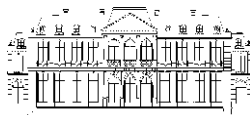


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ORGANISATION DE COOPÉRATION ET
DE DÉVELOPPEMENT ÉCONOMIQUES



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ORGANISATION FOR ECONOMIC
CO-OPERATION AND DEVELOPMENT

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 18 June 1998

JUDGMENT IN CASE No. 32

Mr. D.

v/ Secretary-General

Translation

(The French version constitutes the authentic text)

JUDGMENT IN CASE No. 32 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Wednesday 10 June 1998
at 10.00 a.m. in the Château de la Muette,
2 rue André-Pascal, Paris

The Administrative Tribunal consisted of:

Mr. Jean MASSOT, Chairman,
Professor James R. CRAWFORD
and Professor Luigi CONDORELLI,

with Mr. Colin McINTOSH and Mrs. Christiane GIROUX providing Registry services.

By decision of 27 August 1997 taken following an opinion from the Joint Advisory Board, the Secretary-General confirmed the termination of the appointment of Mr. D., a grade A3 official of the Organisation, adding that he considered the indemnity received by Mr. D. to be sufficient compensation for the prejudice caused by the loss of his job.

On 27 November 1997, Mr. D. filed an application (No. 32) asking the Tribunal to annul the decision to terminate his appointment and consequently to order his reinstatement in the OECD, and to say that should this not be done, the Organisation will be obliged to pay him for life a monthly indemnity the amount of which should not be less than 70 per cent of his salary. He also asked the Tribunal to order the Organisation to pay him the sum of FF 50 000 by way of costs.

On 2 February 1998, the Secretary-General submitted his comments asking the Tribunal to reject the submissions of the application.

On 3 March 1998, the Staff Association filed an intervention document in support of the applicant's submissions.

On 18 March 1998, the applicant submitted a reply.

On 20 April 1998, the Secretary-General submitted his comments in rejoinder in which he maintained his submissions rejecting the application.

The Tribunal heard:

Maître Roland Rappaport, Barrister, Counsel for the applicant;

Mr. David Small, acting Legal Counsel, and Mr. Joao Viegas, on behalf of the Secretary-General;

and Mr. Patrice Billaud, on behalf of the Staff Association.

It handed down the following decision:

The facts

Assigned as of August 1989 to the Documentation Resources Management Division to look after the Organisation's archives, Mr. D., a long-time asthma sufferer, asked, in February 1994, to be transferred to another

post and, on 19 April 1994, produced a certificate from his doctor stating that it “would be desirable for [Mr. D.] to obtain a change of workstation such that any contact with dust is kept to a minimum”. As from 1 October 1994, Mr. D. was given a probationary period in the Council Secretariat. On 25 October 1995, the Organisation’s medical officer certified that Mr. D. was not fit to resume his duties. On 13 November 1995, a colleague of Mr. D.’s was informed by memorandum from the Personnel Service that she had been transferred to the post which Mr. D. ceased to occupy on 1 October 1994. On 5 February 1996, a memorandum from the same Personnel Service informed Mr. D. that his probationary period could not be extended, that there was no suitable post for him and that, in these circumstances, he was in a situation analogous to that of an official whose post had been suppressed and that, consequently, he was entitled to an indemnity for loss of employment after a period of notice of four months, or a final probationary period for a period of three months. Mr. D. opted for this possibility then, noting that he found himself in the situation of an official whose post had been suppressed, he asked, on 12 July 1996, for his case to be submitted to the Invalidity Board.

Following this request, Mr. D.’s case was submitted to the Board but at the same time, on 1 October 1996, the Head of Personnel informed him that his appointment would terminate on 31 October 1996, and that he would be entitled to indemnities in lieu of notice and for loss of employment. On 25 October, the Board concluded that Mr. D. was not suffering from permanent invalidity which totally prevented him from performing the duties attached to his employment in the OECD. Mr. D. asked for his case to be submitted to the Joint Advisory Board. The opinion of the Board was sent to the Secretary-General on 30 June 1997. The Secretary-General maintained the previous decisions under which Regulation 11 a) ii) of the Staff Regulations (post suppression) was applied to Mr. D. and an invalidity pension was refused him. On 27 November 1997, Mr. D. filed an application requesting the Tribunal to annul the decision terminating his appointment, and to order his reinstatement or the payment of an indemnity equivalent to an invalidity pension.

On the claim that the Organisation failed to apply the Staff Regulations correctly

Regulation 11 a) of the Staff Regulations provides that “The Secretary-General may, after consultation with an advisory body, terminate the appointment of an official:

...

ii) if the post of the official is suppressed, if the responsibilities attached to his post are changed and the official is no longer qualified for it, or if there is any reduction in the number of posts in his grade, and there is no vacant post for which the Secretary-General considers that the official has the necessary qualifications”.

The Organisation wished to apply this provision to Mr. D., considering that his situation was similar to that of an official whose post has been suppressed. The Tribunal cannot share this point of view since the provision contains a restrictive list of the cases in which it applies, none of which covers Mr. D.’s situation. In the case in question, it was not the post occupied by Mr. D. in the Documentation Resources Management Division which was suppressed, but that previously occupied by the colleague who was then appointed in his place. No doubt the situation resembled that referred to in the third case under Regulation 11 a) ii), namely a reduction in the number of posts in the official’s grade, with no vacant post for which the Secretary-General considers that the official has the necessary qualifications. But in this case there was another post for which Mr. D. had the necessary qualifications, precisely the one he had requested to leave and which was no longer vacant only because the Organisation had assigned another official to it without Mr. D.’s having been given a chance to react to this decision.

It is true that Mr. D. was transferred at his request and on the basis of a medical certificate he himself produced. But the Organisation could not conclude, on the basis of this certificate alone, even if corroborated by the opinion of the OECD’s medical adviser, that Mr. D. was totally prevented from performing the duties attached

to his employment in the Organisation. It could do so only after having submitted the case to the Invalidation Board in the circumstances laid down in Article 13 of Annex X to the Pension Scheme Regulations.

A referral was finally made to this Board at Mr. D.'s request, and it concluded in the negative. However, if this opinion had been given before, and not after the decisions to replace Mr. D. and then to terminate his appointment, the applicant, faced with his responsibilities, could have chosen to resume his duties rather than risk a decision terminating his appointment. While the fact that the Organisation chose to deal with this termination on the basis of Regulation 11 a) ii), more favourable to the applicant than Regulation 11 a) i), reduced the prejudice suffered by Mr. D., it could not make this decision legal.

In these circumstances, and without having to consider whether it involved any misuse of power, the decision terminating Mr. D.'s appointment must be annulled.

Inasmuch as the consequence of the annulment pronounced by the Tribunal is Mr. D.'s reinstatement, it does not appear necessary, at this stage, to rule on the request for an indemnity. It is only if, on the basis of Article 12 c) of the Resolution of the Council on the Statute and Operation of the Tribunal, the Secretary-General deems such reinstatement impossible or inadvisable, that he should ask the Tribunal to fix instead an amount of compensation.

On the intervention by the Staff Association

The Tribunal notes the intervention of the Staff Association in support of the submissions alleging a misuse of power and failure to apply the Staff Regulations correctly.

As to costs

The Tribunal decides that in the circumstances of the case, the Organisation shall pay FF 15 000 to Mr. D.

The Tribunal decides:

- 1) The decision of the Secretary-General dated 27 August 1997 maintaining the decision of the Head of Personnel of 1 October 1996 is annulled;
- 2) The Organisation shall pay Mr. D. the sum of FF 15 000.