

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 398/2007 (Nadine BOLENDER 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, Ms Nadine Bolender, lodged her appeal on 18 September 2007. The appeal was registered on the same day under No. 398/2007.
2. On 12 October 2007, the appellant submitted further pleadings.
3. On 29 February 2008, the Secretary General sent his observations about the appeal. The appellant submitted a memorial in reply on 31 March 2008.
4. The public hearing in the present appeal took place in the Administrative Tribunal Hearing Room in Strasbourg, on 23 April 2008. The appellant was represented by M^e J-P. Cuny, while the Secretary General was represented by Mrs B. O'Loughlin, Deputy Head of the Legal Advice Department in the Directorate of Legal Advice and Public International Law, with the assistance of Mrs Christina Olsen, Mrs M. Junker-Schreckenberg and Mr Nicola-Daniele Cangemi, all of the same department. The hearing also dealt with another five appeals (No. 394/2007 - Christopher Sawyer, No. 396/2007 - Giuseppe Cortese, No. 397/2007 - Patrick Buchmann, No. 400/2007 - Marie-Louise Wigishoff and No. 404/2007 - Alfred Sixto), which relate to issues connected with those raised by the present case.

5. After the hearing, at the request of the Tribunal, the Secretary General submitted a number of documents concerning the procedures before the ad hoc Committee set up to advise the Secretary General in the post classification exercise. 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 FACTS

6. Recruited in December 1997, the appellant, a French national, is a permanent member of the Organisation's staff. She is assigned to the Directorate General of Administration and Logistics. She works as an information technology architect in the Information Technology Department.

7. In the course of the year 2004, the Secretary General decided to initiate a post 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

At the end of the exercise, the Secretary General reached the conclusion that the appellant's post should be maintained at grade B4.

8. On 19 July 2006, the appellant submitted a request for review of the classification of her post in order to obtain its upgrading to grade A2/A3.

9. On 27 June 2007, the Director of Human Resources informed the appellant in writing that the Secretary General, in response to her request for review, had decided to maintain the

post at its current grade, namely grade B4.

10. On 15 July 2007, the appellant lodged an administrative complaint in pursuance of Article 59 of the Staff Regulations. She requested the upgrading of her post to grade A2.

11. In a letter dated 27 July 2007, the Secretary General rejected the administrative complaint. He considered that the complaint was unfounded and dismissed it.

12. On 13 September 2007, the appellant lodged the present appeal.

THE LAW

13. In her appeal, the appellant requests that the Tribunal set aside the Secretary General's decision not to upgrade her post to grade A2. She also requests payment of the sum of 5000 euros as reimbursement of the costs occasioned by the present appeal.

14. The Secretary General, for his part, asks the Tribunal to declare the appeal unfounded and to dismiss it.

I. ARGUMENTS OF THE PARTIES

15. The appellant relies on three grounds in support of her appeal: violation of the general principle of law which requires reasons to be given for administrative acts, substantive defects in the impugned decision, and violation of general principles of law: equality between staff members and legitimate expectations of the other party.

16. Firstly, the appellant argues that, when she was orally informed, she received no explanation in any amount of detail of the negative decision communicated to her.. Furthermore, the decision to dismiss her administrative complaint contained not even the first signs of any reasons. The appellant adds that the impugned decision even went so far as to theorise about the impossibility of giving reasons. According to her, the impossibility of going into detail is quite simply incomprehensible. She emphasises that giving the reasons for an act is essential both for the staff member and for the administrative judge. In practice, each will be able, thanks to the reasons given for the decision, to assess from his own viewpoint the lawfulness of the decision, and, inter alia, verify whether the administrative authority has taken account of all the relevant facts and law.

17. In her second argument, the appellant maintains that the Secretary General has not taken account of vital information in the file, and has drawn from that file erroneous conclusions.

The appellant points out that the Secretary General limited his discretionary power by setting for himself objective parameters which he asserted that he wished to follow, and which he had communicated to staff. She adds that the Secretary General is sheltering behind the Ad hoc Review Board's recommendations and dismissed the administrative complaint because that committee had recommended upgrading to grade B4. She further adds that an appointment decision is not unchallengeable simply because the Secretary General had followed the Appointments Board's recommendation. The Secretary General could not shelter behind the Ad hoc Review Board's recommendations.

As to the erroneous conclusions, the appellant argues that the work done in her post, as described in the objective-setting form for the year 2007 and the appraisal form for 2006, is typical of the work of an ICT 1 post rather than ICT 3. In support of her assertions, the appellant refers to three vacancy notices for posts at grade A1/A2. An examination of these notices reveals that they refer to duties that are strictly similar, or even identical, to those which she performs in her current post. She adds that her superiors were convinced of the need to create a specific reference job, but their request had been refused, and this had brought a regrettable measure of confusion.

18. In her third argument, the appellant states that she is a victim of discrimination: she would do the job of a grade A while continuing to be classified at a level B.

As to the principle of the legitimate expectations of the other party, the appellant states that international administrative authorities are under an obligation to comply with the commitments into which they have entered vis-à-vis staff. The existence and application of this principle are confirmed by the case-law of international administrative courts.

The Secretary General gave all staff an undertaking to examine objectively the classification of their post and, if need be, to carry out the requisite reclassification. The Secretary General did not honour this commitment in respect of the appellant, in that he decided to classify her at the level of a reference job which scarcely corresponds to the work which she does.

19. 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).

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

21. The Secretary General adds that, in the appellant's case, the Ad hoc Review Board reached a unanimous decision that her post should not be upgraded, and recommended its maintenance at grade B4. He therefore followed this recommendation and decided to maintain the post held by appellant at grade B4.

22. 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, her 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.

23. With regard to the appellant's claim that no reasons were given for the decision not to upgrade her post to grade A, 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 B4 and not be upgraded to A2, as the appellant requested.

24. 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.

25. The Secretary General denies that the fact that he followed the opinion of the Ad hoc Review Board could be a problem. He then denies the existence of any discrimination, in so far as the Ad hoc Review Board concluded that the appellant's post corresponded to grade B4. Finally, the principle of the legitimate expectations of the other party was not ignored, because the Secretary General had undertaken only to verify and have verified the classification of posts within the Organisation, a pledge which was honoured. At no time had the appellant been given an assurance that the post would be upgraded to A level.

26. 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.

27. 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.

28. 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. THE TRIBUNAL'S ASSESSMENT

29. 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.”

30. 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.

31. 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 26 above).

32. Having reached this conclusion, the Tribunal should declare that the appeal is in any case inadmissible.

33. 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.

34. 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.

35. 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 Bécet 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.

36. 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.

37. 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.

38. In conclusion, the appeal is inadmissible for the reasons given in paragraphs 29-32 above, and the Tribunal has no need to examine the merits of the appeal.

39. 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 5000 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 5000 euros.

For these reasons,

The Administrative Tribunal:

Declares the appeal inadmissible;

Dismisses it;

Orders that the Secretary General should reimburse the sum of 5000 euros for 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