

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

Appeal No. 397/2007 (Patrick BUCHMANN v. Secretary General)

The Administrative Tribunal, composed of:

Mr Georg RESS, Deputy Chair,
Mr Angelo CLARIZIA,
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the present decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Patrick Buchmann, lodged his appeal on 14 September 2007. The appeal was registered on the same day under No. 397/2007.
2. On 10 October 2007, the appellant filed further pleadings.
3. On 28 February 2008, the Secretary General submitted his observations concerning the appeals. The appellant submitted observations in reply on 1 April 2008.
4. The public hearing in the present appeal was held in the Administrative Tribunal Hearing Room, in Strasbourg, on 23 April 2008. The appellant represented himself while the Secretary General was represented by Ms B. O'Loughlin, Deputy Head of the Legal Advice Department, Directorate of Legal Advice and Public International Law, assisted by Ms Christina Olsen, Ms M. Junker-Schreckenber and Mr Nicola-Daniele Cangemi, all from the same department. At the hearing, five other appeals were also examined (No. 394/2007 - Christopher Sawyer, No. 396/2007 - Giuseppe Cortese, No. 398/2007 - Nadine Bolender, No. 400/2007 - Marie-Louise Wigishoff and No. 404/2007 - Alfred Sixto) which concerned matters related to those raised by the present appeal.
5. After the hearing, at the request of the Tribunal, the Secretary General submitted a number of documents. By decision of 23 April 2008, the Tribunal decided that, in view of the confidential nature of these documents, it would study them without disclosing them to the

appellants. The appellant, for his part, submitted comments.

THE FACTS

6. The appellant, a French national, took up employment with the Council of Europe on 1st October 1995 and is a permanent staff member. He works in the Directorate of Human Resources where he is head of the Medical and Social Insurance Unit.

7. In the course of 2004, the Secretary General had decided to launch a job classification exercise.

Staff were informed of the launch of this exercise, in 2005, and of its subsequent progress.

In a document designed to address a number of recurrent questions, it was explained that:

“The objective of the exercise is not to promote or demote individuals. In some limited cases it can lead to the identification of some roles that have more or less impact in the organisation than was originally thought. In the future it will help the Organisation to coach you in your personal development and career and to give you information how to grow by competency management and self-development.”

In a document dated 10 March 2006, the Secretary General said that he was “determined to find the necessary funding and [had] already discussed this point with the Director General of Administration and Logistics”. In the same document, it was made clear that “if a member of staff is not satisfied with the grade of his/her post, a review can be requested under existing provision of the Staff Regulations”.

In a document dated 27 June 2006 on information for staff members, it was explained that “the Directorate General of Administration and Logistics is finalising the detailed procedures and timetable to allow staff members employed on reclassified posts to be considered for promotion to the grade of the post in question.”

In a communication dated 16 July 2007, the Secretary General told staff that any interested staff members would have until 15 September 2007 to lodge an administrative complaint under Article 59 of the Staff Regulations.

Following the exercise, the Secretary General concluded that the appellant’s post should be upgraded from B5 to B6.

8. At the end of July 2006, the appellant submitted a request, asking for a review in order that his post might be upgraded to A2.

9. In January 2007, the Director of Human Resources suggested that the appellant submit a new job description, to be included in the classification file. At the end of March 2007, the appellant learned that the independent experts had concluded that this updated description made no difference in terms of either the file or the classification of his post, and that consequently it had not been appended to his application for a review.

10. On 4 June 2007, the appellant was informed verbally that his request for a review had

been rejected.

11. On 15 June 2007, the appellant filed an administrative complaint under Article 59 of the Staff Regulations. He asked the Secretary General to kindly reconsider his decision not to upgrade his post to A2.

12. On 27 June 2007, the Director of Human Resources wrote to the appellant, informing him that the Secretary General had rejected his request for a review and that his post would be upgraded to B6.

13. In a letter dated 16 July 2007, the Secretary General rejected the administrative complaint. He considered that the complaint was unfounded and dismissed it.

14. On 14 September 2007, the appellant lodged the present appeal.

IN LAW

15. In his appeal, the appellant asks the Tribunal to annul the Secretary General's decision not to upgrade his post to A2. In the event that the Tribunal should refrain from giving a decision on the level of his post, he asks it to order that a job description matching his tasks be drawn up, approved by all the parties concerned and resubmitted for review, with any decisions made under the review procedure to take effect from 1 October 2006, as was the case with the upgrading to B6. The appellant also asks to be awarded 2,000 euros to cover the costs incurred in the present proceedings.

16. The Secretary General, for his part, asks the Tribunal to declare the appeal unfounded and to dismiss it. With regard to the request for reimbursement of costs, the Secretary General submits that the appellant has not incurred any costs and that his request should be dismissed.

I. SUBMISSIONS OF THE PARTIES

17. The appellant advances five grounds of appeal: violation of the general legal principle which requires that reasons be given for administrative acts, violation of the right to due process, violation of the right to a fair and just procedure, manifest errors of judgment with regard to the level of the post held by the appellant and failure to meet legitimate expectations.

18. In support of his first point, the appellant maintains that the decision to reject his request for a review was communicated verbally, without giving reasons, and that it was only after he insisted that he received a written answer (memorandum of 27 June 2007).

Referring to this memorandum of 27 June 2007 informing him that his request for a review had been dismissed, the appellant contends that merely referring to the prescribed procedure, to the method of classification and to the various bodies which dealt with the file does not amount to a statement of grounds for a decision if, indeed, that was the purpose of the letter. Consequently, he is unable to discover on what basis it was decided to reject his request for a review and to upgrade his post to B6 rather than A2. He further maintains that this constitutes an unacceptable impediment to his right to contest the grounds for this decision.

19. In his second ground of appeal, the appellant submits that there was a whole series of irregularities in the proceedings which suggest that these were not conducted in an objective, rigorous and proper manner. He alleges that:

- a) there was a lack of information and a failure to provide reasons regarding the grade assigned to the post;
- b) the classification exercise was based on erroneous documents as:
 - the job description used in the exercise contained omissions and was partially obsolete;
 - the reclassification notice contained substantial changes in relation to the job description used in the classification exercise;
- c) he was not consulted about the substantial changes made to the job description;
- d) there was no co-ordination with his immediate superior's case file;
- e) the reclassification notice was hastily drafted.

20. In his third ground of appeal, the appellant alleges that there has been a violation of the right to a fair and just procedure. He maintains that at no stage in the procedure were his superiors, as the persons handling, and responsible for ensuring the integrity of the exercise for the entire Organisation, able to act as managers in regard to himself. He cites as evidence the fact that in January 2007, his superior, the Director of Human Resources, was involved in the entire classification exercise yet was unable to take a decision on the case file and instead referred the matter to the independent experts, without herself adopting a position as his superior. Alternatively, the appellant notes that the independent experts are all staff members from the Directorate General of Logistics. In the absence of any statement of grounds and not having access to the file, he cannot help but think that other considerations were involved, besides merely the description of his duties (desire to save money on wages).

21. In his fourth ground of appeal, the appellant maintains that manifest errors were made when assessing the level of his post. In support of this claim, he presents six arguments relating to the description of his post, the description of his duties or the reference duties.

22. In his fifth and last ground of appeal, the appellant refers to the failure to meet his legitimate expectations. He submits four arguments relating to the possibility of being promoted to grade A, the audit finding that the post ought to be upgraded, discrepancies between the description of duties compiled for the classification exercise and that used in the appraisal procedure and, lastly, the mismatch between the objective-setting exercise and the job description.

23. The Secretary General, meanwhile, after providing some background information on the classification exercise, notes that each request for a review was examined separately, both by an independent classification expert and by the Directorate of Human Resources. The requests were submitted to an ad hoc board made up of two staff representatives, the director of Human Resources or her representative, a person representing the Secretary General and a representative from the main administrative entity concerned. Afterwards, the board made a

recommendation to the Secretary General on whether or not the post should be upgraded (indicating the opinions expressed if a consensus had not been reached).

24. In the opinion of the Secretary General, this review procedure was objective and rigorous and conducted in the proper manner.

25. The Secretary General further states that, in the appellant's case, the ad hoc board was unanimous that his post should not be upgraded and recommended that it remain at grade B6. He duly acted on this recommendation and decided to keep the post held by the appellant as a B6 post.

26. The Secretary General argues that it is not possible to go into the details of the points raised by the appellant because the experts, the Directorate of Human Resources and the ad hoc board carried out this exercise (analysis of the post and of the arguments put) in respect of all of the posts, his included. It would not be appropriate to review the entire exercise that was carried out by the experts in this area. It would not make sense to conduct an *a posteriori* review of each staff member's arguments and the profile of each post, as this has already been done by persons with expertise in such matters. Where a procedure has been conducted in a rigorous manner, as in the present case, its findings should be heeded.

27. With regard to the appellant's claim that no reasons were given for the decision not to upgrade his post to A2, the Secretary General submits that there is no foundation for this allegation. Staff members were kept informed as the classification exercise progressed and with due regard, obviously, for the confidential nature of the ad hoc board's work, the methods and results of the exercise, and the review procedure described above, not least through the numerous news items that appeared on the Council of Europe intranet site. The Secretary General further maintains that, with all this detailed information at their disposal, as well as the information in the memorandums that were sent out, advising them that their requests for upgradings had not been granted, and the information contained in the replies to their administrative complaints, staff could hardly claim to be unaware of the reasons behind the decision to upgrade a particular post to one grade rather than another, or to keep it at the same grade. The procedure is clear. In this particular instance, it was decided that the appellant's post should remain at grade B6 and not be upgraded to A2, as the appellant requested.

28. The Secretary General further observes that, throughout the procedure and afterwards, all staff members had the opportunity to seek further information and explanations both from their superiors and from the Directorate of Human Resources.

29. The Secretary General does not agree that having the Director of Human Resources on the ad hoc board had the adverse impact that the appellant suggests. He points out that the said Director did not in fact chair the board and that among those who carried out the analysis of posts, there were not only Council of Europe staff members but also a number of independent experts.

30. The Secretary General notes that, in any event, the Secretary General, being vested with authority to make appointments, has discretionary powers in matters of staff management. In exercising those powers, he is qualified to ascertain and assess the Organisation's operational needs and staff members' professional abilities.

31. The Secretary General concludes by pointing out that no staff member is entitled to have his or her post upgraded, still less to be promoted to the post occupied by him or her, should that post be upgraded.

32. Having regard to these factors, it is clear that there has been no breach, either in the regulations or in practice, of the general principle of law. Nor, in the Secretary General's view, have there been any errors in assessing the relevant facts, false conclusions drawn from the documents in the file or improper exercise of authority.

II. TRIBUNAL'S ASSESSMENT

33. Before considering the merits of the appeal, the Tribunal will examine a question that was not raised by the Secretary General and which relates to the admissibility of the appeal. For in view of the nature of the act complained of and the purpose of the exercise undertaken by the Secretary General, the Tribunal, before seeking to establish whether the act in question is an "administrative act adversely affecting" the appellant, must ascertain whether the appellant had a "direct interest" in challenging the act in question (Article 59 of the Staff Regulations). In its decision of 19 January 2007 in appeals nos. 366 and 367/20006 (Jeannin (III) and Becret (III) paragraphs 33-44), the Tribunal concluded that an appellant does not have a direct interest when the act in question is a management decision which does not concern the appellant. In paragraph 42 of its decision, the Tribunal concluded as follows:

"In the Tribunal's view it is important to note that the upgradings and downgrading did not concern posts for which any appointment procedure had been started with the previous grading, let alone posts occupied by the appellants. Consequently, the Tribunal is dealing here with a management decision not concerned with the appellants, even though – indirectly – it does affect them. The appellants therefore have no direct interest in the classification of the posts and have not directly or immediately suffered any harm entitling them to bring contentious proceedings".

The Tribunal goes on to state (in paragraph 43):

"The Tribunal accepts that, in the present case, the appellants' promotion prospects may have been somewhat diminished because of the changes made. It arrives at that conclusion even though the appellants have not proved that their qualifications would have enabled them to apply if the classification of the posts had remained unchanged.

However, the appellants' interest in the posts' continuing to carry their original gradings is not an interest protected by Article 59 of the Staff Regulations.

The Secretary General is undoubtedly empowered to make changes to the Secretariat. When altering the classification of vacant posts, he is taking a decision on the Secretariat's general organisation which is concerned not with management of an individual staff member's career but with the Council's job structure.

If the manner in which the Secretary General performs that task poses a staff management problem at the general level, that problem cannot be solved by means of a judicial decision in an individual case."

34. The Tribunal notes that in the present case, the decision complained of concerned the post occupied by the appellant whereas in the Jeannin (III) and Becret (III) appeals, the decisions complained of concerned posts which were not occupied by the appellants (paragraph 43 of the above-mentioned decision). This fact, however, should not lead the Tribunal to reach a conclusion different from that reached in the Jeannin (III) and Becret (III) appeals.

The upgrading procedure as announced, described and completed by the Administration was an procedure pertaining to the organisation of the Council of Europe, and hence a general decision, not aimed directly at individual staff members. The Secretary General initiated this procedure within the scope of his power to make general changes and adjustments to the Council of Europe Secretariat, without conferring an automatic right to promotion, not even on the persons occupying the upgraded posts. This is amply demonstrated by the proviso which the Secretary General made with regard to funding, which would be liable to be affected by any such promotion.

35. The review of the classification of the appellant's post was indeed part of a wider exercise spanning the entire Organisation: it was not designed to ascertain whether a particular staff member should or should not be promoted to the upgraded post. The reclassification procedure was all about managing the Council's job structure. Even if this organisational exercise resulted in a decision to upgrade the appellant's post, the Council was under no obligation to consider whether the appellant should be promoted. The appellant's interest in the procedure was indirect and incidental to the aim and general purpose of the exercise as a whole, which was designed to assess the operational needs of the Organisation rather than the professional abilities of its staff (paragraph 30 above).

36. Having arrived at this conclusion, the Tribunal should declare the appeal inadmissible.

37. Even if the Secretary General's very general statement, made in the document dated 10 March 2006, could be construed as entitling staff to contest his decisions by bringing contentious proceedings, the Tribunal considers that such a statement cannot alter the nature of the organisational decision. Reclassification is an objective decision, of general scope. It cannot, however, be deemed to constitute a general act adversely affecting staff under the terms of Article 59(1) of the Staff Regulations.

38. The Tribunal considers it worth adding that even if it did not consider this appeal to be inadmissible, it would, by a very similar process of reasoning, conclude that the appeal was unfounded, even after rejecting the Secretary General's formal objections as to admissibility.

39. For as regards the merits of the appeal, the Tribunal considers that a job reclassification exercise spanning the entire Council of Europe is without doubt a one-off procedure and not comparable to ordinary procedures such as competitions, promotions, etc., nor to the procedure involving the appellants Jeannin and Bcret and which related only to specific, clearly defined posts. It follows that the discretionary powers enjoyed by the Secretary General in respect of these organisational measures is extremely wide. Such a procedure may be conducted without detriment to individual postholders. This objective procedure is an internal administrative matter and hence within the Secretary General's discretionary authority. There is no need to justify such decisions because the reclassification exercise, as the Tribunal has already stated, is an organisational act. The Tribunal has noted that the job classification procedure launched by the Secretary General in 2005/2006 was primarily an objective procedure, internal to the Council of Europe. It was during this phase that an ad hoc board made up of five members (including a staff representative) was set up and a number of independent experts brought in to assist it in its work. Staff members, moreover, were perfectly free to submit to the board – whose proceedings, in view of their nature, could not be conducted in the presence of the parties – comments and information regarding the work involved in the posts occupied by them. The Tribunal can merely check to ensure that the board was properly constituted and that the proper procedures were followed. Having had an opportunity to study the records of the board's

proceedings for the purpose of this appeal, the Tribunal finds nothing amiss in either its composition or the procedures followed. The records show that the board conducted an objective review of the posts, with no reference to the abilities of the persons currently in those posts.

40. The Secretary General, however, did not confine himself to an objective upgrading of posts but seems to have also sought to address requests from individuals, asking to be promoted to the upgraded posts, even though staff members' involvement related mainly to training for the purpose of framing the organisational act. This post-reclassification phase, although it is included in the same Secretary General document, is not entirely "objective" and may have given staff the impression that they had an individual right of correction or at least a legitimate expectation, as has already been pointed out. It appears from the Secretary General's document on the ramifications of the reclassification that any individual promotions of this kind were contingent on financial resources (ultimately, whether there were enough funds in the budget) and personal ability (as in promotion procedures). This shows that there is no automatic obligation for the administration to promote individual staff members in the light of the results of the reclassification exercise.

41. The Secretary General did nevertheless respond in rather general terms to individual requests for promotion to upgraded posts. Even though these replies do not provide the extensive justification that might be expected in appeals or promotions, the Tribunal considers that the references to objective reclassification procedures followed by the ad hoc board meet the requirements for this exceptional procedure. In the present cases, the ad hoc board made recommendations to the Secretary General, at times unanimously and at other times by a majority. The entire procedure followed by this ad hoc board, which was set up to assist the Secretary General with his reclassification project, suggests diligence and a concern to be objective. The fact that some of the recommendations were supported by the majority, rather than all, of the members is more an indication of the problematic nature of the classification system, which is not wholly rational but rather an evaluation of objectives, duties, etc. which, like all evaluations, involves an element of subjectivity. There was nothing irregular in the fact that the Secretary General appointed this board of experts whose professional qualities served as a sort of safeguard, ensuring that the procedure was objective. Nor was there anything irregular in the fact that the Secretary General based his decision on the opinion of this board.

42. In conclusion, the appeal is inadmissible for the reasons stated in paragraphs 33-36 above and the Tribunal has no need to consider the merits of the appeal.

43. Under Article 11, paragraph 3, of the Tribunal Statute:

"3. In cases where it has rejected an appeal, the Tribunal may, if it considers there are exceptional circumstances justifying such an order, decide that the Council shall reimburse in whole or in part properly vouched expenses incurred by the appellant. The Tribunal shall indicate the exceptional circumstances on which the decision is based."

The appellant is claiming 2,000 euros in costs. The Tribunal is of the view that the information provided by the Secretary General to staff regarding the possibility of contesting his classification decisions constitutes an exceptional circumstance within the meaning of Article 11, paragraph 3, of the Tribunal Statute. Furthermore, and most importantly, this is one of the first appeals to be lodged in the matter.

The Tribunal considers it reasonable that the Secretary General should reimburse the sum of 2,000 euros.

For these reasons,

The Administrative Tribunal:

Declares the appeal inadmissible;

Dismisses it;

Orders the Secretary General to reimburse the sum of 2,000 in costs and expenses.

Delivered at Strasbourg on 3 July 2008, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

G. RESS