

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

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 404/2007 (Alfred SIXTO (II) 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 Alfred Sixto, lodged his appeal on 14 December 2007. The appeal was registered on the same day under No. 404/2007.
2. On 30 January 2008, the appellant submitted further pleadings.
3. On 6 March 2008, the Secretary General sent his observations about the appeal. The appellant submitted a memorial in reply on 3 April 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<sup>e</sup> 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. 398/2007 - Nadine Bolender and No. 400/2007 - Marie-Louise Wigishoff), 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 appellant, for his part, submitted comments.

## THE FACTS

6. Recruited on 1 January 1994, the appellant, a Spanish national, is a permanent member of the Organisation's staff. He is assigned to the Secretariat of the Parliamentary Assembly of the Council of Europe. With effect from 1 November 2007 – so after the occurrence of the facts of the case – he was promoted, following an internal competition procedure, to grade A5 and appointed Head of the Table Office in the Secretariat of the Parliamentary Assembly. The present case relates to facts concerning his former post (Head of the Secretariat of a standing committee, grade A4).

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 A4.

8. The appellant submitted a request for review of the grade of his post, in order to

obtain its upgrading to grade A 5.

9. On 27 June 2007, the Director of Human Resources informed the appellant in writing that the Secretary General had, in response to his request for review, decided to maintain the post at its current grade, namely grade A4.

10. On 1 August 2007, the appellant submitted another request for the upgrading of his post.

11. On 13 September 2007, the Director of Human Resources informed the appellant that a further review could not be begun. She added that the previous decision remained valid, given that the appellant's duties had not changed in the meantime.

12. On 14 September 2007, the appellant submitted an administrative complaint in pursuance of Article 59 of the Staff Regulations. He challenged the decision which had been communicated to him on 28 June 2007 and requested that this be set aside. The appellant also requested financial compensation.

13. In a letter dated 15 October 2007, the Secretary General rejected the administrative complaint. He considered that the complaint was unfounded and dismissed it.

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

## **THE LAW**

15. In his appeal, the appellant requests that the Tribunal set aside the Secretary General's decision not to upgrade his post to grade A5. He further requests adequate compensation for the professional and pecuniary damage suffered. He also requests the payment to him of the sum of 5,000 euros in reimbursement of the costs occasioned by the present appeal.

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

### **I. ARGUMENTS OF THE PARTIES**

#### **A. Admissibility of the appeal**

17. The Secretary General relies on the inadmissibility of the appeal on two grounds: firstly, the appellant could not justify a "direct and existing interest" (Article 59 (1) of the Staff Regulations), and, secondly, his complaint was made out of time.

18. In relation to his first defence, the Secretary General asserts that the decision challenged by the appellant produced no legal effect which would directly and immediately affect his interests and which would significantly change his legal status. The Secretary General adds that the appellant's work has not been changed since his appointment and that, as a result, no change in his legal status has occurred following the refusal to upgrade his post to grade A5. Furthermore, it was in 2004 that the appellant should have submitted his requests for compensation; those submitted today are out of time.

19. Where the second defence is concerned, the Secretary General maintains that it was in

2004 – i.e. when the appellant was appointed Head of a Committee of the Parliamentary Assembly of the Council of Europe – that the appellant should have protested about the classification of the post, if he considered that it was at too low a grade.

20. For his part, the appellant says that he does have an interest in taking action, and points out that the classification exercise was not started until 2005.

### **B. Merits of the appeal**

21. The appellant relies on three grounds in support of his 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.

22. Firstly, the appellant argues that, when he was orally informed, he received no explanation in any amount of detail of the negative decision communicated to him. Furthermore, the decision to dismiss his 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 him, the impossibility of going into detail is quite simply incomprehensible. He 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.

23. In his 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. He adds that the Secretary General is sheltering behind the *Ad hoc* Review Board's recommendations and dismissed the administrative complaint because that board had recommended that the posts of Head of a committee of the Parliamentary Assembly should be classified at grade A4 rather than A5 and, therefore, recommended that the appellant should be maintained at grade A4. He 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 of the staff members whose task is to ensure the smooth functioning of the Parliamentary Assembly, which differs from the requirements of the intergovernmental sector, is of a particular nature. On this point, the appellant referred to the self-classification which he produced on 1 August 2007 (see paragraph 10 above).

24. In his third argument, the appellant argues that he is a victim of discrimination: he is doing a job which belongs to grade A5 and has continued to be classified at A4 level until 1 November 2007, the date on which he was promoted to an A5 post.

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 him at the level of a reference job which scarcely corresponds to the work which he does.

25. 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).

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

27. The Secretary General adds that, in the appellant's case, the *Ad hoc* Review Board did not reach a consensus. It is on the basis of all the positions expressed by the members of the *Ad hoc* Review Board that he decided to maintain the appellant's post at grade A4.

28. 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.

29. With regard to the appellant's claim that no reasons were given for the decision not to upgrade his post to grade A5, 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 A4 and not be upgraded to A5, as the appellant requested.

30. 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.

31. 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 A4. 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.

32. 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.

33. 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.

34. 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

35. At first, the Tribunal will examine the question related to the admissibility of the appeal.

However, before examining the two defences raised by the Secretary General, defences which are based on the appellant's legal status and the conduct of the specific procedure relating to the latter, the Tribunal will consider a question which has not been raised by the Secretary General. 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 Bécet (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.”

36. 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 Bcret (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 Bcret (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.

37. 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 32 above).

38. Having reached this conclusion, the Tribunal should declare that the appeal is in any case inadmissible, and that there is no longer cause to return to the defences raised by the Secretary General.

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. In conclusion, the appeal is inadmissible for the reasons given in paragraphs 35-38 above, and the Tribunal has no need to examine the other grounds of inadmissibility raised by the Secretary General or to issue an express ruling about the merits of the appeal.

45. 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 5,000 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 5,000 euros.

For these reasons,

The Administrative Tribunal:

Declares the appeal inadmissible;

Dismisses it;

Decides that each party shall pay its own costs.

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