

CONSEIL DE L'EUROPE— —COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeals Nos. 258/2000 and 261/2000
(José-Maria BALLESTER (I and II) v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Kurt HERNDL, Chair,
Mr José da CRUZ RODRIGUES,
Mr Helmut KITSCHENBERG, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Ms Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

A. Appeal No. 258/2000

1. Mr José-Maria Ballester lodged his first appeal on 1 February 2000. On 2 February 2000, it was registered under file No. 258/2000. The purpose of the appeal was to secure annulment of the appointment of Mr Raymond Weber to the post of Director of Culture and Cultural Heritage.

2. On 2 March 2000, the appellant's legal representative, Mr Jean-Pierre Cuny, filed a supplementary memorial. On 12 April 2000, the Secretary General submitted his observations concerning the appeal. The appellant filed a memorial in reply on 16 May 2000.

3. In his memorial replying to the Secretary General's observations, Mr Cuny requested that a number of witnesses be heard, to clarify certain questions of fact. On 30 May 2000, he wrote to the Tribunal, asking it to indicate whether, and to what extent, it was prepared to hear the witnesses proposed by the appellant. On that same day, the Registrar notified him that the Tribunal had provisionally decided that witnesses would not be heard at this stage in the proceedings.

4. Mr Martens, Chair of the Tribunal, initially scheduled a hearing in the case on 7 June 2000, but this hearing had to be postponed.

5. The public hearing took place in the Tribunal's room at the Council of Europe on 5 July 2000. The appellant was represented by Mr Cuny, and the Secretary General by Mr Roberto Lamponi, Head of the Legal Advice Department in Directorate General I - Legal Affairs, assisted by Mr Jörg Polakiewicz, Deputy Head of Department. The parties' representatives argued the case and answered written and oral questions put to them by the Tribunal. The appellant also spoke in person.

On 11 July, the Secretary General submitted certain information requested by the Tribunal at the hearing. A copy of this letter was sent to counsel for the appellant on the same day.

6. On the Tribunal's instructions, the Registrar had written to Mr Weber on 5 July 2000, to establish whether he was aware of the appeal and whether he wished to intervene in the proceedings (Article 10 of the Statute of the Tribunal). By letter dated 12 July, Mr Weber replied that he was aware of the appeal and did not wish to seek authorisation to intervene in the proceedings.

B. Appeal No. 261/2000

7. The appellant lodged his second appeal on 25 July 2000. On 26 July 2000, this was registered under file No. 261/2000.

8. On 6 September 2000, the appellant's legal representative, Mr Cuny, filed a supplementary memorial. He repeated the request for the hearing of witnesses made in connection with appeal No. 258/2000. On 20 September 2000, the Secretary General submitted his observations on the appeal. The appellant submitted his observations in reply on 5 October 2000.

9. The public hearing took place in the Tribunal's room at the Council of Europe on 16 October 2000. The appellant was represented by Mr Cuny, and the Secretary General by Mr Lamponi.

C. Proceedings common to appeals Nos. 258/2000 and 261/2000

10. In a decision given on the day the hearing ended, the Tribunal partly granted the appellant's request for the hearing of witnesses.

11. By letter dated 6 November 2000, the parties were informed that the hearing of witnesses had been scheduled for 15 December 2000.

On 11 December 2000, the Registrar informed the parties that the Tribunal had been obliged, for internal reasons, to postpone the hearing of witnesses.

12. Following the death of Mr Martens, Chair of the Tribunal, on 6 January 2001, Mr Kurt Herndl, Deputy Chair, replaced him as Chair (Article 2 of the Statute of the Administrative Tribunal; Article 9(2) and Article 33 of the Internal Rules of Procedure of the Administrative Tribunal).

13. The witnesses were finally heard in the Tribunal's room at the Council of Europe on 9 March 2001. The appellant was represented by Mr Cuny, and the Secretary General by Mr Lamponi, assisted by Mr Polakiewicz.

In accordance with its decision of 16 October 2000, the Tribunal heard as witnesses MM. H.C. Krüger, Deputy Secretary General, J. Kalous, former Deputy Director of Education, Culture and Sport, G. Mazza, Director Responsible for Education and Higher Education, and M. Martins, Deputy Director of the Private Office of the Secretaries General.

On 19 June 2001, in accordance with its decision of 16 October 2000, the Tribunal heard Mr Weber, who had been unable to attend on 9 March 2001. The hearing took place in the Tribunal's room at the Council of Europe, in the presence of Mr Cuny and Mr Lamponi, assisted by Mr Polakiewicz.

When Mr Weber had been heard, the parties submitted their comments on all the hearings, and also their final arguments.

THE FACTS

14. The appellant, a permanent Council of Europe staff member, joined the Organisation on 15 September 1979 as Head of the Regional Planning, Monuments and Sites Division. His division was transferred, with effect from 1 September 1990, to the Directorate of Education, Culture and Sport ("DECS"). When the two appeals were lodged, the appellant was on Grade A5, and had been "blocked" at step 11 since 1993.

The two appeals arise from a dispute concerning the alleged assignment to the appellant of certain duties attaching to a grade (A6) above his own, and of the title corresponding to them ("the appointment of the appellant").

15. The accounts of the facts given the Tribunal by the parties are partly at variance. Their disagreement centres on certain events which took place between September 1997 and August 1998. Moreover, during the proceedings before the Tribunal, both the parties changed their position on this point several times. This was why the Tribunal ordered the hearing of witnesses.

With this reservation, the facts relating to the two appeals can be summarised as follows.

A. Appeal No. 258/2000

16. According to the appellant, at the 600th meeting of the Ministers' Deputies on 9-10 September 1997, the Secretary General announced that he was renewing Mr Weber's contract as Director of the DECS. On that occasion, he allegedly also informed the Deputies of his decision to appoint:

- Mr Kalous to the post of Deputy Director of the same Directorate;
- Mr Mazza to the post of Head of the Education Department;
- The appellant to the post of Head of the Culture and (Tribunal's underlining) Cultural Heritage Department.

17. Subsequently, by memorandum dated 1 October 1997, the Director of the DECS informed staff in his Directorate of these appointments. He also informed the Council for Cultural Co-operation and the Culture and Cultural Heritage Committees of the new duties assigned to the appellant. The memorandum read as follows:

“I would like to inform you of the decisions taken by the Secretary General:

The Secretary General has confirmed me in my position as Director and has appointed Mr Jaroslav KALOUS to the post of Deputy Director. Mr KALOUS, who is at present Director of the Institute for Educational Research and Development at Charles University in Prague, will be taking up his duties on 1 November 1997.

It is the Secretary General's wish that the Director and Deputy Director should attend to all sectors of the Directorate and not be, as in the past, responsible for any particular department. He has accordingly decided to entrust the duties of Head of the Culture and Cultural Heritage Department to Mr José-Maria BALLESTER, and the duties of Head of the Education Department to Mr Gabriele MAZZA.

As I have in substance told the Culture Committee and the Education Committee, I should like to take advantage of this opportunity to optimise our Directorate's human resources, so that we can operate more transparently and effectively, and so that everyone can deploy his/her skills and qualities to maximum advantage. To succeed in this, I shall need the help of each and every one of you!

We shall, of course, have an opportunity to discuss this approach together.”

18. The establishment table appended to the 1998 budget was reportedly adjusted to reflect the two above appointments.

19. At the start of the proceedings before the Tribunal, the appellant claimed that the Secretary General's Private Office had delayed implementation of his appointment without giving him any reasons for this. It was only on 20 August 1998 that the Secretary General informed the Director of the DECS that implementation of the appellant's appointment raised a legal problem, since it would establish a hierarchical relationship between two staff-members holding the same grade, the appellant as Head of Department, and Mrs B. as his subordinate. This was considered incompatible with the Staff Regulations, even though the appellant had served longer than Mrs B.

20. The Director of the DECS allegedly informed the appellant of this serious reservation. In the proceedings before the Tribunal, the appellant stated that he took this to mean that implementation of his appointment was “simply being suspended” and accepted this “simple suspension”.

21. The Secretary General formally denies appointing the appellant to the post of Head of the Culture and Cultural Heritage Department. At the above-mentioned 600th meeting, the Deputies held an informal exchange of views, as provided for in

Article 25(2) of the Regulations on Appointments, in the course of which the Secretary General told them that he intended to appoint Mr Weber to the post of Director of the DECS, and Mr Kalous to the post of Deputy Director. No decision concerning the appellant is mentioned in the proceedings of the meeting. Moreover, the Regulations on Appointments provide for such an exchange of views only in the case of appointments to grades A6 and A7. The Secretary General adds that, in the discussion, the Deputies favoured the establishment of two departments: Education Department and Culture Department, also covering cultural heritage. This explained why these new structures featured in the establishment table appended to the 1998 budget, which the Committee of Ministers adopted in December 1997.

22. The Secretary General states that the memorandum of 1 October 1997 from the Director of the DECS (see paragraph 17 above) was not authorised by his Private Office and that “it actually gave rise to management problems within the departments concerned, which resulted in the Deputy Secretary General’s intervening”. The Secretary General admits that these problems were rooted in Mrs B.’s wish not to serve under a head of department holding the same grade as herself.

23. The Secretary General recalls that, at the beginning of 1998, the Deputy Secretary General had held a series of discussions with all the persons concerned, including the appellant. A first meeting took place on 23 January 1998, and a second on 13 February 1998. The Secretary General first told the Tribunal that the last meeting had been the decisive one; when the addresses were being presented, he said that the decisive meeting had been the first one. This statement was not contested by the appellant or his counsel. At that first meeting, attended initially by MM. Weber and Kalous, and later by Mr Mazza and the appellant, it was decided “with the agreement of all the participants, including the appellant”, that the cultural heritage sector would remain separate from the Cultural Policy and Action Division.

24. In his memorial in reply to the Secretary General’s observations, the appellant maintains that the memorandum of 1 October 1997 from the Director of the DECS proves that the Secretary General definitely appointed him Head of the Culture and Cultural Heritage Department. In this connection, he points out that the memorandum also announced the appointment of Mr Mazza, who immediately assumed the functions indicated in the memorandum and was still exercising them when the Tribunal was considering the appeal. He adds that certain Deputies told him “unequivocally” that the Secretary General had announced his appointment at the 600th meeting.

The appellant does not deny that, at the decisive meeting, the Deputy Secretary General said that it was necessary to keep the cultural heritage sector separate from the Cultural Policy and Action Division – but he formally denies that he agreed to this. On the contrary, he expressed “his disappointment and surprise” and “pointed out that he had in the past himself been subordinate to a staff-member holding the same grade”. The Deputy Secretary General did not question the DECS Director’s memorandum. The appellant maintains that he expressly referred to the fact that Mrs B. and he both held the same grade as a legal obstacle to implementation of the decision to appoint him. He claims that the Deputy Secretary General dismissed his protest and closed the meeting by saying: “It is my decision”.

In his submissions, the Secretary General confirmed that, at the decisive meeting, the Deputy Secretary General had said: “It is my decision”. He added that this decision was dictated by the wish to avert the management problems which might have arisen from the appellant’s having, as head of a Culture and Cultural Heritage Department, the same grade as one of his subordinates. The Secretary General denied that this circumstance had been cited as a legal obstacle. The Deputy Secretary General had certainly said that the legal aspects would have to be considered too, but only to reserve his position on this particular point. The Secretary General added that the second meeting – at which Mrs B. had, for the first time, been present – had set out to find an answer to the problem. Unfortunately, this had proved impossible, and so the Secretary General’s “decision” not to have a Culture and Cultural Heritage Department headed by the appellant, taken on 23 January, had been confirmed on 13 February. Neither the appellant nor his counsel had contested this decision by the Secretary General.

25. Concerning subsequent developments – on which the parties agree – it should be noted that, at its 681st meeting on 30 September 1999, the Committee of Ministers adopted a new organisation chart for the Council of Europe Secretariat, which is now divided into Directorates General.

This new organisation chart features four operational Directorates General, including Directorate General IV - Education, Culture, Youth and Sport, Environment, which is responsible for activities in all those sectors. The decisions taken on restructuring turn the old “Departments” into “Directorates”, and the old “Divisions” into “Departments”.

Thus, Directorate General IV is divided into four Directorates: the Directorate of Education and Higher Education, the Directorate of Culture and Cultural Heritage, the Directorate of Youth and Sport, and the Directorate of Sustainable Development.

Each of the former Directors, with the exception of the Director of the DECS, was appointed Director General. In fact, Mr S. was appointed Director General of Directorate General IV, while Mr Weber, Director of the former DECS, was placed at the head of the Directorate of Culture and Cultural Heritage. The appellant kept the post of Head of the Cultural Heritage Department.

26. On 3 November 1999, the appellant lodged an administrative complaint, in accordance with Article 59 of the Staff Regulations, asking the Secretary General to annul his decision to appoint Mr Weber, Director of the former DECS, Director of Culture and Cultural Heritage. He claimed that the decision complained of was unlawful, since it discriminated against him. He also regarded it as incompatible with Article 11 of the Staff Regulations and Article 25 of the Regulations on appointments.

27. On 3 December 1999, the Director of Administration informed the appellant that his administrative complaint had been rejected, on the ground that structural reform of the Secretariat was a Committee of Ministers prerogative, and that the exercise of this prerogative could not, as such, have caused him damage.

The Director then added:

“Moreover, determining the powers and responsibilities assigned to Directors and Heads of Department, within the Directorates General, is a matter for the Secretary General. The refocusing of Mr Weber’s managerial functions, which took place when Directorate General IV was established, does not concern you directly, and has caused you no damage, insofar as your professional situation remains what it was before: you keep the same post, with the same grade, the same title and the same functions.”

B. Appeal No. 261/2000

28. On 12 May 2000, the appellant lodged a second administrative complaint, worded as follows:

“I learn from your observations of 12 April 2000 [see para. 2 above] – observations which reached me a few days later – that your predecessor decided to annul, on a date unspecified and without at any stage informing me, Mr Raymond Weber’s memorandum announcing the decision to appoint me to the post of Head of the Culture and Cultural Heritage Department.

It thus appears that your predecessor and yourself have, to my detriment, violated a number of general legal principles, principles which international administrative case-law regards as wholly applicable to relations between staff and the Organisation, and which chiefly enshrine:

- certainty of the law;
- legitimate expectations;
- the duty to inform.

Since the violation of these principles is particularly blatant, I am confident that you will award me compensation for the non-material and professional damage I have suffered, from the date of Mr Weber’s aforesaid memorandum to the present time.

In my view, and having regard to the recent case-law of the Administrative Tribunal, this compensation should be of the order of 200 000 FF.”

29. On 13 June 2000, the Secretary General rejected this complaint. He repeated that he had at no stage appointed the appellant to the post in question and added that he had not authorised the memorandum of 1 October 1997. In his view, the complaint was in any case out of time. He also concluded that the complaints were unfounded.

C. Subsequent developments

30. On 16 September 2001, Mr Weber left the Council. At the Deputies’ 758th meeting on 21-25 June 2001, the Committee of Ministers had approved up-grading of Mr Ballester’s post to A6. In Decision A.P. No. 6234 of 4 July 2001, the Secretary General appointed Mr Ballester to the post of Head of the Culture and Cultural Heritage Department, upgraded to A6 with effect from 1 July.

THE LAW

31. The Administrative Tribunal has ordered the joinder of the two appeals as being closely related, in accordance with Rule 14 of its Rules of Procedure.

I. APPEAL No. 258/2000

32. As already indicated in paragraph 1 above, the purpose of this appeal is to secure annulment of Mr Weber's appointment as Director of Culture and Cultural Heritage. The appellant asks the Tribunal to annul this decision and award him the sum of 24 000 French to cover costs incurred through this appeal. He considers that, as a result of Mr Weber's appointment to head the new "Directorate" of Culture and Cultural Heritage, he was effectively downgraded, and suffered a definite loss of professional status. Moreover, this appointment was discriminatory, since Mr Weber held the same grade as his superior, the new Director General, Mr S. The decision complained of was also contrary to law, since it violated Article 11 of the Staff Regulations: Mr Weber's new duties were not commensurate with his grade (A7) but corresponded to a lower one. Finally, Article 25 of the Regulations on Appointments was also violated.

The Secretary General contests both the admissibility and the merits of the appeal.

The parties' arguments may be summarised as follows.

A. Arguments of the parties

1. *Concerning the admissibility of the appeal*

33. The Secretary General argues that the appeal is inadmissible on two counts.

First of all, he argues that the appellant has no "direct and existing interest" (Article 59, para. 1 of the Staff Regulations) in annulment of the decision to appoint Mr Weber Director of Culture and Cultural Heritage. In this connection, the Secretary General points out that this was not an appointment to a vacant post, following the procedure provided for in Article 25 of the Regulations on Appointments, since Mr Weber continued to occupy the post he had occupied before, with the same grade. Only his functions had changed: previously responsible for all the activities subsequently dealt with by Directorate General IV, he was, after the structural changes, responsible for only a part – albeit a substantial part – of those activities. These changes in the extent of Mr Weber's functions had no adverse effects for the appellant. In fact, they left his situation unaffected: his post, grade, title and functions remained the same.

As for "the deterioration in certain practical aspects of the work", complained of by the appellant, the Secretary General notes that the alleged developments were neither directly nor indirectly the consequence of Mr Weber's "appointment", but were due to the new structure. Finally, relying on the Administrative Tribunal's case-law, the Secretary General notes that neither the Staff Regulations nor the Regulations on Appointments give any staff-member a right to promotion.

34. The Secretary General further argues that the appeal is out of time, insofar as the appellant complains that he is not exercising the functions of Head of a Culture Department, embracing both the Cultural Policy and Action Division and the Cultural Heritage Division. In this connection, the Secretary General makes the point that,

even supposing that these duties had indeed been assigned to the appellant in 1997, he had not exercised them since February 1998. In DECS documents dating from April and August 1998, he appears only as “Head of the Cultural Heritage Department”, and the establishment table for 1999, approved by the Committee of Ministers at the Deputies’ 651st meeting, no longer refers to a Culture and Cultural Heritage Department, but to a Cultural Heritage Department and a Cultural Policy and Action Division.

35. In reply, the appellant strongly contests the presentation of the facts on which, in his view, the Secretary General’s first objection is based. He maintains that the Secretary General is ignoring the fact that he had been appointed Head of the Culture and Cultural Heritage Department, and that this appointment had not been annulled, but simply “frozen”. This being so, his subsequent appointment as Head of the Cultural Heritage Department can only be described as “professional downgrading”. He claims that this caused him immense non-material damage, reducing his standing in the eyes of the Committee of Ministers, his colleagues – including his subordinates and immediate assistants – and members of the committees with which he worked. He points out that his functions were also reduced: prior to the decision complained of, they were essentially those of a head of department; afterwards, they were merely those of a head of division, under the old system.

The appellant also notes that the argument used to suspend his appointment as Head of the Culture and Cultural Heritage Department – the impossibility of establishing a hierarchical relationship between two staff-members holding the same grade – was not used in the case of other staff. He accordingly considers himself the victim of blatant discrimination. He also regards this argument as a mere pretext for depriving him of some of his responsibilities. Be this as it may, he considers that he was injured, first, when implementation of the said decision was suspended, and again when functions previously entrusted to him were transferred to Mr Weber.

36. The appellant also contests the Secretary General’s claim that his appeal was out of time. As he sees it, this could apply only from the time when the September 1997 decision to appoint him Head of the Culture and Cultural Heritage Department was explicitly annulled or rescinded. This, however, did not happen. The effects of that decision were suspended by the Deputy Secretary General. He states that he was, and still is, convinced that the decision in question had merely been “frozen”, pending clarification of the legal problem raised by the Secretary General. The fact that the other appointments announced in the memorandum of 1 October 1997 took immediate effect supports what he says – but not what the Secretary General says on annulment of the memorandum.

The appellant adds that the Secretary General’s objection that the appeal is out of time is flagrantly at odds with his stating for the first time, in his observations on the appeal, that his Private Office had not authorised the memorandum of 1 October 1997. In effect, the Secretary General is implicitly admitting that he failed to respect the principles of certainty of the law and legitimate expectations by leaving the appellant in a state of subjective and objective uncertainty concerning his professional future and the accuracy of the information on his professional status contained in the said memorandum. The Secretary General also failed in his duty to inform - not just the appellant, but also the memorandum’s other recipients.

2. *Concerning the merits of the appeal*

37. The appellant alleges, first of all, that Article 11 of the Staff Regulations, which establishes the principle that grades and posts must correspond, has been violated. He points out that all the Directors, except Mr Weber, and also the Heads of Department and Deputy Directors, were given new titles, becoming respectively “Directors General” or “Directors”. Only Mr Weber, the Director of the former DECS, remained a “Director” in the new terminology, although his functions – previously corresponding to those of an A7 post – now corresponded only to those of an A6 staff-member.

38. Even supposing that the post of Director of Culture and Cultural Heritage had become vacant following Mr S.’s appointment as Director of Directorate General IV, he also considers that the Secretary General was required to advertise that post, in accordance with Article 25, para. 1 of the Regulations on Appointments. He adds that, if the Secretary General wished to dispense with publication of the vacancy notice, he should, in accordance with that same provision, have sought the Committee of Ministers’ consent - which he did not.

39. Finally, the appellant claims that the Secretary General has violated another general rule laid down in Article 11 of the Staff Regulations – the rule that the power to make appointments must be exercised in accordance with the Regulations on Appointments.

40. The Secretary General maintains that Mr Weber’s “appointment” as Director of Culture and Cultural Heritage complied fully with the rules laid down in the Staff Regulations and the Regulations on Appointments and did not involve abuse of power. Even if Mr Weber was no longer in charge of the education sector, after the structural changes, he had not moved to a new post, and so the advertising procedure provided for in Article 25, para. 1 of the Regulations on Appointments did not apply. This meant that the decision complained of had violated no formal or procedural rules. Mr Weber’s “appointment” was dictated by his grade and seniority; he had built up solid experience in the fields of culture and cultural heritage. In other words, his “appointment” took account of the essential facts and involved no abuse of authority.

The Secretary General also takes the view that this “appointment” did not violate the principle that grades and posts should match, referred to by the appellant: Mr Weber was not “appointed” to a post which did not correspond to his grade. In this connection, the Secretary General cites a memorandum on the new Secretariat structures, of 20 October 1999, to show that the link between grade and post is by no means rigid. According to this memorandum, “Departments” and “Directorates” are among the “second level” structures - and may be headed by either A6 or A7 staff members.

The Secretary General further rebuts the claim that all the Heads of Department and Deputy Directors became “Directors”. He states that there are, in the other Directorates General, Heads of Department who kept that title, even after the changes.

41. In conclusion, the Secretary General asks the Tribunal to declare the present appeal inadmissible or, in the alternative, to dismiss it.

42. In his observations in reply, the appellant maintains that Mr Weber's appointment was improper, because it failed to respect the principle that posts and grades must correspond, and because it did not pursue a legitimate end.

He adds that the decision complained of dispensed the Secretary General from advertising an A6 post, carrying functions corresponding to those of "Head of Culture and Cultural Heritage Department", for which his qualifications entitled him to apply.

He considers that the *de facto* downgrading of Mr Weber in turn "downgraded his own level of responsibility or, at the very least, checked his prospects of advancement".

43. The appellant accordingly holds to the arguments on which his appeal is based.

B. The Tribunal's opinion

44. The Tribunal must first decide which administrative measure the appellant is really attacking: is it the 1997-98 decision concerning him, the decision appointing Mr Weber, or both? Once it has answered this question, it will be able to consider the Secretary General's objections of inadmissibility.

45. Under Article 59 (1) of the Staff Regulations, only staff members "who have a direct and existing interest in so doing" may submit administrative complaints to the Secretary General. There is no need to develop a general theory here on the precise meaning of the concept "direct and existing interest". It is enough to make the point, first, that Article 60 (1) implies that the same condition governs the admissibility of appeals and, second, that this condition is plainly restrictive. In the case of an appeal against the appointment of another person to a particular post, such an interest can be recognised as existing only in exceptional circumstances. There are special requirements regarding certainty of the law in this area, and this means that it is not enough for a staff-member appealing against the appointment of another person simply to allege that, in making this appointment, the administrative authorities have failed to respect certain rules of law. He/she must also plausibly show that, had these rules been respected, he/she would have stood a reasonable chance of being appointed. In the special circumstances of this case, however, the appellant's claim that the principle embodied in Article 11 of the Staff Regulations has been flouted, and that the conditions laid down in Article 25 (1) of the Regulations on Appointments have not been respected, does not satisfy this requirement. In reaching this conclusion, the Tribunal bears in mind that the issue in this case was not an appointment, but a structural change, with no bearing on the relationship which had existed between Mr Weber and the appellant in the old DECS.

46. The latter has argued that, in 1997, he had been appointed Head of the Culture and Cultural Heritage Department, and that this appointment had not been annulled, but simply "frozen", on the ground that it faced a legal obstacle, insofar as it created a hierarchical relationship between two staff members with the same grade. He deduces from this that his subsequent appointment to the post of Head of the Cultural Heritage

Department – which he apparently sees as the necessary consequence of Mr Weber’s appointment to the post of Director of Culture and Cultural Heritage – can only be regarded as a professional “down-grading”, and that this has caused him immense non-material damage. He also deduces from this that Mr Weber’s appointment to a post subordinate to that held by a staff-member with the same grade constitutes patent discrimination against himself (see paragraph 32 above).

47. The Secretary General has denied appointing the appellant Head of the Culture and Cultural Heritage Department (see paragraph 21 above), but the Tribunal considers that there are sufficiently clear and consistent indications for it to accept, at this stage in its examination of the case, that the appellant had, in 1997, legitimate reasons for believing that he had been appointed Head of the Culture and Cultural Heritage Department. There is, first of all, the Secretary General’s admission that he did, at the end of 1997, establish a culture department which also extended to cultural heritage, and which appears in the establishment table appended to the 1998 budget, adopted by the Committee of Ministers in December 1997 (see paragraph 21 above). There is, secondly, the memorandum of 1 October 1997 from the Director of the DECS, which, according to him, was based on information from the Secretary General. This conclusion is in turn reinforced by the fact – which has not been contested – that Mr Mazza, whose appointment the memorandum also announced, immediately assumed the functions mentioned in the memorandum, and has exercised them ever since (see paragraph 24 above).

48. Subsequent events, and particularly those which took place at the two meetings on 23 January and 13 February 1998 (see paragraph 23 above) must be assessed against this background. The Tribunal is of the opinion that the Deputy Secretary General’s decision can be interpreted only as an annulment of the appellant’s appointment, as he understood it, to the post of Head of the Culture and Cultural Heritage Department. It cannot therefore accept the appellant’s claim that he saw this “decision” as “merely suspending” implementation of his appointment. This view is incompatible with the uncontested facts of those two meetings. Moreover, even if the appellant believed that mere suspension was the case, he should have been undeceived by the fact, again uncontested, that he appeared only as “Head of the Cultural Heritage Department” on DECS documents dating from April and August 1998, while the establishment table for 1999, approved by the Committee of Ministers at the Deputies’ 651st meeting, no longer referred to a Culture and Cultural Heritage Department, but to a Cultural Heritage Department and a Cultural Policy and Action Division (see paragraph 34 above).

49. This reading of the facts means that the appellant, who saw annulment of this appointment as “professional down-grading”, causing him non-material damage, could, under Article 59 (2) of the Staff Regulations, have submitted an administrative complaint to the Secretary General against annulment of his appointment by the Deputy Secretary General. Having failed to make use of this possibility, he is time-barred from employing, in the present proceedings, the arguments set out in paragraph 35 above. Moreover, in his administrative complaint of 3 November 1999, he acknowledges that the Deputy Secretary General’s decision was final, since he states:

“It was only at the end of these dealings that the Deputy Secretary General summoned me to tell me that the Secretary General’s decision would not be implemented in the form in which it had been announced to the Deputies.

Notwithstanding this regrettable absence of consultation, I did not contest the final decision [...]”.

Neither the interpretation of this statement which the appellant has given in the present proceedings nor the facts which he alleges, i.e. that Mr Weber changed functions and was entrusted with responsibilities which the appellant expected to be his in due course, can lead the Tribunal to alter its conclusion. The appellant is accordingly out of time, even if he formally requests annulment of the September/October 1999 decision to assign the functions of Director of Culture and Cultural heritage to Mr Weber.

50. Because the appeal is out of time, the Tribunal is unable to rule on the lawfulness of the “decision” dating back to 13 February 1998 (see paragraph 24 above) – the real administrative measure that the appellant wishes to attack.

However, the Tribunal notes with satisfaction that the Secretary General has acknowledged that what occurred was not an example of good management. In fact, good staff management and the importance of the functions and responsibilities involved would have demanded more clarity, at both the “appointment” and the “annulment” stage.

51. Again because the appeal is out of time, the starting point in deciding whether the appellant has a direct and existing interest in attacking Mr Weber’s appointment in September 1999 must be the fact that, immediately prior to the 1999 restructuring, the appellant was simply Head of the Heritage Department. This being so, the Tribunal concludes that he lacks the interest required to appeal against Mr Weber’s appointment. This is why this appeal must be declared inadmissible.

This conclusion dispenses the Tribunal from having to decide on the merits.

II. APPEAL No. 261/2000

52. The appellant states that, during the proceedings concerning his appeal No. 258/2000, he learned that Mr Weber’s memorandum of 1 October 1997 had been annulled on a date unspecified. In the present appeal, he contests that decision.

The Secretary General contests the admissibility and merits of the appeal.

The arguments of the parties may be summarised as follows.

A. The arguments of the parties

1. *On the admissibility of the appeal*

53. The Secretary General considers, first of all, that the appeal has no object, since the appellant was never appointed to the post he claims. Since the Secretary

General cannot annul an appointment which has never been made, no appeal can be brought against a non-existent decision.

Secondly, he contends that the appeal is out of time and therefore inadmissible, since the events on which the appellant bases his arguments took place in 1997 and 1998. In fact, from the end of 1998 at the latest, the appellant could have had no further doubt that the Secretary General had not appointed him Head of the Culture and Cultural Heritage Department.

54. The appellant responds, first, by pointing out that the object of his appeal is “annulment of the Secretary General’s decision – the date of which is unknown – to annul the appellant’s appointment to the post of Head of the Culture and Cultural Heritage Department”.

Secondly, he considers that the argument that the appeal is out of time, and therefore inadmissible, must be rejected, since he did not learn until April 2000 of the decision to annul the appointment announced in Mr Weber’s memorandum of October 1997.

2. On the merits of the appeal

55. The appellant claims that the general principles of good faith and legitimate expectations have been violated. He further alleges that the duty to inform and give reasons has also been violated. Concerning this latter complaint, he considers that the Secretary General should have told him exactly what his professional situation was. He also considers that the Secretary General did not give adequate reasons for his decision to annul the earlier decision appointing him. Finally, he claims compensation for the damage done to him – which he puts at 300 000 French francs – and a sum of 24 000 French francs to cover the cost of the present proceedings.

56. The Secretary General denies that the general principles of good faith and legitimate expectations were violated. He also denies that the duty to inform and give reasons was violated. Finally, he contends that, even if the appellant has in fact suffered damage, such damage is non-material only, and that a simple finding to this effect by the Tribunal will suffice.

B. The Tribunal’s opinion

57. The Tribunal notes that it is required to look beyond the parties’ verbal contest and determine the object of the present appeal.

This can only be the Secretary General’s decision to annul the “decision” referred to in Mr Weber’s memorandum of 1 October 1997, announcing the appellant’s appointment to the post of Head of the Culture and Cultural Heritage Department. This conclusion is based on the Tribunal’s examination of all the documents and arguments presented to it.

58. This question was in fact the object of appeal No. 258/2000, which the Tribunal has just examined. Accordingly, since the present appeal has the same object, it must be declared inadmissible. Even supposing that it has a different object,

it was lodged too late and is therefore out of time. On this issue, the Tribunal refers to its comments on appeal No. 258/2000 (see, in particular, paragraphs 44 to 51 above).

For these reasons, the Administrative Tribunal:

Orders the joining of appeals Nos. 258/2000 and 261/2000;

Declares appeal No. 258/2000 inadmissible;

Declares appeal No. 261/2000 inadmissible;

Decides that each party will meet its own costs.

Done at Strasbourg on 31 January 2002, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

K. HERNDL