

CONSEIL DE L'EUROPE COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 669/2020 (M. R. 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,
Mr Dmytro TRETAKOV, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, M. R., lodged his appeal on 24 July 2020. It was registered the same day under No. 669/2020.
2. On 21 August 2020, the appellant filed further pleadings.
3. On 24 September 2020, the Secretary General forwarded her observations on the appeal.
4. On 11 December 2020, the appellant filed submissions in reply.
5. On 29 March 2021, the hearing on this appeal, which was due to take place that same day, was cancelled at the request of the appellant and by decision of the Tribunal. In agreement with the parties, the Tribunal decided to replace the hearing by an exchange of written submissions.
6. On 6 April 2021, the parties submitted written pleadings.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The appellant has been a permanent staff member of the Council of Europe since 2004. He holds a C2 post in the Registry of the European Court of Human Rights.

8. Following the publication of vacancy notice no. 069/2019, the appellant submitted his application for the internal competition for the post of System Support Assistant, B3 grade, in the Directorate of Information Technology (hereinafter “DIT”).

9. On 3 December 2019, the Directorate of Human Resources (hereinafter “DHR”) e-mailed the appellant, informing him that he had not been selected for interview at the shortlisting stage. According to the appellant, the only other candidate competing for the post received a similar e-mail. The appellant says that his ensuing request for an explanation went unanswered.

10. On 10 December 2019, DHR informed the appellant that the e-mail dated 3 December notifying him that his application had been rejected contained an error. The relevant part of the e-mail reads as follows:

“Following an error in the e-mail (...) in which you were informed that a list had been drawn up and that you had not been shortlisted, I am pleased to inform you that, after further examination of your application, DHR has asked the department concerned to proceed with interviews of all candidates.

You will be contacted by the department shortly to arrange a date for this interview.”

11. On 31 January 2020, the appellant was interviewed by representatives of the recruiting department.

12. On 31 March 2020, DHR e-mailed the appellant informing him that his application had not been successful because his technical skills did not meet the level required for the post for which he had applied.

13. DHR informed the appellant, by e-mail dated 1 April 2020, that, in view of the recommendation made by the Appointments Board after examining the applications, no candidate had been selected for the post in question.

14. On 14 April 2020, the DHR staff member in charge of the competition contacted the appellant again, indicating that she was quite willing to organise a joint interview with DIT to answer any questions he had concerning the rejection of his application.

15. On 27 April 2020, the appellant lodged an administrative complaint with the Secretary General contesting the decision to reject his application for the post of System Support Assistant.

16. On 28 May 2020, the Secretary General dismissed the appellant’s administrative complaint.

17. On 9 June 2020, DHR and DIT sent the appellant feedback to answer his questions about the rejection of his application.

18. On 24 July 2020, the appellant lodged the present appeal against the decision to dismiss his administrative complaint.

II. RELEVANT LAW

19. Article 59, paragraphs 2 and 3, of the Staff Regulations concerns administrative complaints and provides that:

“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:

- a. within thirty days from the date of publication of the act concerned, in the case of a general measure; or
- b. within thirty days of the date of notification of the act to the person concerned, in the case of an individual measure; or
- c. if the act has been neither published nor notified, within thirty days from the date on which the complainant learned thereof; or
- d. within thirty days from the date of the implicit decision rejecting the request referred to in paragraph 1.

The Director of Human Resources shall acknowledge receipt of the complaint.

In exceptional cases and for duly justified reasons, the Secretary General may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.”

20. Article 60, paragraphs 1 and 2, of the Staff Regulations also provides that:

“1. In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers.

2. The Administrative Tribunal, after establishing the facts, shall decide as to the law. In disputes of a pecuniary nature, it shall have unlimited jurisdiction. In other disputes, it may annul the act complained of. It may also order the Council to pay to the appellant compensation for damage resulting from the act complained of.”

21. Appendix II to the Staff Regulations is entitled “Regulations on appointments”.

22. Article 12 of the Regulations on appointments specifies the functions of the Director of Human Resources with regard to recruitment, transfers and promotions:

“The Director of Human Resources shall be responsible for managing recruitment and internal competition procedures, for ensuring that the selection process is appropriate and consistent with the needs of the Organisation and for taking the necessary decisions in this regard. In the case of a procedure to fill a vacancy in a specific Major Administrative Entity, the Director of Human Resources shall work in close co-operation with the Major Administrative Entity concerned.”

23. Article 13 of the Regulations on appointments sets out the functions of the Appointments Board with regard to recruitment and promotion at the Council of Europe:

“At the end of a recruitment procedure or an internal competition which may result in the promotion of a staff member, the Board shall assess the procedure and submit a recommendation to the Secretary General on the basis of all the relevant information at its disposal. Where a number of applicants are included in the recommendation, they shall be listed in order of merit.”

24. Article 9, paragraph 3, of the Regulations on appointments sets out the procedure for adopting opinions and recommendations submitted to the Secretary General by the Appointments Board:

“3. Opinions and recommendations submitted to the Secretary General by the Board shall set out the reasons on which they are based, be signed by all persons having participated in the deliberations and, should the occasion arise, be accompanied by their dissenting opinions.”

25. Article 7, paragraph 6, of Rule No. 1355 laying down procedures for the implementation of the Regulations on appointments sets out the procedure for examining applications in cases falling within the competences of the Appointments Board as follows:

“6. In cases falling within the competences of the Appointments Board [...], the following documents providing information on the shortlisted applicants’ competencies and performance are made available to the members of the Board:

- a. the staff member’s application;
- b. a personal curriculum vitae prepared by the applicant in a form provided by the Directorate of Human Resources;
- c. the applicant’s most recent appraisal report; the applicant may submit the last three appraisal reports to the Board; the applicant may also submit the last objective-setting form to the Board, in particular if this form reflects a change in duties since the last appraisal report was drawn up;

[...]”

THE LAW

26. The appellant asks that the Secretary General’s decision to reject his application for the post of System Support Assistant under vacancy notice no. 069/2019 be set aside.

27. The appellant also asks to be informed in writing of the reasons for the decision to reject his application and proposes that a new internal competition be held, including a written test and an oral test, “as part of a neutral and objective procedure”.

28. The Secretary General, meanwhile, asks the Tribunal to declare Appeal No. 669 partially inadmissible and ill-founded and to dismiss it in its entirety.

I. SUBMISSIONS OF THE PARTIES

A. The admissibility of the appeal

29. First, the Secretary General observes that the appellant’s request to be informed in writing of the reasons for the decision rejecting his application and his proposal that another internal competition be held do not fall within the powers of the Tribunal, which, except in disputes of a pecuniary nature, is empowered only to set aside the act complained of. The dispute in this case is not of a pecuniary nature. Consequently, the Tribunal is empowered only to set aside the contested act, namely the decision to reject the appellant’s application for the post of System Support Assistant. No directions may be addressed to the Secretary General with respect to the appellant’s other requests, which must be declared inadmissible.

30. The Secretary General also notes that, in accordance with Article 59, paragraph 2, of the Staff Regulations, in order to lodge a complaint with the Secretary General, staff members must have a “direct and existing interest” in bringing the case. By definition, having an interest in bringing proceedings implies that staff members can obtain a decision enabling them to gain some benefit. As regards the appellant’s request to obtain a written statement of the reasons why his application was rejected, however, it must be noted that there is no such interest.

31. The Secretary General points out that the DHR staff member in charge of the competition in question sent the appellant an e-mail on 31 May 2020 informing him that his application had not been successful because he lacked the technical skills required for the post in question. Accordingly, the appellant has already obtained what he wanted since the reasons for the rejection of his application were communicated to him in writing on 31 May 2020. The appellant also had a feedback interview

with DHR and DIT on 9 June 2020 during which he was informed in a precise and exhaustive manner of the reasons why his application was unsuccessful.

32. The Secretary General concludes that the appellant's request to be told of the reasons for the decision to reject his application is devoid of purpose due to his having been fully informed on the matter, both orally and in writing, and this part of the appeal is also inadmissible on that basis.

33. The appellant, for his part, maintains that he never received a full reply concerning the grounds on which his application was rejected.

B. The merits

34. The appellant considers that he has all the skills and qualifications necessary for the post of System Support Assistant and that his application was unfairly rejected.

35. The appellant states that he never received a reply to his request for an explanation as to why his application was initially not selected at the shortlisting stage (see paragraph 9 above). The e-mail he subsequently received on 10 December 2019 referred to an error "in the [previous] e-mail", and the other applicant received a similar e-mail. The appellant alleges that this situation caused him to lose a great deal of time, energy, confidence and peace of mind, all of which were necessary to prepare for a competition.

36. The appellant complains of a total lack of transparency in his case, from the beginning to the end of the procedure, which he believes shows a clear intention to hold an external competition.

37. The Secretary General notes that, in the case of the internal competition, only two staff members applied: the appellant and another candidate. Both initially received an e-mail from DHR explaining that they had not been shortlisted along with other candidates whose qualifications most closely matched those set out in the vacancy notice. This e-mail had been sent in error as there were no other shortlisted candidates, the only candidates for this competition being the appellant and the second applicant. This error was rectified and both candidates were subsequently invited for an interview.

38. It is apparent from the minutes of the Appointments Board's meeting that it carried out, in accordance with its role, a thorough examination of the two applications, including that of the appellant, in the light of the requirements of the post to be filled.

39. Questions were put to the appellant to assess his skills and knowledge for the role in question. The interview included questions of a technical and professional nature, and questions about the essential competencies required (for example: concern for quality, analysis and problem solving, planning and work organisation, and teamwork and co-operation). Although the appellant came across as motivated and determined during his interview, he did not demonstrate that he had the technical and professional expertise required for the position of System Support Assistant.

40. After the interviews, the Appointments Board examined the applications in relation to the requirements of the post to be filled. It did so on the basis of the assessment of the candidates' performance during the interviews and their application forms, curricula vitae and most recent appraisal reports. In the case of the appellant, the Appointments Board decided not to recommend his appointment to the post after noting that his skills were not up to the standard required for the latter.

41. Ultimately, the Appointments Board unanimously decided not to recommend any candidates for the position of System Support Assistant on the grounds that none of the applicants in the internal

competition had demonstrated that they were qualified for the post in question. As a result, no candidate was appointed.

42. The Secretary General points to the Tribunal's case law whereby in matters of staff management, and more particularly in matters of promotion, the Secretary General holds the authority to make appointments and has discretionary powers. In exercising these powers, she is authorised to ascertain and assess the needs of the service and the professional skills of staff. Decisions that come within the scope of discretionary authority are only subject to limited scrutiny and can only be annulled if they were not taken by a competent authority, are vitiated by a formal or procedural defect, are based on an error of fact or law, fail to take account of essential facts, are vitiated by an abuse of power or rely on conclusions wrongly drawn from the evidence in the file (see ATCE, No. 26/1996, *Zimmermann v. Secretary General* [decision of 24 April 1997](#), paragraph 37).

43. According to the Secretary General, the Appointments Board assessed the skills and qualifications of the candidates in relation to the requirements of the post to be filled. After the Board had examined the applications and conducted interviews, it became clear that none of the candidates was qualified for the position of System Support Assistant. That was the basis on which the Appointments Board made its recommendation, so the Secretary General's decision to reject the appellant's application for this post was entirely justified.

44. The Secretary General considers that the appellant's application was examined in accordance with transparency, good faith and the principles of fair competition between candidates.

45. It should also be noted that the appellant was given – orally and in writing – precise and exhaustive reasons for the decision to reject his application.

46. First, in an e-mail dated 31 March 2020, the DHR staff member in charge of that competition informed the appellant that his application had not been successful because he lacked the technical skills required for the post in question.

47. The reasons why the appellant's application had not been successful were then reiterated in the reply to his administrative complaint of 28 May 2020.

48. Lastly, the appellant had a feedback interview on 9 June 2020 with representatives of DIT and DHR to provide him with additional and detailed explanations about the rejection of his application. During this interview, the DIT and DHR representatives not only reminded the appellant of the reasons why he had not been selected for the post in question, but also went over the key competences required for the post, point by point, in order to explain to him why his profile did not match the one sought.

49. The Secretary General concludes that the Organisation fulfilled its duty of care towards the appellant throughout the procedure, not only by discharging its duty to give reasons for rejecting his application, but also by ensuring that he received relevant explanations concerning this decision. As a result, the appellant has no grounds for claiming that the questions he put to DHR concerning the rejection of his application went unanswered.

50. It is the Secretary General's view that all these considerations show that the appointment procedure was fully respected in this case and that the decision to reject the appellant's application was well-founded. There is no justification for granting the appellant's request for that decision to be set aside.

II. THE TRIBUNAL'S ASSESSMENT

A. Admissibility

51. As regards the appellant's request to be informed in writing of the reasons for the decision rejecting his application and his proposal that another internal competition be held, the Tribunal points out that it has no power of injunction that would allow it make decisions about such requests. The Tribunal also considers that the appellant was fully informed of the reasons for the rejection of his application, both orally and in writing (see paragraphs 45-49), and notes that this information was reiterated during the present proceedings. The appellant's request to be informed of the reasons for the rejection of his application must therefore be considered irrelevant and, that being so, declared inadmissible.

B. Merits of the appeal

52. The appellant challenges the validity of the selection procedure which led to the rejection of his application after it was examined by the Appointments Board.

53. In this respect, the Tribunal considers that, 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 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, Appeal No. 172/93, *Feriozzi-Kleijssen v. Secretary General*, [decision of 25 March 1994](#), paragraph 31; see also European Court of Justice (ECJ), case 40/86, [George Kolivas v. Commission of the European Communities](#) [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 authority responsible for selection full responsibility for their choice (see, for example, [Judgment No. 1077](#) of the Administrative Tribunal of the International Labour Organisation (ILOAT) in *Barahona v. Pan American Health Organisation (PAHO)*, 29 January 1991, paragraph 4).

54. In the instant case, the Appointments Board assessed the skills and qualifications of the candidates in relation to the requirements of the post to be filled. The Appointments Board concluded that the appellant was not qualified for the post of System Support Assistant. The Appointments Board made its recommendation on that basis.

55. The Tribunal notes that the appellant disagrees with the Board's decision, arguing that he is qualified for the position. He does not allege that the interview was conducted improperly, but rather challenges the Board's assessment of his performance during the interview.

56. The Tribunal has ruled that "in assessing objective qualifications the competent authority naturally makes less use of discretionary power than in assessing subjective qualifications" (ATCE, Appeals Nos. 216/1996, 218/1996 and 221/1996, *Palmieri (III, IV and V) v. Secretary General*, [decision of 27 January 1997](#), paragraph 43).

57. There is nothing in the evidence available to the Tribunal to show that the Appointments Board failed to comply with the requirements set out in the vacancy notice and the principles laid down by the Tribunal or that its assessment was arbitrary. Nor is there any evidence that the

Appointments Board drew clearly mistaken conclusions or that its assessment of the appellant's qualifications was arbitrary.

58. The Tribunal accepts that the "error" made by DHR at the shortlisting stage (see paragraph 37 above) shows some carelessness in the conduct of the proceedings. Although the rectification sent by DHR on 10 December was in the appellant's favour, this sudden change of decision was regrettable to say the least. In the Tribunal's view, it showed a lack of respect for the appellant, who, in those circumstances, had legitimate reason to doubt that his application had received the thorough and objective consideration required.

59. The Tribunal notes in this regard that the appellant was not told the exact nature of the "error" acknowledged by DHR on 10 December 2019 and that it is not clear from the evidence on file whether it was merely an administrative slip or an error of judgment. In either case, the appellant could have received reassurance that his application certainly met the requirements of the vacancy notice. Without such reassurance, it is understandable that the appellant was somewhat anxious about his interview (see paragraph 35 above). The Tribunal considers that, through its conduct, the Administration underestimated, if not ignored, the impact that the contradictory and confusing messages that were sent might have on the appellant, undermining his confidence in the procedure.

60. The Tribunal considers, however, that this procedural incident does not constitute a defect capable of vitiating the regularity of the proceedings.

61. The Tribunal therefore concludes that the appeal is unfounded insofar as it concerns the challenge to the rejection of the appellant's application.

III. CONCLUSION

62. The Tribunal concludes that, insofar as the appeal seeks to have the decision to reject the appellant's candidature set aside, it is unfounded and must be dismissed. The appellant's other claims must be declared inadmissible.

For these reasons,

The Administrative Tribunal:

Declares the appeal inadmissible insofar as it concerns the appellant's request to be informed of the reasons for the rejection of his application;

Declares the appeal admissible insofar as it concerns the exclusion of the appellant's candidature;

Declares it, within these limits, unfounded;

Orders each party to bear its own costs.

Adopted by the Tribunal by videoconference on 14 June 2021 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 24 June 2021, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

Christina OLSEN

Nina VAJIĆ