ADMINISTRATIVE TRIBUNAL

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Appeal No. 738/2024

C.A.

v.

Secretary General of the Council of Europe

***

JUDGMENT

25 January 2024

The Administrative Tribunal, composed of:

Nina VAJIĆ, Chair,
Lenia SAMUEL,
Thomas LAKER, Judges**,**

assisted by:

Christina OLSEN, Registrar,
Dmytro TRETYAKOV, Deputy Registrar,

has delivered the following judgment after due deliberation.

PROCEDURE

1. The appellant, C.A., lodged his appeal on 8 August 2023. It was registered the same day under No. 738/2023.

2. On 20 September 2023, the Secretary General forwarded her observations on the appeal.

3. The public hearing took place in the court room of the Administrative Tribunal in Strasbourg on 6 November 2023. The appellant conducted his own defence. The Secretary General was represented by Sania Ivedi, legal adviser at the Legal Advice and Litigation Department of the Council of Europe, accompanied by Benno Kilian, head of that department.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

4. The appellant is a permanent staff member of the Council of Europe who was recruited on a B4 indefinite-term contract on 1 January 2007, after being employed as a B5 temporary staff member from 1 January 2002 to 31 December 2006. From 1 March 2022, the appellant was employed at grade B6.

5. Following the publication of Vacancy Notice No. 29/2023, the appellant applied to sit an internal competition for an A1/A2/A3 job in the Directorate of Programme Co-ordination (DPC). The appellant was able to apply for this A grade job because he met the eligibility criterion set out in paragraph 340.1 of the Staff Rule on classification of jobs, i.e. the requirement to have been employed in the same category – in the appellant's case, category B – for at least six years on an open-ended contract or, as in the appellant's case, on an indefinite-term contract (CDI).

6. By decision dated 2 June 2023 of the Deputy Secretary General acting by delegation from the Secretary General, the appellant was appointed with effect from 1 July 2023 to the job for which he had applied in response to Vacancy Notice No. 29/2023, at grade A1, step 8. This

decision to classify the appellant as an A1 was based firstly on the reference made in paragraph 340.1 of the Staff Rule on classification of jobs to paragraph 440.2 of the Staff Rule on entry into service, according to which only candidates with at least six years' professional experience involving duties similar to those exercised by staff members in category A are to be appointed to grade A2, and, secondly, on the administrative practice whereby only years of experience at grades B5 and B6 as permanent staff are taken into account for such purposes. As the appellant's career as a permanent staff member had included just over fifteen years' experience at grade B4 and 16 months' experience at grade B6, he was appointed to grade A1, without regard being had to his five years' experience as a temporary staff member at grade B5.

7. On 15 June 2023, the appellant lodged an administrative complaint contesting the decision of 2 June 2023 to appoint him to grade A1 rather than A2.

8. On 17 July 2023, the Secretary General dismissed the appellant's administrative complaint in its entirety.

9. On 8 August 2023, the appellant lodged the present appeal.

II. RELEVANT LAW

10. Article III of the Staff Regulations on classification of jobs states:

> "3.1 All jobs in the Organisation shall be divided among the following categories:
>
> 3.1.1 category A, comprising professional or managerial roles;
>
> 3.1.2 category L, comprising interpretation or translation roles;
>
> 3.1.3 category B, comprising support, administrative or team-supervision roles or junior professional programmes;
>
> 3.1.4 category C, comprising technical, manual or service roles.
>
> 3.2 Within each category, jobs shall carry a grade, in accordance with the system in force in the co-ordinated organisations.
>
> 3.3 Appropriate arrangements shall be made by the Secretary General for the classification of jobs and staff according to the nature of the duties and responsibilities required.
>
> 3.4 The Secretary General shall make provisions to enable passage between categories."

11. Paragraph 550 of the Staff Rule on career development states in paragraphs 1 and 2:

> "550.1 Internal competitions are open to staff members confirmed in employment.
>
> 550.2 Following an internal competition a staff member may be transferred, promoted, or assigned to a job carrying a lower grade or to a job in a different category."

12. Paragraph 340 of the Staff Rule on classification of jobs deals with passage between categories and reads as follows:

"340.1 A staff member who holds an open-ended contract or an indefinite term contract, and has been employed in the same category for at least six years, is eligible to apply to participate in an internal competition in respect of a vacancy in a category other than that to which they are currently assigned.

340.2 A trial period shall be obligatory for all staff members who change category following an internal competition.

340.3 If, at the end of the trial period, the Secretary General decides not to confirm the staff member's appointment, they shall be assigned to a job at the grade held prior to such appointment.

340.4 When a staff member successfully participates in an internal competition for a job advertised at C1/C2, B1/B2, L1/L2 or A1/A2/A3 level, the staff member's grade shall be determined by application, mutatis mutandis, of Article 440 of the Staff Rule on entry into service.

340.5 The salary of a staff member who changes category following an internal competition shall be determined by comparing the salary scales corresponding to the category of the new job and the job held by the staff member prior to assignment to that job. If the basic salary corresponding to the highest step of the grade to which the staff member is assigned is lower than the basic salary corresponding to the highest step of the grade held by the staff member prior to assignment, the staff member shall be placed at the step in the new salary scale which results in the smallest possible reduction in basic salary. If the basic salary corresponding to the highest step of the grade to which the staff member is assigned is higher than the basic salary corresponding to the highest step of the grade held by the staff member prior to assignment, the staff member shall be placed at the step providing an increase in basic salary equal to at least the amount that would have resulted from one step advancement at the grade they held in the previous category."

13. Article 440.2 of the Staff rule on entry into service states:

"Where the vacancy is advertised at A1/A2 level, candidates with at least six years' professional experience involving duties similar to those exercised by staff members in category A shall be appointed at grade A2."

14. Paragraphs 7.1 and 7.2 of the Secretary General Decision of 30 December 2022 on entry into force of the Staff Rules implementing Staff Regulations states:

"7.1 The provisions of the Staff Rules related to passage between categories shall enter into force gradually according to the schedule below.
7.2 From January 2023, internal competitions for category A vacancies shall be open to eligible staff members employed in category B grades 5 and 6, and category L."

THE LAW

15. In his appeal, the appellant asks the Tribunal to set aside the ad personam decision No. 8479 taken by the Deputy Secretary General on behalf of the Secretary General, appointing him following competition No. 29/2023 to grade A1, step 1, from 1 July 2023 and to declare that his professional experience warrants his being appointed to grade A2.

16. For her part, the Secretary General invites the Administrative Tribunal to declare the present appeal unfounded and to dismiss it.

I. THE PARTIES' SUBMISSIONS

1. The appellant

17. In his appeal, which he maintains is admissible, the appellant contends that the practice of the Directorate of Human Resources (DHR) whereby, when a member of staff moves to a job in another category, only the years of experience as a permanent staff member in a grade equivalent to that of the job to be filled – that is to say, in the case of an A grade job, only the years of employment in grades B5 and B6 – are taken into account for the purposes of determining the grade, is not applicable to him. As a result of this practice being applied in the case of the appellant, his fifteen years of experience at grade B4 were not taken into account for the purposes of determining whether he had the six years of professional experience required to be appointed to grade A2. Consequently, the appellant was appointed only to grade A1.

18. The appellant considers that this practice is arbitrary because, by merely taking into account the experience and career of a staff member in relation to their grade, without regard to the duties they have actually performed and the responsibilities actually assumed, it lacks an objective basis. In the appellant's view, such a practice is all the more arbitrary given that, within the organisational structure of the Council of Europe, there is no effective and up-to-date division of responsibilities and competences between jobs. He points here to the fact that the last job classification exercise was in 2006. He also mentions the tendency to increase the responsibilities entrusted to B grade staff, and in particular to B4 staff, in response to budgetary pressures.

19. The appellant points out that throughout his career he has sought to draw attention to the discrepancy between his responsibilities and his grade, as evidenced by his objectives and appraisal reports prior to his appointment to grade B6. He also emphasises that the post he held prior to that appointment was classified at grade B6 for the purposes of internal posting. In the appellant's view, this proves that he had previously performed work equivalent to grade B6 since at least 1 January 2015, when he was appointed Head of Unit. During that period, the appellant states that he temporarily replaced an A2 staff member, reporting directly to an A5.

20. The appellant next submits that the impugned practice favours external candidates, insofar as the latter's professional experience is examined in the light of the responsibilities actually performed. Had he been recruited as an external candidate with a level of responsibility identical to the one he had during his career at the Council of Europe, the appellant believes that he would have been recruited at grade A2. The practice in question also, he contends, discriminates against staff on temporary contracts whose experience is not taken into account: the appellant takes issue with the fact that his five years' experience at grade B5 were not taken into account in determining his eligibility for the A2 grade.

21. Lastly, the appellant contends that the practice relied on against him is not settled. He cites the case of a staff member, P.R., who was awarded the A2 grade as part of a general job classification review exercise, even though the staff member in question had only one year's previous experience at grade B5.

2. The Secretary General

22. The Secretary General begins by explaining the basis on which the impugned decision was taken. To this end, she refers to DHR's settled administrative practice for determining a staff member's grade when moving between categories following an internal competition. Insofar as it is the years of experience as a permanent staff member (i.e. the years during which the staff member has been employed on an indefinite-term contract, an open-ended contract or fixed-term contracts) that determine eligibility to sit an internal competition for a job in another category, the Secretary General notes that only these years of experience are taken into account in determining the grade at the time of appointment.

23. It has thus been DHR's consistent practice to appoint to grade A2 staff with six years' experience at a grade equivalent to grade A, i.e. grades B5 and B6. If this condition is not met - as in the case of the appellant, who had 16 months' experience at grade B6 and just over 15 years' experience at grade B4 - the staff members concerned are appointed to grade A1. Based on the fact that the duties performed by B5 and B6 staff may be regarded as similar to those performed in category A, unlike the duties performed at grade B4 and below, the practice in question makes it possible to deal with the wide variety of situations in an equal and completely objective manner.

24. The Secretary General then repudiates the appellant's argument that the duties and responsibilities he performed when employed at grade B4 were above his grade. She makes various points to support her view that this argument is unsubstantiated and no more than a subjective assessment on the part of the appellant. Firstly, the Secretary General refers to the appellant's appraisal reports from 2010 to 2020, which show that his level of responsibility remained broadly the same, regardless of the changes that had occurred in the appellant's job title in the meantime. Secondly, the Secretary General denies the appellant's allegation that he temporarily replaced an A2 staff member: insofar as that staff member's job had been transferred, along with most of his duties, there was no vacancy that necessitated a replacement. In the absence of a vacancy, one of the conditions which would have justified paying an extra duties allowance to the appellant for the performance of higher-level duties was not met, therefore. Thirdly, the Secretary General submits that the fact that, as a B4, the appellant was reporting directly to an A5, is not sufficient evidence that the level of responsibility actually exercised by the appellant had changed and was above his grade. Lastly, the Secretary General acknowledges that in February 2022, the job description for the field mission support job changed and that in March 2023, the job was advertised at grade A1/A2. At the same time, she points out that DHR approved the classification of this job at grade B6 and that, in terms of classification, B6 is equivalent to A1/A2.

25. According to the Secretary General, the appellant's complaint that there was a mismatch between his level of responsibility and the level of the grade at which he was employed between 2015 and 2022 is in any event inadmissible, since it was for the appellant to raise this complaint at the time of the relevant facts, using the remedies available to him.

26. As to the appellant's argument that the failure to take account of his years of experience as a B5 temporary staff member results in discriminatory treatment, the Secretary General notes that these years were taken into account at the time when the appellant was recruited to grade

B4 in 2007, since he was appointed to step 6 of grade B4 instead of step 1. The Secretary General also points out that, under the applicable rules, a change of category following participation in an internal competition is not equivalent to a promotion and may lead to a reduction in salary.

27. With regard to the appellant's complaint that he suffered discrimination in relation to candidates recruited through an external recruitment procedure, the Secretary General points out that staff who, like the appellant, change category following an internal competition are not, objectively speaking, in the same situation as candidates recruited through an external competition. Consequently, the fact that they are treated differently does not, in the Secretary General's view, amount to an infringement of the principle of equal treatment.

28. The Secretary General concludes that, in the light of the applicable rules and established administrative practice, the appellant's appointment to grade A1 following the internal competition in question is justified and consistent with the principle of equal treatment between staff.

II. THE TRIBUNAL'S ASSESSMENT

29. The question which the Tribunal must consider in this case is whether, in the circumstances, it was justified for the Administration, in line with existing administrative practice, to determine the appellant's grade when he moved to a different category by taking into account only his previous experience at grades B5 and B6 and excluding the experience that he had acquired as a B4.

30. The Tribunal notes firstly that there can be no question in this appeal of determining whether the tasks which the appellant performed when he was a B4 were of a higher level. If the appellant believed he was entitled to a grade higher than the one accorded to him, it was incumbent on him to lodge a complaint to that effect using the remedies available to him at the material time and to seek a decision which he could, if necessary, have challenged before the Tribunal. Contrary to what the appellant contends, the observations he made in his assessments concerning the alleged mismatch between his grade and his duties are not sufficient to satisfy the exhaustion of remedies requirement: at no time did the appellant identify a decision adversely affecting him and raise an administrative complaint which the Administration could have taken up. It follows that the appellant's arguments based on an alleged discrepancy between his grade and his duties cannot be examined and must be dismissed as inadmissible.

31. The Tribunal emphasises that under the relevant case law, a construction which an organisation wilfully and consistently puts on a rule for years may become a binding element of personnel policy to be applied to everyone who is in the same position in law and in fact. That flows from the general principles that an organisation must show good faith and frame personnel policy in objective terms (Administrative Tribunal of the International Labour Organisation (ILOAT), Judgment 1125, consideration 8).

32. In the present case, the Administration construed the relevant provisions, i.e. paragraph 340.4 of the Staff Rule on classification of jobs and paragraph 440.2 of the Staff Rule on entry into service applicable *mutatis mutandis* (see paragraphs 12 and 13), in such a way that only duties performed by staff at grades B5 and B6 are considered similar to duties performed in category A,

for the purposes of calculating the six years required for appointment to grade A2. In applying the above provisions in this way, the Administration merely put a particular construction on those provisions within the scope of its discretionary power.

33. The Tribunal notes in this regard that the determination of a staff member's grade - whether as a result of recruitment, promotion or, as in the present case, a change of category - is an area in which the Secretary General has discretionary power (see *mutatis mutandis*, Appeals Board of the Council of Europe (ABCE), Appeal No. 146/1986, decision of 3 August 1987, *Brown (I) v. Secretary General*, paragraphs 52 to 53; Administrative Tribunal of the Council of Europe (ATCE), Appeal No. 240/1997, decision of 23 April 1998, *Van Loon v. Secretary General*, paragraph 31; ILOAT, Judgment 2490, consideration 5). Accordingly, in the event of a dispute, the Tribunal cannot substitute its own judgment for that of the Administration. Nevertheless, it has a duty to ascertain whether the disputed decision was taken in accordance with the Organisation's regulations and the general principles of law to which the legal systems of international organisations are subject.

34. The Tribunal observes that the impugned administrative practice is not contrary to the wording of the relevant provisions, since it merely clarifies their scope, by specifying the duties which may be considered similar to duties performed in category A when determining whether to appoint a staff member to grade A1 or A2.

35. As to the settled nature of the practice concerned, the Tribunal notes that the only precedent relied on by the appellant to challenge it, that of P.R. (see paragraph 21), is not relevant. The P.R. case was governed by the rules in force in 2007. The conditions of appointment to grade A2 that were applied to that staff member have since evolved and are not comparable to those that were applied to the appellant. The appellant alleges that there are other precedents which show that the practice in question is not settled. The Tribunal notes, however, that mere allegations concerning the existence of other precedents, without any further details, have no evidential value. Such allegations are not of a kind to cast doubt on the settled nature of the practice in question and are not sufficient to shift the burden of proof onto the Administration.

36. As to the appellant's argument that the impugned practice is arbitrary, the Tribunal considers that the question to be examined in response to that plea is whether the practice has an objective and reasonable basis and whether it is consistent with the objective pursued by the rules whose implementation it allows.

37. The Tribunal notes in this regard that the grade actually held by staff members is an objective criterion for assessing the nature of the work performed and the level of responsibility exercised by them. In view of the Administration's obligation to see that staff members are given work appropriate to their grade (ILOAT, Judgment 411, consideration 3; Judgment 809, consideration 17 and Judgment 2594, consideration 14), it may reasonably be supposed that the duties performed by a staff member correspond to the grade which they hold. The appellant's argument to the contrary, based on the fact that the Council of Europe's most recent job classification exercise dates back to 2006, is irrelevant since an exercise of this type consists in an objective job evaluation that hinges on the duties of the post and not on the manner in which the

incumbent performs them (ILOAT, Judgment 1647, consideration 6 *in fine*; Judgment 1808, consideration 7 and Judgment 1874, consideration 7).

38. As to the appellant's argument that the practice at issue discriminates between internal and external candidates (see paragraph 20), the Tribunal considers that it is not discriminatory to value the professional experience of staff members moving from one category to another following an internal competition and that of candidates recruited following an external competition according to different systems insofar as the circumstances of the two groups are objectively different. The Tribunal notes that according to the relevant case law, "the fact that account is taken of relevant experience [of internal and external candidates for the purposes of their classification in step following a competition] by means of two separate systems" is not contrary to the principle of equal treatment "provided that the two groups are objectively different and the two systems are adapted to the particular circumstances of each group (…)". That is the case, in particular, where the professional experience acquired by internal candidates before they entered the service of the Organisation has already been taken into account at the time of their recruitment, their professional experience acquired within that Organisation having, moreover, also been taken into account at the time of their advancement in step or promotions (see, to that effect, Judgment of 29 January 1985 of the Court of Justice of the European Communities, Michel v. Commission, 273/83, EU:C:1985:31, paragraphs 24 to 26).

39. That being so, the Tribunal finds that the Administration does not discriminate if, in an internal competition to fill a vacancy in another category, it uses the criterion of grade to assess the level of responsibility of internal candidates, even though no such criterion is applicable to external candidates in a recruitment process.

40. For the same reason, the Tribunal considers that no discrimination can be inferred in the present case from the fact that the Administration took into account only the years of experience which determine eligibility for participation in the competition, namely the years as a permanent staff member, since the years of experience as a temporary staff member had already been taken into account at the time when the staff member concerned was recruited. The Tribunal observes that the appellant's years of experience as a B5 temporary staff member were duly taken into account at the time when he was recruited to grade B4, since he was appointed to step 6 rather than to step 1.

41. In the light of the foregoing, the Tribunal concludes that by developing the administrative practice according to which only years of experience as B5 and B6 permanent staff members count as years of experience in the performance of duties similar to those performed by A grade staff, the Administration did not exceed the limits of its discretionary power. The same applies to the assessment of the appellant's professional experience in the light of this practice: by not taking into consideration the appellant's years of experience as a B4 permanent staff member, together with those he acquired as a B5 temporary staff member, the Administration did not exceed the limits of its discretionary power either (see *mutatis mutandis* ATCE, Appeal No. 617/2019, decision of 17 December 2019, *Ubowska v. Secretary General*, paragraph 32).

42. On the basis of the foregoing considerations, the Tribunal concludes that the present appeal is wholly unfounded and must be dismissed.

III. CONCLUSION

43. In conclusion, the appeal is unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares the appeal unfounded and dismisses it;

Orders that each party shall bear its own costs.

Adopted by the Tribunal in Strasbourg on 23 January 2024, and delivered in writing in accordance with Rule 22, paragraph 1, of the Tribunal's Rules of Procedure on 25 January 2024, the French text being authentic.

Registrar of the Administrative Tribunal	Chair of the Administrative Tribunal
Christina OLSEN	Nina VAJIĆ