have the six years’ professional experience involving duties similar to those exercised by A grade staff members, which were required in order to be appointed to grade A2.

16. On 7 June 2007, the appellant lodged her appeal.

THE LAW

17. The appellant challenges the Secretary General's refusal to appoint her to grade A2; she asks the Tribunal to order him to appoint her to this grade and to reinstate her in her career. The appellant is also seeking compensation for material and non-material injury and reimbursement of her legal costs.

18. The Secretary General asks the Tribunal to dismiss the appeal as inadmissible and/or ill-founded.

A. Submissions of the parties

1. *On the admissibility of the appeal*

19. The Secretary General maintains that the appeal is inadmissible on two grounds.

20. Firstly, the administrative appeal is inadmissible on the ground of lack of interest in bringing proceedings, since the appellant had freely consented to every aspect of the decision complained of.

21. Secondly, the appellant should have lodged an administrative complaint within thirty days following receipt of the offer of employment at Grade 1.

22. The Secretary General observes that the appellant signed the offer in full knowledge of the facts and that to renege on her acceptance would be a breach of good faith. He further maintains that, contrary to what the appellant claims, such acceptance was not without legal force merely because the offer was a conditional one, being subject to the results of the medical examination and satisfactory professional references. Failure to meet these conditions would have entitled the Secretary General to withdraw his offer of employment but it was not open to the appellant to break off the contract in the light of the results of the medical examination or the professional references.

23. The Secretary General disputes the appellant's claim that the offer of employment did not constitute a contract and did not confer on her the status of staff member. In his view, the contract of 1 February 2007 was merely a broad outline confirming the offer of employment, and the details which were vital for free and informed consent were set out in the offer of employment and not in the contract dated 1 February 2007. Even supposing, moreover, that the time-limit was deemed to run from 1 February, the appeal would still be out of time because, according to the Secretary General, the administrative complaint was not lodged until 22 March 2007.

24. Lastly, the Secretary General advances a whole series of considerations in support of his argument that the e-mails of 7 and 8 February were merely requests for information and not an application under Article 59, paragraph 1, *in fine* of the Staff Regulations or an administrative complaint.

25. With regard to the Secretary General's first point, the appellant maintains that by "also examining the merits of [her] complaint, the Secretary General acknowledged the admissibility of her application". She also states that on 28 December 2006, she was not yet a staff member. In accepting the offer on 28 December 2006 – and in signing the contract of

employment on 1 February 2007 – she "expressed her desire to work for the Council of Europe, with both parties adhering to the Staff Regulations, to which the two contractual documents also referred." According to the appellant, acceptance of a contract containing prescribed clauses does not prevent the employee from disputing certain clauses, or from requesting that they be rectified or revoked. This is a general legal principle of contractual obligations which applies equally to the Council of Europe, particularly as there are no statutory provisions to prevent a staff member from contesting the contractual clauses once he or she has signed the contract.

26. As to the allegation that the complaint was out of time, the appellant submits that the offer of employment of 18 December 2006 did not itself constitute an appointment decision; consequently, her acceptance of the said offer did not confer on her the status of Council of Europe staff member and so did not entitle her to challenge the said act. She also states that legally speaking, her acceptance of the offer constituted a pre-contract, i.e. a promise between the parties to conclude a contract of employment. Were that not so, there would have been no need to sign a further document on 1 February 2007. Also, the offer was subject to conditions which might lead the Council to withdraw its offer in the light of the medical results and references.

2. *On the merits of the appeal*

27. In her appeal, the appellant challenges the Secretary General's decision to appoint her to grade A1 rather than A2. The reason given by the Council of Europe to justify the decision lies in the fact that her professional experience at the Court was not similar to that of A grades. The appellant does not accept this view.

28. Under Article 24 of the Regulations on appointments (Appendix II to the Staff Regulations), as amended by Resolution (2006)19 of 8 November 2006:

> Article 24 – Beginning-of-career appointments and passage between categories of posts or positions
>
> "**a. Conditions for appointment to grades A1, A2 and A3**
>
> 1. Staff members may be promoted from A1 to A2 and from A2 to A3 without changing post/position.
>
> 2. The entry grade to this group of grades shall be A1. However, external candidates with six years' professional experience involving duties similar to those exercised by A grade staff members shall be appointed to grade A2. The Secretary General shall set out, in a Rule, the conditions for granting additional steps to candidates with more extensive professional experience.
>
> 3. A1 staff members shall be promoted to A2 upon successful completion of their probationary period.
>
> (…)".

29. In support of her request that she be appointed to grade A2, the appellant submits that the duties which she performed in the Court as a temporary lawyer were similar, if not identical, to those exercised by A grade staff members. In this connection, she provides a number of details concerning the work carried out and invites the Court to hear witnesses in order to explore the matter further. She also states that such grades have already been granted to other people whose situation was similar to her own.

30. The appellant further alleges that there has been a violation of the "*tempus regit actum*" principle and of the principles of non-discrimination and legitimate expectation.

31. The appellant maintains that since the competition ended in October 2006 and so prior to the entry into force, on 8 November 2006, of the new version of Article 24 of the Regulations on appointments (see paragraph 28 above), this new text would not have been applicable in her case.

Under the former provision, however, appointments to grade A2 could be made if a candidate had "at least two years' professional experience at a level which is considered adequate". The appellant goes on to state that someone who sat the same competition and was appointed on 1 November 2006 was employed at grade A2. She maintains that the competition vacancy notice, together with the regulations on appointments in force at the time, constituted "specific assurances" such as to give rise to a "legitimate expectation". She submits that she is therefore entitled to claim protection of legitimate expectations.

32. The Secretary General concludes from the job classification exercise recently conducted at the Council of Europe that the duties performed by the appellant when she was a temporary staff member were in the nature of B3 duties. He adds that the A grade lawyers working in the Registry of the European Court of Human Rights perform more complex duties.

33. The Secretary General goes on to maintain that no discrimination may be deemed to have occurred because the appellant was treated in the same way as staff recruited after 8 November 2006. Nor, he submits, was there any violation of the "*tempus regit actum*" principle, as the Organisation has the right to amend its statutes and regulations. Prior to the adoption of the new Regulations on appointments (Appendix II to the Staff Regulations), on 8 November 2006, the appellant was not a permanent member of staff of the Council of Europe.

34. In conclusion, the Secretary General submits that he has not violated any regulation, practice or general principles of law.

B. Tribunal's assessment

35. The Tribunal must first rule on the objections of inadmissibility raised by the Secretary General.

36. Through his first objection, the Secretary General submits that, at the time when the appellant unconditionally accepted the offer of employment, the individual concerned no longer had any interest in bringing proceedings.

37. According to the first and second sentences of 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."

38. Article 15 of the Staff Regulations reads as follows:

Article 15 – Initial contract

> "1. Staff members shall be engaged on a contract drawn up in accordance with a standard form and concluded by them with the Secretary General under the conditions defined by the Regulations on Appointments.
>
> 2. The contract shall state the date on which the appointment becomes effective; on no account may this date precede that on which the official takes up his or her duties.
>
> 3. The content of the contract shall be communicated to the candidate in a letter of appointment."

39. The Tribunal notes that the appellant received a job offer setting out all the terms of employment, including the grade to which she was to be appointed. In a letter, the appellant freely and unconditionally accepted this offer, stating, as requested, that she had "read and approved [it] having taken cognisance of the Staff Regulations". The appellant subsequently took up her duties and, the same day, signed her contract which was shortly afterwards confirmed by the Director of Human Resources.

40. The Tribunal concludes from this that the appellant had no interest in bringing proceedings under Article 59, paragraph 1, of the Staff Regulations from the time when she accepted, on 28 December 2006, the offer of a fixed-term contract of employment. What is more, she reiterated her acceptance by signing, on 1 February 2007, her contract of employment, which once again made it clear that the grade to which she was being appointed was A1.

41. This conclusion is in keeping with international case-law (see ILOAT, judgments nos. 1396 of 1 February 1995 – Clark, and 1916 of 3 February 2002 - Dekker no. 2).

42. No legal significance may be attached in this respect to the fact that on 7 February 2007 the appellant applied to the Directorate of Human Resources, inquiring about the grade. For irrespective of whether this action constituted a simple request for information, an informal objection to the decision or a genuine administrative complaint, the fact remains that it occurred after the appellant had accepted the offer of employment and signed the contract. It is not open to the appellant to argue that the Director of Human Resources did not confirm the contract until 19 February 2007 because in her e-mails of 7 and 8 February 2007, the appellant did not, in any case, call into question either her acceptance of the offer of employment or her signing of the contract. The Tribunal does find it surprising, however, that the appellant received no official reply to these e-mails from Human Resources and that in the end, she had to lodge an administrative complaint in order to obtain such a reply.

43. Consequently, although the appellant's good faith is in no doubt, the Secretary General's objection should be upheld.

44. Having reached this conclusion, the Tribunal does not need to examine the second objection of inadmissibility raised by the Secretary General, namely that the administrative complaint was out of time. Nor can it deal with the merits of the case.

For these reasons,

The Administrative Tribunal:

Declares the appeal unfounded;

Dismisses it;

Orders that each party bear its own costs.

Delivered in Strasbourg on 29 February 2008, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	E. PALM