

CONSEIL DE L'EUROPE————

————**COUNCIL OF EUROPE**

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

Appeal No. 581/2017

**(Manuel Antonio de ALMEIDA PEREIRA v. Secretary General
of the Council of Europe)**

The Administrative Tribunal, composed of:

Mr Christos Rozakis, Chair,
Ms Mireille Heers,
Mr Ömer Faruk Ateş, Judges,

assisted by:

Mr Sergio Sansotta, Registrar,
Ms Eva Hubalkova, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Manuel Antonio de Almeida Pereira, lodged his appeal on 18 July 2017. It was registered on 21 July 2017 as appeal No. 581/2017.
2. On 31 August 2017, the Secretary General submitted his observations on the appeal.
3. On 30 September 2017, the appellant submitted a memorial in reply.
4. The public hearing took place on 20 November 2017 in the Administrative Tribunal's hearing room in Strasbourg. The appellant conducted his own defence, while the Secretary General was represented by Ms Ekaterina Zakovryashina, Head of Division in the Legal Advice Department, Directorate of Legal Advice and Public International Law, assisted by Ms Sania Ivedi, administrative officer in the same department.

In this circumstance, the appellant filed some documents that were communicated to the Secretary General.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The appellant is a staff member of the Council of Europe with a contract of definite duration. He entered on duty on 18 January 2016 following a recruitment procedure launched for the position of Project Manager (Cybercrime) (vacancy notice n° e28/2015). He works in the Council of Europe Office in Bucharest (Romania).

6. Upon successful recruitment, the appellant was placed in the reserve list of candidates, and in December 2015 he was contacted by the Organisation with a view to his effective engagement.

7. For the purpose of the said engagement, a number of emails was exchanged between the Human Resources and the appellant. The first information requested by the appellant was a clarification regarding the net salary of this particular position and the respective grade. Actually, the vacancy notice mentioned that “remuneration for this position in Bucharest is based on the coordinated salary scale for Council of Europe staff serving in Belgium”. According to him, he had never had a response to this question before receiving the offer.

8. On 23 December 2015, the appellant received the employment offer from the Directorate of Human Resources, which, *inter alia*, specified the amount of the net salary based on A2 grade, step 1.

9. On 25 December 2015, the appellant signed the offer mentioning “Read and agreed having taken note of the Staff Regulations”. Nevertheless, in his email to the Directorate of Human Resources sent on 31 December 2015, he noted, *inter alia*:

“...

2. In accordance with Point 3 of the offer, my appointment conditions are grade 2 step 1. Having in mind the opened possibility previewed in Section 2 of Article 24 of Appendix II to the CoE Staff Rules, which states that ‘The Secretary General shall set out, in a Rule, the conditions for granting additional steps to candidates with more extensive professional experience’ and also having in mind my seniority (25 years of professional experience), I kindly request if such a rule was issued and therefore my step be reviewed accordingly? Please note that this is just a question for my own information and for the SG’s consideration and does NOT constitute whatsoever a condition for me to accept the offer.

...

I am not sending yet the offer signed due to the possible existence of any mistake in accordance with the question raised above in ... Nr 2.”

10. In its reply of 4 January 2016, the Directorate of Human Resources informed the appellant, among other things, that:

“...

2. The Rule 1322 states that: ‘The appointment under 24 of the Regulations on Appointments (Appendix II to the Staff Regulations) of an external candidate to the A2, B2, C2 or L2 grade shall be to the first step of the grade.’”

11. On the same day, the appellant sent back the signed offer to the Directorate of Human Resources.

12. On 18 January 2016 the appellant entered on duty in the Cybercrime Programme Office (C-PROC) of the Council of Europe in Bucharest.

13. On 16 March 2016 the Head of C-PROC, Cybercrime Division addressed a memorandum to the Director of Human Resources drawing his attention to the appellant's 25 years of relevant professional experience and the latter's maturity which were of obvious benefit to the Bucharest Office which had difficulties in attracting a bigger number of good candidates. It was further mentioned that the appellant was managing a project with 5 persons and a budget of EUR 10 million. Considering this background, the Head of C-PROC requested that the exception provided for by the rules be applied to the appellant and that additional steps be awarded to him.

14. Having received the memorandum on 2 June 2016, the Director of Human Resources replied in a memorandum dated on 7 June 2016. Referring to Article 1 of Rule 1322 and taking into consideration that the appellant had accepted and signed the contract, starting on 18 January 2016 with the remuneration based on grade A step 1, and without any discussion regarding additional steps during the recruitment phase, the Director of Human Resources considered that legally he was not in a position to respond positively to the request.

15. On 17 June 2016 the appellant introduced an administrative complaint challenging the memorandum of the Director of Human Resources, in particular his decision not to review the appellant's nomination to grade A2, step 1. He complained of the level of his salary and requested that the Secretary General grant him supplementary steps taking into account his professional experience. In this respect, he underlined that he had not been properly informed by the Directorate of Human Resources at the moment of his recruitment. He submitted, in particular that:

"8. The HR Officer responded to [my] questions in an email dated of 4 January 2016. To the first question the HR Officer only mentioned the rule 1322 and did not put to the consideration of the Secretary General as requested and did not consult anyone else concerning my 25 years of experience and to open possibility that is at the discretion of the SG to consider an additional step based on the experience.

...

10. Without further information provided and because the complainant did not have any other possibility to verify other considerations concerning salary steps and scales, the complainant just signed the offer.

11. By not providing the complainant with sufficient information on the salary scales outside France and by not putting at the consideration of the SG the request for reviewing the step as requested by the complainant, the Council of Europe violated the duty of information beyond any doubt and the legitimate expectations of the staff member."

16. Under Article 59 paragraph 5, the appellant's administrative complaint was submitted to the Advisory Committee on Disputes which adopted its opinion on 14 March 2017. It invited the Directorate of Human Resources to reconsider the conditions of the complainant's recruitment by entering with him into negotiations concerning the possibility of awarding him additional steps.

17. On 12 April 2017, the Secretary General granted the administrative complaint. He underlined that the appellant's situation had not corresponded, at the moment of his recruitment, to a situation allowing the Human Resources to offer supplementary steps to the appellant. Nevertheless, the Secretary General considered, like the Advisory Committee on Disputes, that the appellant should have received the complete information as to the provisions governing the award of additional steps. He therefore decided, in order to remedy the harm caused to the appellant, that the Human Resources would contact him in order to find a reasonable solution whereby the wrong, caused to the appellant by the failure to give him the full information at the moment of his recruitment, would be compensated.

18. On 31 May 2017 the Directorate of Human Resources informed the appellant as follows:

“... as a compensation for the prejudice caused by the failure to provide you with exhaustive information on the provisions governing the conditions for granting additional steps to external candidates on the occasion of your appointment, you will be granted one additional step to be paid retroactively as from your recruitment by the Organisation.”

19. On 1 June 2017 the appellant reacted in the following terms:

“... in order that I can consider a solution for my case, I would kindly request:

1. What would be, in normal conditions, the step given to a professional with the years of proven experience that I have in the Category A2? What is the criterion for the attribution of steps?
2. Based on that reply, I am therefore ready to enter into negotiations and agree in a fair, equitable and collaborative manner on the setting-up of the correspondent step.
3. Please note that in accordance with my own calculations vis-à-vis the years of relevant experience – as I have said in previous communications – I estimate I should be in at least step 7.

Based on the above, and without prejudice of further action I may take under Article 60 of the Staff Regulations, I have to decline the offer you have done in your email below and I am available – within the spirit of the opinion of the advisory committee – to enter into negotiations in order to reach an equitable and fair agreement in the step that I believe I deserve.”

20. In his reply of 7 June 2017 a representative of the Directorate of Human Resources reiterated the Directorate's proposal to grant the appellant compensation in the amount of one additional step to be paid retroactively as from his recruitment, clarifying further the decision of the Secretary General and ensuing proposal of the Human Resources. They noted, *inter alia*:

“The Secretary General found that a retroactive negotiation of your recruitment conditions has no basis in the relevant legal provisions (Article 24 of Appendix II to the Staff Regulations and Article 1 of Rule No. 1322 of 9 November 2010 on the conditions for granting additional steps to external candidates appointed to beginning-of-career posts or positions). Having regard to your professional experience at the time of your recruitment you were offered employment at grade A2/1 instead of the usual entry grade which is A1 (see Article 24 a.2. of Appendix II to the Staff Regulations). The Secretary explained in his reply to your complaint that the possibility of granting additional steps constitutes a recruitment tool which is only to be used where an external candidate would otherwise reject the Organisation's employment offer. On the occasion of your recruitment you did, however, not make the acceptance of the employment offer by the Council subject to more favourable salary conditions. By contrast, you always made it very clear that the question of granting additional steps would in no way affect your acceptance of the offer.

The Secretary General nevertheless acknowledged the finding of the Advisory Committee on Disputes that the Administration failed to provide you, at the time of your recruitment and at your related request, with complete information on the relevant legal provisions. He consequently decided to award a

compensation for the prejudice caused by such failure. The Directorate of Human Resources' email of 31 May 2017 aims at implementing this decision and you will appreciate that the Directorate of Human Resources has no mandate to enter into retroactive negotiations on your salary conditions.”

21. On 9 June 2017, the appellant met the representative of the Directorate of Human Resources who, according to the appellant, reiterated that the only offer was one step; but he also mentioned that even if the appellant would have tried to negotiate the steps at the time of his recruitment, the policy of the Directorate of Human Resources would be to pass to the next candidate in the list.

22. On 10 June 2017 the appellant, replying to the previous email of 7 June 2017 underlined that he had not been aware of the rule allowing him to negotiate the steps before his recruitment. He noted, among other things, the following:

“5. That the fact that I have mentioned that I would accept the initial offer is not more than a normal situation that a newly employee is facing when entering a new organisation, who does not obviously want to lose his job; in addition, as you clearly said in our meeting, if I would reject the offer and tried to negotiate a higher step, the attitude of the Administration would be to go to the next candidate in the list; therefore, the argument that I should have negotiate the steps before the recruitment would be totally useless.”

23. On 18 July 2017, the appellant lodged the present appeal.

II. THE RELEVANT LAW

24. Article 24 (Beginning-of-career appointments and passage between categories of posts or positions) of The Regulations on Appointments (Appendix II to the Staff Regulations) reads as follows:

“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.”

25. Rule No. 1276 of 9 June 2007 on the conditions for granting additional steps to external candidates appointed to beginning-of-career or positions (repealed on 1 December 2010 by Rule No. 1322)

“1. The Secretary General when appointing, under Article 24 § 2 of the Regulations on Appointments (Appendix II to the Staff Regulations), an external candidate to the A2 grade shall allow additional seniority, in order to take account of his/her previous professional experience involving duties similar to those exercised by A grade staff members, in accordance with the following table:”

Overall professional experience of at least:	External candidate appointed as:
eight years	A2 step 2
ten years	A2 step 3
twelve years	A2 step 4
fourteen years	A2 step 5

26. Rule No. 1322 of 9 November 2010 on the conditions for granting additional steps to external candidates appointed:

“...

HAVING REGARD to Rule No. 1276 of 9 June 2007 on the conditions for granting additional steps to external candidates appointed to beginning-of-career posts or positions;

HAVING REGARD to the budgetary restrictions affecting the Council of Europe and the commitment of the Organisation to optimise the use of its resources, by reducing staff expenditure;

CONSIDERING that the provisions of Rule No. 1276 are too inflexible and lead to expenditure which is not necessary for recruitment purposes and should therefore be revised in order to allow for the granting of additional steps only where this is necessary to recruit external candidates;

...

Article 1

1. The appointment under Article 24 of the Regulations on Appointments (Appendix II to the Staff Regulations) of an external candidate to the A2, B2, C2 or L2 grade shall be to the first step of the grade.

2. More extensive professional experience than that required for the appointment to the grade may only be considered if it is necessary to award additional steps in order to recruit the external candidate because of his/her specific training, special experience and/or labour market conditions. Such an award is to be used as a recruitment tool and cannot be construed as a subjective right for external candidates. Reasons shall be stated for the decision to award additional steps.”

THE LAW

27. The appellant challenges the failure of the Administration to provide him in a clear manner with all necessary information at the time of negotiation of the job offer and the subsequent decision of the Director of Human Resources of 7 June 2016, denying him the award of additional steps and therefore requests the Tribunal to direct the Administration to award him additional steps to which he is entitled due to his relevant experience for the job.

28. The Secretary General asks the Tribunal to declare the appeal ill-founded and to dismiss it.

I. SUBMISSIONS OF THE PARTIES

A. The appellant

29. The appellant underlines that he always provided the services of the Council of Europe with all possibilities to reach a consensus by going through his line of hierarchy from the beginning of the dispute until the submission of his appeal to the Administrative Tribunal.

30. He recalls that he never contested the fact that he had been recruited on an A2 category. He did know it from the beginning and had accepted that without hesitation.

31. The issue in dispute was the attribution of additional steps based on his experience and on the wrong/negligent/lack of information delivered by the services of the Council of Europe at the time of his recruitment.

32. The appellant went through his own hierarchy, through the submission of memos signed by his Head of Division and immediate supervisor; he went through the Advisory Committee on Disputes and also through direct meetings with the administration and used all means at his disposal to avoid introducing the present appeal, acting always in the most friendly and cooperative manner to settle the issue.

33. He makes it clear that during the dispute concerning the present issue, he continued to carry out his professional duties in the most efficient manner and with very high level of performance, always exceeding expectations. He adds that from the Administration, he always had negative responses with no possibility for negotiation. The Administration was always imposing measures, going against the spirit and the wording of the recommendation made by the Advisory Committee on Disputes.

34. The appellant further recalls that, in the meeting with the representative of the Directorate of Human Resources on 9 June 2017, he was informed that even if he had not accepted the offer based on the steps, the Directorate of Human Resources would just pass to the next candidate and the appellant would lose the opportunity for the job. Recalling also the previous facts of the case, the appellant underlines that he did not act in bad faith.

B. The Secretary General

35. The Secretary General, relying on Article 24, paragraph 2 of the Staff Regulations and on Article 1 of Rule No. 1322, maintains that the only criterion to be taken into consideration in order to award additional steps to an external candidate is to know whether the award is necessary for the candidate's recruitment. If the recruitment of the candidate is not called into question and if the latter does not require a higher salary as a condition to accept the employment offered by the Council of Europe, the conditions laid down in Article 1, paragraph 2 of Rule No. 1322 are not in any case complied with and the additional steps cannot be awarded.

36. The Secretary General underlines that the candidates who have extensive professional experience do not have a subjective right to have the additional steps granted. In other words, even if in the event that the appellant would know the content of Article 1, paragraph 2 of Rule No. 1322 at the moment of his recruitment, it would have not been justified to request to apply this provision to his personal situation because the grant of additional steps does not constitute a subjective right.

37. Indeed, the grant of additional steps is a recruitment tool which can be used by the Directorate of Human Resources, when it is necessary to propose wage conditions more favourable to allow the recruitment of a candidate who refuses the original offer due to too low salary level. Hence, when the candidate accepts the offer of employment and the recruitment is not affected, it is not possible to award the additional steps as provided for in Rule No. 1322.

38. Nonetheless, it is important to note that if the candidate refuses an employment offer because of the too low salary level, the Directorate of Human Resources has no obligation to use this recruitment tool and to award the additional steps to the candidate concerned. Having regard to the necessity for the Council of Europe to reduce its personnel related costs, the policy of the Directorate of Human Resources in case of such a refusal is, in the vast majority of cases, to take note of the refusal and to offer the employment to the next candidate on the reserve list.

39. Referring to the content of the appellant's email of 31 May 2016, his administrative complaint and application to the Tribunal, the Secretary General underlines that the appellant did not give up the employment offer of the Council of Europe and that he merely wanted to discuss the possibility of granting the additional steps in order to take into account his extensive professional experience. He clearly indicated that he did accept the employment offer regardless the outcome of his question concerning the grant of the additional steps.

40. The Secretary General further emphasises that the appellant's extensive experience was taken into account at the moment of his recruitment as he was given grade A2 instead of A1 as provided for in Article 24, paragraph 2 of the Staff Regulations.

41. In addition, the Secretary General finds that the Directorate of Human Resources breached their duty to fully inform the appellant. Nevertheless, he does not accept that the appellant would be a victim of the loss of a chance to be granted the additional steps based on his extensive professional experience.

42. The Secretary General concludes that the appeal should be declared ill-founded and rejected.

C. The Tribunal's assessment

43. The Tribunal notes at the outset that there is no fixed or standard model of recruitment into international organisations. The recruitment policy, including wage settlements, is directly linked and has therefore to be adapted to the budgetary situation of each international organisation, such as the Council of Europe. One of the measures adopted by this Organisation in order to optimise the use of its resources was the revision of the rules for allowing additional steps when recruiting external candidates. If under Rule No. 1276 of 9 June 2007, which was repealed on 1 December 2010, additional steps to external candidates appointed to beginning-of-career positions were granted automatically depending on the length of their previous professional experience involving duties similar to those exercised by staff members appointed at the same grade, Rule No. 1322 which was the one applicable at the moment of the present appellant's recruitment, introduced a new approach: award of additional steps is henceforth used as a recruitment tool which cannot be construed as a subjective right for external candidates.

44. The Tribunal further notes that the contractual policy and the procedure of conclusion of employment contracts have to be carried out in a clear, transparent and unambiguous manner from the outset and that the expression of will of the parties involved has to be comprehensive, clear and explicit. Moreover, an individual's consent for accepting the employment offer has to be a freely given specific indication of his or her wishes by which the individual signifies his or her agreement to accept the offer.

45. In the present case, the Tribunal observes that having received the employment offer on 23 December 2016, the appellant signed it two days later mentioning "Read and agreed having taken note of the Staff Regulations". Nevertheless, he did not dispatch the offer back to the Directorate of Human Resources immediately afterwards, having some hesitations in respect of the career step assigned to him. He addressed this issue to the Directorate of Human Resources underlying that, in any event, this did "not constitute whatsoever a condition for [him] to accept the offer".

46. The Tribunal admits that, in its reply, the Directorate of Human Resources failed to provide the appellant with full information on circumstances in which additional steps could be awarded to an external candidate at his or her recruitment, as referred to in the second paragraph of Article 1 of Rule No. 1322. It notes, however, that this omission could be explained by the fact that there was no genuine doubt about the appellant's intention to join the Organisation, he himself having been clear in his statements as to the acceptance of the employment offer in its original terms, including the salary stipulations. The Directorate of Human Resources could, therefore, reasonably consider that there was no need to provide further information about the conditions of employment and that there was no room for using this recruitment tool in the appellant's case.

47. In other words, though the Directorate of Human Resources did not act in a wholly clear, transparent and unambiguous manner not disclosing the full text of Rule No. 1322 to the appellant, the latter could and had to express himself comprehensively, clearly and explicitly in respect of the conditions under which he was prepared or not to accept the employment offer. The Tribunal adds in this respect that the procedure of conclusion of employment contracts is guided by the principle of contractual liberty, based on mutual agreement and free choice. Moreover, the memorandum of 16 March 2016 was not addressed to the Director of Human Resources by the appellant himself but by his Head of Division and no indication is given that he was acting following an appellant's request who had just complained about a non-correspondence of his grade and salary to his experience and responsibilities.

48. In the light of these circumstances, the Tribunal considers that the appeal is ill-founded and must be dismissed.

D. Costs

49. The appellant, who conducted his own defence and is not based in Strasbourg, asks the Tribunal to order the reimbursement of his travel expenses for the hearing held in Strasbourg.

50. The Secretary General invites the Tribunal to dismiss this claim. He adds that he himself was willing to waive the requirement to hold a hearing and that the oral procedure took place because the appellant requested it.

51. The Tribunal notes that the appellant was under no obligation to waive the hearing. Any such renunciation, moreover, would have required the approval by the Tribunal which alone has the power to decide whether an oral procedure can be dispensed with.

52. The appellant is not based in Strasbourg and he should not, therefore, be obliged to bear the costs entailed in attending the oral procedure.

53. Consequently, the Tribunal considers it reasonable that the Secretary General should reimburse the requested sum (Article 11, paragraph 2, of Appendix XI to the Staff Regulations).

III. CONCLUSION

54. The appellant's appeal is ill-founded and must be dismissed. The Organisation has to reimburse the appellant in respect of the costs incurred and claimed by him.

For these reasons, the Administrative Tribunal:

Declares the appeal ill-founded and dismisses it;

Orders the Organisation to reimburse the appellant in respect of the costs incurred and claimed by him.

Adopted by the Tribunal in Strasbourg, on 24 January 2018, and delivered in writing on 7 March 2018 pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure, the English text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS