

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIRMAN'S ORDER OF 1ST DECEMBER 1998

in the case of SCHMITT v. Secretary General

THE FACTS

1. The complainant is a permanent staff member (grade B5) of the Council of Europe, assigned to the Human Resources Department.
2. On 21 September 1998, she applied for a post of Administrative Officer responsible for Equal Opportunities Policy (grade A2/A3) in the Directorate of Administration – Human Resources Department (Vacancy Notice No. 50/98).
3. On 13 October 1998, she was informed that, despite her qualifications, the Recruitment Panel had rejected her application.
4. On 9 November 1998, she submitted a complaint to the Secretary General under Article 59, paragraph 1, of the Staff Regulations, asking him to cancel the panel's decision.
5. She challenged the merits and the reasoning of that decision.
6. On the merits, she argued that her professional experience and educational qualifications were entirely consistent with the criteria set out in the vacancy notice.
7. As to the reasoning, she maintained that it was both concise in the extreme and unclear.

The concision was extreme in that the note informing her of the decision failed to state the reasons why her application had not been accepted, in particular which qualifications she lacked.

The decision was unclear as, in informing her that her application had been rejected despite her qualifications, the author of the note might have meant that she had not been selected although she had the required qualifications. The complainant therefore appeared to have been excluded for inappropriate reasons.

8. In a note dated 17 November 1998, the complainant applied to the Chairman of the Administrative Tribunal for a stay of execution of the Secretary General's decision.

9. On 17 November 1998, the Chairman of the Administrative Tribunal invited the Secretary General to submit any observations he wished to make on the request for a stay of execution.

10. The Secretary General submitted his observations by letter of 23 November 1998. A copy of these observations was sent to the complainant the same day. The complainant submitted her observations in reply on 26 November 1998.

THE LAW

11. Under Article 59, paragraph 7, of the Staff Regulations, a request for a stay of execution of an administrative act may be made if such execution is likely to cause “grave prejudice difficult to redress”.

12. The reason given for the present application for a stay of execution is that execution of the challenged decision would cause the applicant serious prejudice “difficult to redress”.

Continuation of the recruitment procedure and appointment of a candidate to the post in question would, it alleged, make the redress the complainant sought impossible in view of the entitlement that candidate would acquire on being appointed.

13. The Secretary General points out that, under Article 59, paragraph 6 d, of the Staff Regulations, the complaints procedure is available “to candidates outside the Council who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure”.

It follows, he maintains, that a complaint cannot be lodged against a preliminary decision by the Secretary General not to allow a candidate to sit a competitive examination.

He therefore submits that the request for a stay of execution of the decision to exclude the complainant from external competitive recruitment examination No. 50/98 is inadmissible.

14. The Secretary General also maintains that, although Article 59, paragraph 6 d, explicitly refers to outside candidates, it also applies to internal candidates wishing, like Ms Schmitt, to sit an external competitive recruitment examination.

His argument is that this obviates “the slightest discrimination between candidates”, an aim stated in the Administrative Tribunal’s case-law (Decision No. 226/1996, paragraph 30).

15. The Secretary General also notes that any stay of execution would delay filling the post of Administrative Officer responsible for Equal Opportunities Policy, whereas it is of undoubted priority for the Organisation that the duties attaching to the post continue to be performed.

16. The Secretary General disputes that the alleged prejudice is grave or difficult to redress, since, even if the complainant were allowed to sit the examination, there is nothing to suggest that she would be appointed to the vacant post.

17. In conclusion, the Secretary General asks that the request be refused as inadmissible. He also contends that the request is disproportionate to the prejudice that would be caused to the Organisation if it were obliged to delay the recruitment procedure.

18. In her observations in reply, the complainant maintains that an external recruitment procedure would establish rights and situations difficult to reverse.

19. She submits that the Secretary General's argument of inadmissibility is clearly unfounded. In her contention, this argument is based on application to the case at issue of the restriction laid down in Article 59, paragraph 6 d, of the Staff Regulations for candidates from outside the Council of Europe. She regards this as an attempt to institute an exception to staff members' right, as laid down in the Staff Regulations, to have the Administrative Tribunal review the lawfulness of administrative decisions adversely affecting them (Article 59, paragraph 1, of the Staff Regulations), an attempt, she contends, which clearly breaches the criteria for interpreting the Staff Regulations stated on many occasions by the Appeals Board and based on Article 31 on the Vienna Convention on the Law of Treaties.

20. Secondly, the complainant contends that the need, referred to by the Secretary General, to "obviate even the slightest discrimination between candidates" is irrelevant since a difference in treatment in this matter is justified by Article 7, paragraph 2, of the Regulations on Appointments, which entitles members of staff to participate in competitive examinations under the external recruitment procedure.

21. As to the Secretary General's argument that the prejudice is neither grave nor difficult to redress as, "even if Ms Schmitt were allowed to sit the examination, there is nothing to suggest that she would be deemed suitable for appointment", the complainant points out that the contested decision prevents her from even competing on an equal footing with outside candidates for the post to be filled by competitive examination.

22. Lastly, concerning the prejudice that would be caused to the Organisation by a delay in filling the post, the complainant notes that, pending an appointment, the Secretary General could entrust the most urgent tasks (in particular sitting on panels as an observer) to a competent administrative officer.

23. The Chairman points out that there can be no question, at this stage, of analysing the parties' submissions relating to the merits of the Secretary General's objection of inadmissibility or the substance of the complaint, which it is inappropriate to discuss, far less examine, in the present proceedings, which only concern the taking of urgent action (see paragraph 10 of the Chairman's Order of 28 January 1992 in the case of Muller-Rappard v. Secretary General).

24. The complainant contends that continuation of the recruitment procedure and the ensuing appointment would objectively make it very difficult, or even impossible, to afford the redress being sought, in view of the entitlement the appointee would acquire on being appointed.

25. The Chairman points out that there have been requests to stay external recruitments which he has granted (Chairman's Orders of 15 December 1994 in the case of Ernould v. Governor of the Council of Europe Social Development Fund, of 7 July 1994 in the cases of Bouillon and Fernandez-Galiano v. Secretary General and of 22 February 1988 in the case of

Jeannin v. Secretary General). However, the facts behind those requests were different: the cases involved, respectively, a member of staff who was challenging a decision opening to competition a post from which he had been dismissed (Ernould), a complaint by a member of staff concerning the lawfulness of an external recruitment procedure to which she was party (Jeannin), refusal of a new application, after a post had been thrown open to external recruitment, by a member of staff whose application under the internal promotions procedure had been rejected (Bouillon), and throwing open to external recruitment a post for which a staff member had been turned down under the internal promotions procedure (Fernandez-Galiano). The first of these cases concerned the prejudice caused by the appointment of a third party to the complainant's post. In the others, the issue was the prejudice arising from appointment of another person to a post for which the complainant was in competition. The complainants therefore relied on a prejudice relating to an existing right or to their participation in a competitive examination procedure still pending (Jeannin) or already completed (Bouillon and Fernandez-Galiano).

In the case under consideration here, the situation is somewhat different, in that the complainant is in essence asserting a right to participate in the procedure at issue.

26. The Chairman reiterates that the exceptional power conferred on him under Article 59, paragraph 7, of the Staff Regulations calls for some self-restraint in its exercise (see Chairman's Order of 31 July 1990 in the case of Zaegel v. Secretary General, paragraph 12 of the). Moreover, as already pointed out above, there can be no question, at this stage, of analysing the arguments relied on by the complainant in connection with her administrative complaint.

27. He also notes that, with regard to a request for a stay of execution in connection with an appointment to a senior post, he ruled that "Article 59, paragraph 7, of the Staff Regulations cannot be interpreted as conferring power to stay, as a matter of urgency, execution of a decision to appoint a senior official such as a director where there is no *prima-facie* evidence that 'grave prejudice' is likely to be caused to the candidates who were not chosen, since otherwise there would be serious risk not only to departmental functioning, but also to management of important parts of the Organisation, a possibility the drafters of the Staff Regulations clearly did not intend" (Chairman's Order of 28 January 1992 in the case of Muller-Rappard v. Secretary General, paragraph 11). In view of the nature of the post at issue here and the duties attaching to it, the Chairman holds that those findings should also be borne in mind in the present case.

28. He nonetheless notes that the letter which the Organisation sent the complainant to inform her that her application had been rejected contains some information revealing an apparent contradiction (see Chairman's Order of 8 January 1992 in the case of Cannizzaro v. Secretary General, paragraph 19).

29. It is therefore necessary to take account not only of the Organisation's interests but also of the complainant's. Consequently, so as not to disrupt the fair balance that should exist between the Council of Europe and the complainant, the Chairman finds that the request for a stay of execution must be refused in so far as it relates to continuation of the procedure, except in respect of appointing another candidate. This solution currently makes it possible to strike an acceptable balance between the parties in that if the complainant were to succeed with her complaint, her application for the post could always be taken into consideration later without the Organisation's suffering significant delay in holding the competitive examination.

30. It follows from the above findings that the request for a stay of execution is unfounded in so far as it relates to continuation of the competitive examination procedure. It is for the complainant, on being informed by the Organisation of subsequent developments in the procedure, to take steps to lodge a new request for urgent action if she so wishes.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59, paragraph 7, of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Article 21 of the Administrative Tribunal's Rules of Procedure.

Having regard to the urgency of the matter,

I, CHAIRMAN OF THE ADMINISTRATIVE TRIBUNAL

Decide

– that Ms Schmitt's request for a stay of execution is rejected in so far as it concerns continuation of the procedure, not including the appointment of another person.

Done and ordered in Savona on 1 December 1998

The Registrar of the
Administrative Tribunal

The Chairman of the
Administrative Tribunal

S. SANSOTTA

C. RUSSO