

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 665/2020
(Ilknur YUKSEK (II) v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Ms Nina VAJIĆ, Chair,
Ms Françoise TULKENS,
Mr Christos VASSILOPOULOS, Judges,

assisted by:

Ms Christina OLSEN Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Ilknur Yuksek, lodged her appeal on 27 May 2020. The appeal was registered the same day under No. 665/2020.
2. On 22 July 2020, the Secretary General forwarded her observations on the appeal.
3. On 18 September 2020, the appellant filed her submissions in reply.
4. On 16 November 2020, the Staff Committee applied to intervene in the case, in support of the appellant's submissions. In an Order issued on 27 November 2020, having conferred with the parties, the Chair authorised the Staff Committee to submit written observations and specified the procedural documents which were to be disclosed to the intervening party.

The Staff Committee's written intervention was received by the Tribunal on 4 December 2020 and forwarded to the parties to the dispute.

5. Owing to the precautionary measures in force because of the pandemic, the hearing in the appeal took place by videoconference, on 11 December 2020. The appellant conducted her own defence. The Secretary General was represented by Mr Jörg Polakiewicz, Director of Legal

Advice and Public International Law (Jurisconsult), assisted by Ms Sania Ivedi and Ms Ine DE CONINCK, Administrators in the Legal Advice and Litigation Department.

6. During the hearing, the Chair of the Tribunal announced the Tribunal's decision to admit to the file two written statements submitted by the Secretary General on 10 December 2020.

7. On 18 December 2020, the appellant submitted to the Tribunal her comments on the written statements submitted by the Secretary General.

8. By Order of 23 December 2020, the Chair of the Tribunal issued a ruling on the requests to admit further evidence to the file which the appellant had submitted in her comments of 18 December 2020. In addition to admitting the appellant's comments to the file, the Order ruled that it was not necessary to hear as a witness the person whose written statement was thus admitted to the file and as a consequence, it rejected the appellant's request to admit the witness hearing of this person. The Order further rejected the appellant's requests that the Tribunal call for the hearing of another witness and for the production of additional evidence.

9. On 8 January 2021, the Secretary General submitted her comments on the appellant's written submissions dated 18 December 2020.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

10. The appellant, Ms Ilknur Yuksek, is a temporary staff member who has been regularly employed at the Council of Europe on the basis of temporary and fixed-term contracts (CDD) since 2004. At the time of lodging her appeal before the Tribunal, she was working in the Sports Convention Unit of the Directorate General of Democracy (DGII) as a senior project manager on a temporary contract.

11. The appellant applied for the post of project manager (grade A1/A2) for MONEYVAL (DGI/Directorate of Information Society and Action against Crime) under the Council of Europe's external recruitment procedure pursuant to Vacancy Notice no. e17/2018. Having successfully passed the written tests, the appellant was invited to attend an interview with the Appointments Board on 3 April 2019.

12. In an email dated 7 June 2019, the Directorate of Human Resources informed the appellant that, on the basis of the Appointments Board's recommendation further to her interview, the Secretary General had decided not to include her name on the reserve list that had been drawn up at the end of the competitive examination.

13. On 28 June 2019, the appellant sent an e-mail to DHR in which she enclosed an electronic copy of her "Administrative Complaint (...) in accordance with Article 59 of the Staff Regulations" concerning the competitive procedure no. e17/2018. In her email, the appellant specified that the original had been sent to DHR, the same day, by registered mail. The document in question, dated 27 June 2019, was entitled "Request related to the examination procedure no. e17/2018 Programme Manager/MONEYVAL" and was addressed to the Secretary General of the Council of Europe, via the Directorate of Human Resources. In the

conclusions, the appellant asked that the decision not to place her on the reserve list be reviewed.

14. On the same date, the Director of Human Resources sent a memorandum to the appellant acknowledging the receipt by the Secretary General of the appellant's "administrative request of 27 June 2019".

15. On 8 August, the appellant met with a human resources adviser who provided her with feedback on her interview.

16. On 13 August 2019, the appellant sent an email to the Director of Human Resources explaining that the feedback received had not dispelled her doubts and requesting that her "administrative complaint be referred to the Advisory Committee on Disputes for an opinion in accordance with Article 59, paragraph 5 of the Staff Regulations".

17. On 14 August 2019, the appellant received an email in reply on behalf of the Director of Human Resources stating that she had submitted an "administrative request" and informing her that her request was "being dealt with as such, in conformity with the provisions of Article 59, paragraph 1, of the Staff Regulations". The email further specified that "administrative requests are due within sixty days from the date of receipt by the Secretariat" and that the appellant's request could not be referred to the Advisory Committee on Disputes "as only administrative complaints may be subject to such a referral".

18. On the same day, the appellant replied to the Director of Human Resources by email, stating that there had been "a misunderstanding" and that her intention had been to submit "an administrative complaint (...) within the deadline of 30 days provided for the administrative complaints by Article 59, paragraph 3b of the Staff Regulations". She therefore asked the Director to "reconsider [her] position" and grant her the opportunity to exercise "[her] right to an administrative complaint".

19. On 20 August 2019, the Director of Human Resources, acting on behalf of the Secretary General, sent the appellant a letter in reply "to [her] administrative request under Article 59, paragraph 1 of the Staff Regulations". Noting that the appellant did not "raise any irregularity throughout the recruitment procedure but rather [disagreed] with the assessment of [her] performance during the interview by the Appointments Board", the Director of Human Resources considered that there was nothing to justify a review of the Secretary General's decision not to place the appellant on the reserve list. The letter advised the appellant that, pursuant to Article 59, paragraph 2 of the Staff Regulations, she was entitled to submit to the Secretary General an administrative complaint against this decision.

20. On 5 September 2019, the appellant submitted an administrative complaint against this decision. She requested that the decision not to place her on the reserve list be set aside on the ground that she had not been interviewed by an impartial Appointments Board.

21. At the appellant's request, the administrative complaint was submitted to the Advisory Committee on Disputes, which delivered its opinion on 4 March 2020.

22. In its opinion of 4 March 2020, having noted that the admissibility of the complaint was not a peremptory matter for it to examine in depth and decide, the Advisory Committee on

Disputes noted its finding in relation to the complaint by Ms Bilge Kurt, that where two consecutive acts give rise to grievances, a related complaint will have been filed in time provided that it is referred to the Secretary General within thirty days of the second act and noted that in the present case, “the Complainant received two decisions from the Secretary General which were capable of giving rise to grievances: the decision of 7 June 2019 not to place her on the reserve list following completion of the recruitment procedure for Vacancy Notice no. e17/2018; and the decision of 20 August 2019 not to review the decision of 7 June 2019, which was given less than thirty days before the filing of the present administrative complaint” (paragraph 23 of the opinion).

As to the merits of the case, the Committee reached the following conclusion:

“24. In the Committee’s view, [the appellant] has provided *prima facie* evidence of the conflict. It therefore accepts that one of the four members of the Appointments Board who took part in her interview was a former manager with whom she had had a conflict.

25. The Committee is not in possession of sufficient information to reach any conclusion on whether the Complainant’s conflict with Mr K. in 2013-2014 had any bearing on the Appointments Board’s recommendation not to include her on the reserve list. (...) It considers, however, that the fact that Mr K. was a member of the Appointments Board may have amounted to a loss of opportunity for her.

(...)

27. In the Committee’s view, the presence on the Appointments Board of a member whose impartiality a candidate has reason to doubt will likely impact upon the candidate’s performance at interview, even if that member demonstrates no sign of actual bias. There is therefore a real risk of prejudice, especially where the member concerned is either the Chair of the Board or, as in the case at hand, the representative of the recruiting entity, since that member’s opinion – especially in relation to technical matters will carry considerable weight. (...)

28. The Advisory Committee on Disputes considers that the Council of Europe has insufficiently regulated the appointments procedure and, as a consequence, that procedure does not afford candidates adequate protection against a lack of impartiality on the part of the Appointments Board. It therefore recommends that the Administration considers whether measures could be taken to strengthen protection in this area, for example, through the advance disclosure to candidates of the identity of the members of the Appointments Board, and/or by requiring Board members to formally disclose any potential conflicts of interest when they are informed about the list of candidates.

29. Such guarantees would most likely have permitted concerns about the impartiality of the Appointments Board to be addressed before the Complainant’s interview took place.

30. For these reasons, the Advisory Committee on Disputes unanimously, – without prejudice to the question of whether the Complainant’s alleged conflict with one of the members of the Appointments Board had any bearing on the Appointments Board’s recommendation, recommends that the Administration allows for the Complainant to be interviewed again by the Appointments Board in a different composition or, in the light of the applicant’s years of service for the Organisation, considers the possibility of reviewing the issue of adding the complainant’s name on the reserve list of competition e 17/2018”.

23. On 6 April 2020, the Secretary General dismissed the complaint in its entirety on the grounds that it was inadmissible and, furthermore, ill-founded.

24. On 27 May 2020, the appellant lodged the present appeal (Article 60 of the Staff Regulations).

II. THE RELEVANT LAW

25. The relevant provisions of Article 59 of the Staff Regulations read as follows:

“1. Staff members may submit to the Secretary General a request inviting him or her to take a decision or measure which s/he is required to take relating to them. If the Secretary General has not replied within sixty days to the staff member's request, such silence shall be deemed an implicit decision rejecting the request. The request must be made in writing and lodged via the Director of Human Resources. The sixty-day period shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.

2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression “administrative act” shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.

3. The complaint must be made in writing and lodged via the Director of Human Resources:

(...)

b. within thirty days of the date of notification of the act to the person concerned, in the case of an individual measure;

(...)”

26. Appendix II (Regulations on appointments) to the Staff Regulations lays down the rules governing recruitment procedures. Competitive examinations are governed by Article 15, which provides:

“1. Recruitment procedures shall consist of shortlisting of applications, assessments, and interviews:

- shortlisting shall be based on the eligibility criteria detailed in the vacancy notice. Candidates who best match the requirements shall be invited to the next stage of the selection process;
- assessments can include written papers, ability tests, knowledge tests, simulation exercises, situational judgement exercises, assessment centres, questionnaires, or any other type of assessment deemed appropriate for the recruitment needs; at least one assessment must be eliminatory;
- interviews shall be conducted by the Appointments Board. The Secretary General may invite up to two more persons, from outside the Council or from among serving staff, to take part in the interviews in an advisory capacity.

2. When the number of successful applicants in a recruitment procedure exceeds the number of vacant posts or positions open to competition, a reserve list placing applicants in order of merit may be drawn up. Successful applicants shall be notified that their name appears on the reserve list. A reserve list shall be valid for two years; its validity may be extended up to a maximum of four years”.

27. Rule No. 1355 of 12 March 2014 lays down the procedures for the implementation of the Regulations on appointments. The composition of the Appointments Board is governed by Article 3 of this Rule which provides:

“1. In accordance with Article 10, paragraph 1, of the Regulations on Appointments, the Secretary General appoints a staff member of grade A5 at least, as a member of the Appointments Board. The Secretary General may appoint up to six alternates. The regular member and his or her alternates shall agree on the sharing of their functions.

2. The Head of the Major Administrative Entity where the post or position is to be filled decides who shall represent the entity concerned on the Board. In the case of recruitment to fill vacancies in several Major Administrative Entities, a representative of one of these entities shall be appointed by the Director of Human Resources. The entity's representative must hold at least the same grade as the post or position to be filled".

THE LAW

28. In her appeal, the appellant requests the Tribunal to annul the Secretary General's decision of 7 June 2019 not to place her on the reserve list, due to the irregularity in the examination procedure carried out under Vacancy Notice no. e17/2018, namely, the failure of the Administration to form an impartial panel in respect of her candidature. As a consequence, she asks the Tribunal to rule *restitutio in integrum* and give her the opportunity to be interviewed by a panel whose members have no history of conflict with her and who are thus fully able to be impartial from the outset, or, alternatively, to provide redress by placing her on the reserve list given that she is a long-serving staff member with many years' experience – including within MONEYVAL – and a positive track record at work.

29. For her part, the Secretary General asks the Tribunal to declare the appeal inadmissible and/or ill-founded and to dismiss it.

I. THE PARTIES' SUBMISSIONS

A. Admissibility

1. The Secretary General

30. The Secretary General considers that the appeal was out of time. She notes that in the present case, the decision which affected the appellant adversely was the decision not to place her on the reserve list, notified to her on 7 June 2020. Consequently, the appellant ought to have lodged an administrative complaint at that stage if she wished to challenge it, in accordance with the procedure set out in paragraphs 2 et seq. of Article 59 of the Staff Regulations rather than inviting the Secretary General, in accordance with the procedure set out in paragraph 1 of Article 59, to take a new decision. Having lodged her administrative complaint on 5 September 2019, it was manifestly out of time and the appellant's appeal in the present case is therefore inadmissible as being out of time.

31. The Secretary General challenges the appellant's allegation that her letter dated 27 June 2019 actually constituted an administrative complaint on the ground that the repeated reference therein to a "request" implied the appellant's intention to submit an administrative request and not an administrative complaint. The Secretary General stresses furthermore that the appellant was made aware that her letter dated 27 June 2019 was being treated as an administrative request from the moment she was notified of the acknowledgment of receipt of such request by the Director of Human Resources on 28 June 2019. Also, according to the Secretary General, the appellant's claim that her letter of 27 June 2019 constituted an administrative complaint is further disproved by the fact that she failed to seek the opinion of the Advisory Committee on Disputes in her complaint and raised this point for the first time only many weeks later, on 13 August 2019.

32. The Secretary General adds that, even assuming the appellant had submitted an administrative complaint on 27 June 2019, which was not the case, her complaint should have been considered as implicitly rejected within 30 days from its receipt, i.e. on 28 July 2019, in pursuance of Article 59, paragraph 4, of the Staff Regulations under which the Secretary General is deemed to have given an implicit decision rejecting the complaint if he or she fails to reply to the complainant within that period. Consequently, it was for the appellant to respect the sixty-day period under Article 60, paragraph 3, of the Staff Regulations which expired on 31 August 2019. The present appeal having been lodged on 27 May 2020, it is in any case out of time.

33. The Secretary General further maintains that as a lawyer, the appellant should not have been mistaken about the Organisation's complaints procedure.

34. The Secretary General also contends that, even supposing the appellant's letter of 27 June 2019 did constitute an administrative complaint, she did not raise therein the issue of the alleged partiality of the Appointments Board. This part of the appeal is therefore inadmissible, in the Secretary General's view, for failure to exhaust internal remedies.

2. The appellant

35. As to the first plea of inadmissibility, the appellant submits that the course of action which she followed clearly indicates her intention that her letter dated 27 June 2019 be treated as an administrative complaint, as illustrated by the series of facts described in paragraphs 13, 16 and 18 above. She adds that in its role as facilitator of the procedure under Article 59, paragraph 3, of the Staff Regulations, the Directorate of Human Resources should have dispelled any misunderstanding in this regard.

36. The appellant further quotes in her favour the opinion of the Advisory Committee on Disputes, according to which, where two consecutive acts give rise to grievances, a related complaint will have been filed in time provided that it is referred to the Secretary General within thirty days of the second act (see paragraph 22 *supra*).

37. The appellant also notes that the Directorate of Human Resources clearly recognised her right to submit an administrative complaint on two occasions, first, in the email exchanges of 13-14 August 2019 between the Director of Human Resources, the Chair of the Staff Committee and herself, and a second time, in the letter of reply dated 20 August from the Director of Human Resources, dismissing the request made in her letter of 27 June 2019.

38. As to the second plea of inadmissibility entered by the Secretary General, the appellant points out that she raised the issue of her concern about the impartiality of a member of the Appointments Board when she met the human resources adviser on 2 July and 8 August 2019. She states that the conflict between this member and herself was in any case already known to DHR when the interview panel was formed, including to the human resources adviser who was chairing the panel.

B. Merits of the appeal

1. The appellant

39. The appellant contends that the Appointments Board's decision recommending that she should not be placed on a reserve list is tainted by the bias of one of its members. She refers in this connection to a conflict in 2013-2014 between herself and the then Head of the Department for Action against Crime, Mr K., who sat on the panel as the representative of the recruiting entity. The appellant claims that this situation – of which she had no prior knowledge before the interview and which she could hardly be expected to contest during or in the immediate aftermath of the interview– placed her at an objective disadvantage.

40. The appellant asserts that in these circumstances, it was incumbent on Mr K. to disclose the existence of the conflict and withdraw from the panel. The appellant further submits that the Directorate of Human Resources, which was aware of this conflict and of the mediation proceedings to which it had led, failed to undertake the necessary action to guarantee an impartial and objective composition of the Appointments Board. In support of her allegations, the appellant cites the duty of care and shared responsibility of the Administration, as well as the principle of respect for long-serving staff drawn, *mutatis mutandis*, from the case law of this Tribunal in Jannick Devaux v. Secretary General (Appeals Nos. 587/2018 and 588/2018, ATCE). She also quotes the standard set by the case law of the European Court of Human Rights according to which for the purposes of Article 6, paragraph 1, ECHR, the existence of impartiality must be determined based on a subjective test and an objective test aimed at ascertaining whether sufficient guarantees were offered to exclude any legitimate doubt in this respect (Fey v. Austria, 24 February 1993, paragraphs 27, 28 and 30, Series A no. 255-A, and Wettstein v. Switzerland, no. 33958/96, paragraph 42, ECHR 2000-XII).

41. The appellant submits that her case exposes the inadequacy of the regulatory framework in place at the Council of Europe, owing to the lack of any rule or measure addressing conflicts of interest/disputes between a member of the Appointments Board and a candidate.

42. In her rejoinder, the appellant further contests the Secretary General's observations regarding the shortcomings identified by the Appointments Board during her interview and the reasons why it did not recommend placing her on the reserve list. Having regard to the principle of adversarial proceedings and equality of arms, she asks that the minutes of the Appointments Board be communicated to her. Moreover, the appellant stresses that the decision not to place her on a reserve list flouts her rights as a long-serving temporary staff member of the Organisation since "the Administration not only had an obligation to act with due diligence and to provide an impartial panel but also had a duty of care to integrate [her] as a long-serving temporary staff member after fourteen years of dedicated work" (paragraph 49 of the rejoinder). As to the Secretary General's remark regarding her failure to participate in another external recruitment procedure for the selection of a Programme Manager for MONEYVAL (grade A1/A2), she considers that this remark is further evidence of the lack of care and diligence displayed by the Administration in her regard and that the Administration should seek to remedy the prejudice caused by the lack of impartiality of the panel that interviewed her, rather than "shifting the responsibility to [her] for not having taken another examination for the same position (with a lesser requirement)" (paragraph 51 of the appellant's rejoinder).

2. The Secretary General

43. The Secretary General begins by noting that the impugned decision is subject to a limited review since in determining the arrangements for and the conduct of competitive examinations, as well as in assessing qualifications and competencies of candidates, the selection authorities of an international organisation enjoy a wide margin of discretion. Such decisions may be quashed only if they were taken without authority, or in breach of a rule of form or of procedure, or if they rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (ATCE, No. 226/1996, *Zimmerman v. Secretary General*, decision of 24 April 1997). The Secretary General further notes that the burden of proof regarding alleged irregularities in the procedure lies with the appellant.

44. In reply to the appellant's observations regarding her previous work experience and positive appraisal reports, the Secretary General stresses the competitive nature of the recruitment procedure aimed at retaining the best candidates. She further notes that the interview before the Appointments Board is eliminatory, insofar as the Board recommends only those candidates whose competencies and qualifications seem adequate, irrespective of their results in the written tests. In the case at hand, while the Appointments Board recognised the positive points regarding the appellant's performance, it identified decisive shortcomings which explain why she was not recommended. The Secretary General considers therefore that the contested decision was duly motivated and based on objective elements.

45. As to the appellant's demand to be placed on the reserve list in the event that the contested decision is set aside, the Secretary General counters that under the applicable rules, there is neither a right to be placed on a reserve list nor a right to be appointed. She submits that this request for redress should therefore be dismissed.

46. With reference to the appellant's claim that the Appointments Board lacked impartiality owing to the direct involvement in a dispute and a mediation procedure in 2013-14 of one of its members, Mr K., the Secretary General refutes this submission on the grounds that it is unsubstantiated and based on a misrepresentation of the facts. Firstly, the Secretary General notes that a mediation procedure is an informal and confidential procedure, of which she has no knowledge and there is no written trace. Secondly, she contends that the conflict in question concerned the appellant and her Head of Division and did not directly involve Mr K. who only acted as an intermediary between them in his role as Head of Department at that time. She observes that in any case, the limited factual elements provided by the appellant in support of her allegations are not convincing and are insufficient to establish reasonable doubts about Mr K.'s personal impartiality vis-à-vis the appellant and her candidature. Finally, the Secretary General notes that the appellant fails to demonstrate how the alleged conflict/dispute involving a single member of the Appointments Board would have influenced the decision-making process of this collegial body where decisions are taken by a majority of votes, in accordance with Article 4 of Rule No. 1355 of 12 March 2014 laying down procedures for the implementation of the Regulations on appointments. Moreover, the Secretary General highlights the fact that Mr K. retired a few months after the interview, which means that he could not have had a personal interest in who was selected for recruitment in his department.

47. The Secretary General further notes that the appellant failed to apply for another external recruitment competition which was advertised on 26 February 2020 to select a

Programme Manager for MONEYVAL (grade A1/A2) and which concerned a position similar to the one at issue in the present appeal. She finds this very surprising, taking into account all the considerations put forward by the appellant in the context of the present procedure.

48. In her oral pleadings, the Secretary General further submits that the case law of the European Court of Human Rights regarding Article 6 cited by the appellant is not applicable in the case at hand since the Appointments Board is not a court, a tribunal or an administrative decision-making body, but a body required merely to issue recommendations. Contrary to what the appellant argues, the Secretary General further contends that the issue of conflicts is addressed in the current regulations under Article 13 of the Charter of Professional Ethics, which is based on Article 36 of the Staff Regulations.

49. The Secretary General concludes that in the absence of any evidence of any flaw, prejudice, bias or conflict of interest in the selection process in question, the Appointments Board carried out a fair assessment of the competencies and qualifications of all candidates, the contested decision is based on objective elements and it is not vitiated by any legal defect.

50. The Secretary General, in conclusion, invites the Administrative Tribunal to declare the present appeal inadmissible and unfounded and to dismiss it in its entirety.

II. THE TRIBUNAL'S ASSESSMENT

A. Admissibility

51. With regard to the Secretary General's objection that the appeal (or more precisely the administrative complaint) was lodged out of time, the Tribunal considers, as it has already argued in other cases (ATCE, Appeal No. 522/2012, Hoppe v. Secretary General, decision of 12 April 2013, paragraph 19), that the point from which the time-limit within which an administrative complaint must be filed begins to run is when the person concerned learns that he or she has failed an examination. In the Tribunal's opinion, this time-limit could not start running from the point at which the appellant learnt how the competitive examination was to be conducted because, under Article 59, paragraph 2, of the Staff Regulations, an administrative complaint must be directed against an act that adversely affects the appellant. Appellants must also show that they have a direct and "existing" interest. Such an interest can only be considered to exist when an appellant learns of the adverse outcome of an examination. In the case at hand, the appellant learned that she had not been placed on the reserve list drawn up pursuant to the competitive examination on 7 June 2019.

52. Having said this, the key issue which the Tribunal must settle is whether the act lodged by the appellant on 27 June 2019 against this decision qualifies as an administrative complaint under paragraph 2 of Article 59 of the Staff Regulations – as argued by the appellant and upheld during her oral pleadings –, or as an administrative request under paragraph 1 of the same article – as maintained by the Secretary General to contest the admissibility of the present appeal.

53. The Tribunal notes that the title of Article 59 of the Staff Regulations is "Complaints procedure" but points out that the purpose of its two paragraphs is different. In point of fact, paragraph 1 makes it clear that staff members who are not subject to an administrative act adversely affecting them within the meaning of paragraph 2 of Article 59 must be subject to such an administrative act before they can challenge it by filing a complaint. As has already

been stated by the Tribunal, a request under paragraph 1 of Article 59 cannot replace or alter an administrative complaint under paragraph 2 of Article 59, whose purpose is to enable staff members who are already subject to an administrative act adversely affecting them to challenge this administrative act by way of an administrative complaint.

54. The Tribunal notes that, from the outset, the appellant was adamant that the act she had lodged on 27 June 2019 with the Secretary General via the Directorate of Human Resources constituted an administrative complaint. Besides entitling the email of 28 June by which she conveyed this act to the Directorate of Human Resources “Admin Complaint”, she expressly refers to her “administrative complaint” in the text of the message and in concluding her email, again, she asks to be issued with an acknowledgment of receipt of her “complaint”. In a later email sent to the Director of Human Resources on 13 August 2019, she refers twice to her “administrative complaint” and consistently asks that her complaint be referred to the Advisory Committee on Disputes for an opinion. She pursues this line of reasoning in a further email dated 14 August 2019, in which she reiterates that her claim of 27 June 2019 is to be regarded as an administrative complaint and expressly refers to the 30-day deadline prescribed for administrative complaints under Article 59, paragraph 3(b), of the Staff Regulations.

55. The Tribunal, however, cannot take account only of the terms used by the appellant. As it has pointed out in the past (TACE, decision of 17 December 2019, Appeal No. 618/2019, Barbara Ubowska (II) v. Secretary General of the Council of Europe, paragraph 42), it must fully assess the nature of documents falling within the scope of litigation.

56. In this connection, whereas the relevant case law requires strict compliance with the term for filing an administrative complaint, it calls for a certain degree of flexibility in determining whether the conditions of form and substance for filing such a complaint have been met by the complainant. Thus, for the purposes of assessing whether the term for lodging a request to review an administrative decision has been respected, it should be considered that “while such a request does not have to take any particular form, it should at the very least identify the administrative decision of which review is sought” (ILOAT, Judgment 1699, 29 January 1998, Halloway v. ONUDI, paragraph 23). Accordingly, an international organisation may not reproach a staff member for a lack of precision in his or her complaint or for a lack of motivation to reach the conclusion that he/she failed to lodge an administrative complaint. According to this case law, for a letter addressed to an organisation to constitute a complaint, it is sufficient for the person concerned to clearly express in it his or her intention to contest the decision complained of, for the request thus formulated to be meaningful and for it to be likely to be accepted, irrespective of whether the complaint is formally accompanied by an explicit statement of reasons in law or in fact (ILOAT, Judgment 3067, 8 February 2012, MEEEA v. Technical Centre for Agricultural and Rural Cooperation (CTA), paragraph 16).

57. The Tribunal observes in this regard, that in her act of 27 June 2019, the appellant unequivocally identified the decision complained of, clearly requested that such decision be reviewed and stated the grounds for her request, besides complying with the formal requirements and the deadline set forth in Article 59 of the Staff Regulations. In these circumstances, the mere fact that her act was entitled “[r]equest (related to the examination procedure no. e17/2018 Programme Manager /MONEYVAL)” was not of itself enough, in the Tribunal’s view, to warrant categorising her act as an administrative request and in any event, it was not incompatible with the intent to submit an administrative complaint aimed precisely at inviting the Administration to reconsider its earlier decision.

58. The Tribunal concedes that, as noted by the Secretary General, had the appellant wished to refer her complaint to the Advisory Committee on Disputes, she should have done so in the act lodged on 27 June 2019; instead, she only raised this point in her email dated 13 August 2019. The Tribunal considers, however, that this circumstance is not such that it can alter *ex post* the qualification of her act as a complaint. On a general level, the Tribunal observes that the Organisation provides no guidance to litigants (in the form of a guidance note or of a standard form, for instance) as to how to lodge an administrative request and an administrative complaint, as they are regulated under Article 59, paragraphs 1 and 2 respectively, of the Staff Regulations.

59. The Tribunal therefore concludes that the appellant's act of 27 June 2019 constituted an administrative complaint within the meaning of paragraph 2 of Article 59 of the Staff Regulations.

60. As to the Secretary General's contention that had the appellant wished to file an administrative complaint, it was incumbent on her to formally contest the Administration's position that her act of 27 June 2019 qualified as an administrative request, the Tribunal notes that the letter of 28 June from the Director of Human Resources acknowledging receipt of the appellant's act did not state the reasons for the Administration's view that this act qualified as an administrative request rather than an administrative complaint. Providing such reasons to the appellant would have enabled her to assess the means of redress at her disposal and to determine which course of action to take, including for instance the lodging of a further administrative complaint. In order to dispel any doubts as to the nature of the act, this Tribunal has pointed out in the past that "the fact that the Director of Human Resources sent an acknowledgement referring to an "administrative request" cannot be considered sufficient, since no reference was made to the relevant legal provisions on which the definition of the nature of the act had been based" (TACE, decision of 17 December 2019, Appeal No. 618/2019, Barbara Ubowska (II) v. Secretary General of the Council of Europe, paragraph 47).

61. Whilst the appellant did not react to the letter of 28 June 2019 from the Director of Human Resources acknowledging receipt of her act as an administrative request, she did question the subsequent email of 14 August from the Directorate of Human Resources informing her that her act was being dealt with as an administrative request. She did so by referring in her email of reply dated 14 August 2019 to a "misunderstanding" and by asserting her entitlement to exercise the right to an administrative complaint in pursuance of the applicable procedure under Article 59 of the Staff Regulations. The Tribunal is not aware of the appellant receiving any further clarification in this respect from the Directorate of Human Resources. Instead, she received reassurances on the part of the Chair of the Staff Committee – who was on copy in the aforementioned exchanges of emails – that her case was being handled as an administrative request and that she would be able to exercise her right to an administrative complaint against the decision on this request, if need be. This communication, in which the Directorate of Human Resources was on copy, would appear to be the last to have occurred on the issue of the proper legal definition of the act lodged by the appellant. Thereafter, acting as she had been directed in this exchange of emails, the appellant filed her administrative complaint on 5 September 2019 and in the reply to this complaint, the representative of the Secretary General relied on the appellant's failure to lodge an administrative complaint within 30 days from the decision of 7 June 2019.

62. The Tribunal notes that staff members of an international organisation enjoy a right to information and that such right is inherent to the duty of loyalty and good faith which governs their relations with the international organisation employing them (ILOAT, Judgment 946, *Fernandez-Caballero v. the United Nations Educational, Scientific and Cultural Organization (UNESCO)*). The case law also has it that “an organisation, as part of its duty of care for its staff, is expected to help any staff member who is mistaken in the exercise of a right, if such help will enable the staff member to take useful action. If it is not too late, the organisation should also provide the staff member with procedural guidance” (ILOAT, Judgment No. 2345, *E.K. v. UNESCO*, paragraph 1c).

63. In the case at hand, the Tribunal notes that the 30-day term for lodging administrative complaints had not yet expired on 28 June 2019 when the Organisation took the position that the act lodged by the appellant on 27 June was to be acknowledged and handled as an administrative request. The Tribunal considers that at that moment and given the indications in the appellant’s written submissions (see above paragraph 54), not only did the Organisation wrongfully categorise the appellant’s act as an administrative request but having taken this position, it failed to properly advise the appellant as to the procedural steps that it considered necessary to accomplish for the appellant to preserve her right to an administrative complaint and ultimately to a judicial remedy against the decision complained of.

64. The Tribunal is of the opinion that, even assuming that the title of the appellant’s act of 27 June 2019 might have cast doubt on the legal nature of this act, diligent handling of her file by the Organisation would have enabled the appellant to lodge her complaint within the prescribed time-limits.

65. Consequently, the appellant failed to lodge an appeal in time against the implicit decision to reject her administrative complaint of 27 June 2019 and the administrative complaint which she subsequently lodged on 5 September 2019 should be declared inadmissible. Such a ruling would not, however, be compatible with the requirements of good faith which the parties and the Tribunal must observe.

66. In the light of the foregoing, the Tribunal, acting in pursuance of Article 60, paragraph 3, of the Staff Regulations, considers that the circumstances described above constitute sufficient reasons to declare admissible the appellant’s second administrative complaint lodged after the expiry of the applicable periods. Consequently, the Secretary General’s plea of inadmissibility for late filing of the administrative complaint, and hence the appeal, fails and must be dismissed.

67. As to the second plea of inadmissibility, the Tribunal notes that the appellant’s administrative complaint of 5 September 2019 raises the issue of the partiality of the Appointments Board. The Secretary General’s objection that the appellant’s letter of 27 June 2019 does not raise this issue and that this part of the appeal must be considered inadmissible for failure to exhaust internal remedies, is therefore irrelevant and must be dismissed.

B. Merits

68. With regard to competitions, international case law is consistent in saying that competent authorities have wide discretion in determining how competitive examinations are conducted and managed, as well as how candidatures are assessed. This discretion must however be counterbalanced by scrupulous observance of the applicable rules and principles and is not exempt from judicial review, the purpose of which is to ascertain whether the challenged decision was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence (ATCE, No. 172/93, *Feriozzi-Kleijssen v. Secretary General*, decision of 25 March 1994, paragraph 31; see also CJEC, case 40/86, *George Kolivas v. Commission* [1987], paragraph 11). The Tribunal will therefore, in cases like the present one, exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the organisation full responsibility for its choice.

69. That said, any candidate who applies for a post to be filled by some process of selection is entitled to have his or her application considered in good faith and in keeping with the basic rules of fair and open competition. This is a right that every applicant must enjoy, whatever his or her hopes of success may be (ILOAT, Judgments 1077, paragraph 4, 1497, paragraph 5(b), and 1549, paragraph 9). Accordingly, it is settled case-law that a selection board in a competition is required to ensure that its assessments of all the candidates examined are made in conditions of equality and objectivity (Judgment in *Pantoulis v Commission*, T 290/03, EU:T:2005:316, paragraph 90).

70. Although, as per the applicable rules, the recommendation of the Appointments Board was not binding on the Secretary General, the aforementioned case-law may still be applied in the present case. Indeed, the duty to act impartially is incumbent not only on the authority competent for issuing the final decision, but also on bodies responsible for making a recommendation to this authority. The case-law in question takes into consideration the influence such bodies may exert on the ultimate decision (ILOAT, Judgments 4234, consideration 3, 2667, consideration 5, and 3958, consideration 11), whilst specifying that the degree of impartiality required of the members of such bodies is proportionate to the function they perform (TACE, decision No. 346/2005 *Carlos BENDITO (III) v. Governor of the Council of Europe Development Bank*, 19 May 2006).

71. In the light of the above, the Tribunal finds that it was for the Administration, pursuant to the principles of equal treatment and impartiality mentioned above, to ensure that the stage of the selection procedure taking place before the Appointments Board was properly organised so that all members of the selection panel had the necessary independence to preclude any doubt as to their objectivity (Judgment in *CG v EIB*, EU:F:2014:187, paragraph 61).

72. The Tribunal notes in this respect that these principles applied to the Appointments Board and to the Directorate of Human Resources – in the discharge of its responsibilities relating to the organisation of the selection process – regardless of the existence in the applicable rules of an explicit provision to that effect. The Tribunal is not convinced in this regard by the position taken by the Secretary General that the matter is expressly addressed in the current regulations of the Organisation, namely Article 36 of the Staff Regulations and Article 13 of the Charter of Professional Ethics. The Tribunal observes in this connection that

these provisions govern the conduct of individual staff members and are not, per se, devised to regulate the functioning of collegiate bodies such as the Appointments Board.

73. Regarding the evidence on which the Tribunal can draw for the purposes of assessing impartiality, the burden of proving alleged irregularities in the selection procedure lies with the appellant (ATCE, appeal No. 554/2014, decision of 17 March 2015, Petrashenko v. Secretary General, paragraph 41). More particularly, the appellant bears the burden of proving bias. In accordance with the settled case-law, the evidence adduced to prove such an allegation must be of sufficient quality and weight to persuade the Tribunal (ILOAT, Judgment 2472, under 9). Considering that bias is often concealed and that direct evidence to support the allegation may not be available, proof may rest on inferences drawn from the circumstances. Reasonable inferences cannot, however, be based on suspicion or unsupported allegations and must be drawn from known facts (ILOAT, Judgment 3380).

74. In the case at hand, it emerges from the evidence adduced to the file that the appellant was involved in a conflict with her immediate superior (N+1) during the time she worked as a Project Manager within the Economic Crime Unit of Economic Crime in the Action against Crime Department in 2013-2014. It is undisputed that one of the members of the Appointments Board who interviewed the appellant and who was Head of Department at the time of the facts, Mr K., was cognisant of this conflict and intervened to regulate it by adopting a number of measures in his role as manager and hierarchical superior of both the appellant and her N+1. It is also confirmed that the dispute in question led to a mediation procedure between the appellant and her N+1 and to a coaching arrangement under the co-ordination of the Directorate of Human Resources.

75. In referring to these facts, the parties disagree as to how to qualify Mr K.'s stance in relation to this conflict. The appellant claims that Mr K. was directly involved in the conflict as a party thereto. The Secretary General takes the position that Mr K. only acted as an intermediary between the appellant and her immediate superior, which was fully consistent with his duties as senior manager and Head of Department at the time. The Tribunal considers, however, that the question before it is whether Mr K.'s involvement in the dispute, however it may be qualified, was such as to call into question his ability to sit on the Board without raising any appearance of partiality.

76. The Tribunal notes that Mr K. himself indicates having raised and discussed the conflict involving the appellant with the other members of the Appointments Board, although he specifies having done so "only after the panel had reached its conclusions based on the performance of the candidates at the interview" as he believed that "performance at an interview and a workplace conflict are two separate matters". The Tribunal notes however that, from the moment the information concerning the conflict in which the appellant had been involved was brought to the attention of the other members of the Board by Mr K., the Board had full discretion to take this information into account for the purposes of assessing the appellant's candidature and deciding whether or not to place her on the reserve list. In any event, it cannot be presumed that once it was disclosed, this information did not influence the panel's decision-making process to the detriment of the appellant. Moreover, had this information not been pertinent to the subject-matter of the procedure before the Board, it should not have been mentioned at all.

77. In the presence of a doubt, the Tribunal must verify whether the procedure followed before the Appointments Board offered sufficient guarantees to rule out any legitimate doubt in respect of the impartial functioning of this body.

78. The Tribunal notes in this regard that under the applicable rules, the procedure followed before the Appointments Board in the competition in which the appellant took part did not make room for specific measures aimed at regulating situations in which the question of a lack of impartiality of a member of the Board could possibly have arisen for the following reasons.

79. Firstly, the rules in question did not stipulate a duty for a member of the Board to withdraw where there is a legitimate reason to fear a lack of impartiality on his or her part. The Tribunal notes that it is a general rule of law that an official who is called upon to take a decision affecting the rights or duties of other persons subject to her or his jurisdiction must withdraw in cases in which her or his impartiality may be open to question on reasonable grounds (ILOAT, Judgment 4240). Although, under this general rule of law, Mr K. could have declined to deal with the matter at hand, the Tribunal notes that he raised no objection to his appointment as a member of the Board, interviewed the candidate and took part in the decision as to whether she qualified for the reserve list.

80. Secondly, as pointed out by the Advisory Committee in its opinion of 4 March 2020, the appellant was not informed in advance of the identity of the members of the Appointments Board and not only could she not have raised her fears about Mr K.'s attitudes and convictions in regard to herself prior to the interview, but also she could not have been reasonably expected to raise such concerns during her interview.

81. Thirdly, the Tribunal finds that in organising the competition in which the appellant took part, the Directorate of Human Resources did not put in place any arrangement devised to pre-empt any risk of partiality or bias on the part of the members of the Board, for instance by inviting them to disclose any personal situation which could objectively justify misgivings as to the impartiality of the Board.

82. Lastly, the Tribunal takes the view that when an issue of impartiality arises with regard to a person who was part of a collegial body such as the Appointments Board, considering the confidentiality of the deliberations of the Board, it may be impossible to ascertain a person's actual influence in the decision-making, thus leaving the impartiality of the Board open to genuine doubt (see *mutatis mutandis*, ECtHR, *Morice v. France* [GC], paragraph 89; *Otegi Mondragon v. Spain*, paragraph 67; *Škrlj v. Croatia*, paragraph 46; *Sigríður Elín Sigfúsdóttir v. Iceland*, paragraph 57).

83. The Tribunal further notes that in its opinion of 4 March 2020, the Advisory Committee on Disputes concluded that the Council of Europe has insufficiently regulated the appointments procedure and that as a consequence, this procedure does not afford candidates adequate guarantees protecting them against a lack of impartiality on the part of the Appointments Board. In the opinion of the Committee, "such guarantees would most likely have permitted concerns about the impartiality of the Appointments Board to be addressed before the complainant's interview took place".

84. Considering that even the slightest doubt of lack of impartiality may suffice to affect the legality of a decision, the Tribunal is of the view that the very fact that there might have

been circumstances justifying Mr K.'s withdrawal undermined the appearance of a fair recruitment process. Therefore, it arrives at the conclusion that in the instant case, the recommendation of the Appointments Board not to place the appellant on the reserve list, and as a consequence, the decision of the Secretary General to follow the Board's recommendation, does not appear to have been made impartially so as to avoid any hint of prejudice. For this reason, this decision must be set aside and annulled.

85. With regard to the appellant's request that the Tribunal rule an act *restitutio in integrum* and give her the opportunity to be interviewed by a panel whose members have no history of conflict with her and who are thus fully able to be impartial from the outset, or, alternatively, to provide redress by placing her on the reserve list given that she is a long-serving staff member with many years' experience – including within MONEYVAL – and a positive track record at work, the Tribunal points out that under Article 60 of the Staff Regulations it is empowered only to set aside the act complained of.

86. According to Article 60, paragraph 6, of the Staff Regulations, the task of enforcing the Tribunal's decisions falls to the Secretary General. In due course, the Secretary General will decide to give effect to this decision by deciding which measures to adopt with respect to the appellant. That being so, the Tribunal nevertheless considers it necessary to recall the international administrative case law on the subject, according to which the principle of *res judicata* obliges the Organisation "not only to take no action which would be in contradiction with *res judicata*, but also and above all to take all the measures which *res judicata* implies" (ILOAT, Judgment No. 553 of 30 March 1983 and Judgment No. 1338 of the same Tribunal of 13 July 1994). According to this case law, "in order to comply with the judgment annulling the measure and to implement it fully, the institution responsible for the annulled measure is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the provision held to be illegal and, on the other, indicate the reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure (Civil Service Tribunal, Judgment of 12 April 2016 in the case F-98/15, CP v European Parliament). If the appellant considers that the manner in which the Secretary General gives effect to this decision is prejudicial to her, she will be able to resort to the judicial means at her disposal and challenge that manner, as other appellants have done in other disputes (ATCE, Appeals Nos. 486-489/2011, 491/2011, 498-500/2011, 500/2011 and 502/2011 – Ümit KILINC and others v. Secretary General, decision of 20 April 2012, paragraph 85).

87. Having reached this conclusion, the Tribunal need not examine the other grounds of appeal regarding the Appointments Board's assessment of the appellant's performance during her interview and her situation as a staff member who has been serving the Organisation for 14 years on the basis of temporary and fixed-term contracts.

88. As the appellant has not requested the reimbursement of costs and expenses in respect of the present proceedings, the Tribunal sees no need to rule on this matter.

For these reasons, the Administrative Tribunal:

Dismisses the Secretary General's pleas of inadmissibility;

Declares the appeal well-founded and sets aside the impugned decision.

Adopted by the Tribunal by videoconference on 26 January 2021 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 12 February 2021, the English text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

C. OLSEN

N. VAJIĆ