



**ADMINISTRATIVE TRIBUNAL**

Judgment of the Administrative Tribunal

handed down on 6 May 2013

**JUDGEMENT IN CASE N° 72**

X

v/ Secretary General

**Translation** (the French version constitutes the authentic text).

## JUDGEMENT IN CASE No 72 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Monday 15 April 2013  
at 10.00 a.m. in Château de la Muette,  
2 rue André-Pascal in Paris

The Administrative Tribunal consisted of:

Mr. Jan PAULSSON, Chairman,  
Mr. Luigi CONDORELLI,  
and Mrs. Louise OTIS,

with Mr. Nicolas FERRE providing Registry services.

The Tribunal heard:

Mr. Jean-Didier Sicault, Counsel for the applicant;

And Mr. Nicola Bonucci, Head of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General.

It handed down the following decision:

### **Introduction**

1. The applicant took up her duties at the OECD on 1 November 1982. She occupied a number of different posts<sup>1</sup> prior to 1 June 2007, when she was appointed Head of the Joint Pensions Administrative Section (JPAS), a grade A5 post.
2. Following a decision by the Secretary-General, of which she was notified on 17 October 2011, the applicant was reassigned to the post of Head of Translation division, a position of the same category and grade as the previous one. The duration of the confirmation period in this new position, as referred to in Instruction 110/3.1, was set at three months from 1 December 2011<sup>2</sup>.
3. On 13 December 2011, the applicant submitted a preliminary request asking that the decision of the Secretary-General be withdrawn or amended. Her argument was that, since her previous post had been suppressed, the Secretary-General could not reassign her

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<sup>1</sup> Translation Service as a confirmed translator and Human Resource Management

<sup>2</sup> Annex 3 of the application

without following the established procedure, i.e. notice of termination and the right of the applicant to have the choice of withdrawing, with prior notice, instead of being reassigned<sup>3</sup>.

4. On 16 January 2012, the Executive Director rejected the preliminary request made by the applicant who decided to lodge an appeal with the Administrative Tribunal.
5. The parties consented to the Tribunal Chairman participating by means of video conferencing.

### **The facts**

6. The facts which led to the applicant being reassigned are clearly illustrated by the documentary evidence and are set out hereinafter.
7. The Co-ordinated Organisations<sup>4</sup> share a system of consultation and recommendations regarding pensions and remuneration which is based on three committees, namely the Co-ordinating Committee on Remuneration (CCR), which is made up of delegates from Member countries of the Co-ordinated Organisations, the Committee of Representatives of the Secretaries-General (CRSG) and the Committee of Staff Representatives (CRP). A CRSG sub-committee, the Pensions Administrative Committee of the Co-ordinated Organisations (PACCO), deals with questions relating to the administration of pensions.
8. The Joint Pensions Administration Section (JPAS) and the Inter-Organisations Study Section on Salaries and Prices (hereinafter IOS) were two sections set up by the Co-ordinated Organisations to help, respectively, with pensions administration and remuneration. The JPAS and the IOS provided secretariat support for the co-ordination bodies in their areas of competence. The JPAS and IOS were administratively part of the OECD secretariat and the officials who worked there were members of staff of the OECD.
9. In 2009, the Executive Directors of the Co-ordinated Organisations decided to conduct a management review so as to rethink the functioning of the JPAS and the Inter-Organisations Study Section on Salaries and Prices (hereinafter IOS) which were the Co-ordinated Organisations' two technical bodies responsible for the common system of remuneration and pensions. According to the applicant, the said review was justified because of managerial shortcomings in the IOS.
10. The applicant was informed of the management review of the two sections JPAS and IOS, received the outside experts' terms of reference and took part in the management review, in particular by drawing up a mission statement.

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<sup>3</sup> Annex 31 of the application

<sup>4</sup> The Council of Europe (CoE), The North Atlantic Treaty Organisation (NATO), the European Space Agency (ESA), the European Centre for Medium-Range Weather Forecasts (ECMWF) and the Organisation for Economic Co-operation and Development (OECD).

11. On completion of the study conducted by the 6 Co-ordinated Organisations' three independent experts, it was decided to merge the JPAS and IOS<sup>5</sup> and entrust responsibility for the new consolidated body on remuneration and pensions to a single manager, namely the new head of the IOS who would be chosen by means of a recruitment competition. However, the creation of the new service involved protracted negotiations between the Co-ordinated Organisations, and it was only in late December 2011 that the process became definitive.
12. Starting in March 2010, the applicant wrote a number of letters and emails to the administrative bodies (Executive Director of the OECD, Chairman of the CRSG, Head of Human Resource Management) with the object of finding out about the internal organisation of the new structure and what was to happen to her post. She let it be known that she was seriously worried about her future in the new integrated structure. She was also critical of the way procedures leading up to the merger had been handled. She was given vague answers by representatives of the administrative bodies and met with HRM representatives and with the Head of the OECD's Directorate for Legal Affairs<sup>6</sup>.
13. On 2 March in particular, the applicant met with Mr. Patrice Billaud, Chairman of the CRSG, and Jean Jevons, expert in charge of the management review, to tell them that the merger of JPAS and IOS was not a good idea and that she did not intend to apply for the position of Head of IOS<sup>7</sup>.
14. On 11 April 2010, Mr. Patrice Billaud, in his capacity as adviser to the Executive Director, took note of the applicant's concerns about her employment situation, pointing out that the direction to be taken by the integrated structure had not yet been determined and that a number of preconditions had still to be discussed. He assured her that a clear and transparent decision would be forthcoming as soon as possible<sup>8</sup>. Exchanges continued to take place from time to time until the new assignment was known.
15. On 26 October 2010, Mr. Jean-François Poels was appointed Head of IOS with the task of preparing for the planned merger of the two IOS and JPAS into a single integrated structure. He was scheduled to take up his duties on 1 January 2011. The managerial responsibilities of the new Head were to include a substantial amount of preparatory work in framing the new structure bringing the two sections<sup>9</sup> together.
16. The documentary evidence shows that the structures of the new entity, the administrative reorganisation of the new sections and, consequently, the finalisation of the merger plan were not really completed until end-2011.

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<sup>5</sup> Annex 11 of the application.

<sup>6</sup> Observations by the Secretary-General, annex, documents no. 17 to 39.

<sup>7</sup> Observations by the Secretary-General, as attested by Patrice Billaud, annex, document no. 13

<sup>8</sup> Observations by the Secretary-General, annex, document no. 12.

<sup>9</sup> Annex 17 of the application

17. Finally, on 17 October 2011, the applicant was informed of the decision by the Secretary-General to assign her to the job of Head of Translation division with effect from 2 January 2012. It is this decision which is the subject of the present application.

#### **In law**

18. The applicant argues that the Secretary-General could not reassign her in accordance with Rule 10/3 of the Staff Regulations contained in the *Staff Regulations, Rules and Instructions applicable to Officials*, since her duties as Head of the Joint Pensions Administrative Section had been suppressed. Consequently, the procedure regarding termination contained in Regulation 11 a) of the Staff Regulations ought to apply to the case in point.

19. The Staff Regulations set out the broad lines of the conditions of service applying to officials making a career in the Organisation. The ways in which the Staff Regulations are applied are governed by the Organisation's Regulations and Instructions approved by the Council. The Instructions set out conditions of service not specified in either the Staff Regulations or the Rules.

20. Under the heading Categories and Grades, Assignment and Reassignment, Regulation 10 b) of the Staff Regulations provides that: *"The Secretary-General shall be responsible for the allocation of functions among officials, their reassignment to other functions, their periodic advancement from one step to another and their promotion from one grade or category to another."*

21. Rule 10/3 of the Staff Regulations sets out the procedures for reassignment: *"Notwithstanding Rule 7/1 a), the Secretary-General may directly reassign officials to other functions within the Organisation, either through transfers at the same grade or promotions"*. The rule does not stipulate any preconditions for reassignment, other than stating that it must be at the same grade.

22. Under the heading Ends of Appointment, Regulation 11 of the Staff Regulations sets out the conditions for the termination of an appointment, while Instruction 111/1.5 specifies how it shall apply:

### **Regulation 11 of the Staff Regulations**

The Secretary-General may terminate the appointment of an official:

...

i) for unsatisfactory service;

ii) in case of disciplinary dismissal;

iii) where:

- based on the Programme of Work and Budget of the Organisation, the Secretary-General decides to reduce the total number of officials assigned to a particular output or activity, or performing a particular type of functions, or carrying a particular category and grade;

- further to the redefinition of the functions, the official's skills and qualifications no longer match the needs of the Organisation ;

- the functions assigned to the official have become unnecessary or redundant;

(.....)

c) In cases falling under a), i), iii), v) or vii) above:

i) the decision shall be taken after the relevant advisory body has been consulted on the regularity of the procedure;

ii) an official shall be notified in writing, before the consultation of the relevant advisory body, of the Secretary-General's intention to terminate his appointment, indicating the grounds for such termination.

d) In all cases falling under a) above, an official shall be notified in writing of the Secretary-General's decision to terminate his appointment, indicating the grounds for such termination.

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### **Instruction 111/1.5**

Termination pursuant to Regulation 11a) iii)

In cases in which the appointment of an official is terminated pursuant to Regulation 11 a) iii) :

a) The Organisation shall assist the official by seeking actively and spontaneously available functions in the Organisation corresponding to his qualifications and experience and, if this search is unsuccessful, by facilitating his search for employment outside the Organisation;

b) the Secretary-General shall, unless the official renounces thereto in writing, seek such functions during a period of three months following the beginning of the notice;

c) if the Secretary-General has been unable to find such functions by the end of the search period or has not searched for such functions because the official concerned has renounced redeployment, the Secretary-General may then terminate the official's appointment, after consultation with the advisory body referred to in Instruction 107/19, paying him the emoluments and allowances corresponding to the balance of this period of notice.

23. In the case in point, Head of the Joint Pensions Administrative Section (JPAS)'s functions were formally suppressed as a result of the decision taken by the 6 Co-ordinated Organisations to merge the JPAS and the IOS which were the two technical bodies involved in the Co-ordinated Organisations' common system of remuneration and pension. This was an administrative decision, the legality of which is not in any doubt.
24. The said decision was taken after a protracted and complicated process which lasted for two years and involved the six Co-ordinated Organisations. The applicant kept track of the main phases of this restructuring, observing that her post could well become redundant.
25. The Secretary-General opted to reassign the applicant to a post of the same category and grade as the one she occupied previously, rather than notify her of his intention to terminate her appointment. That Head of Translation division's post corresponds to the competencies of the applicant is not in dispute
26. Consideration of the provisions relating to the career path and end of employment reveals a chronological sequence in the legal situations that can impinge on an official. Transfers and career advancement obviously precede the end of employment which constitutes the definitive break in the link with the job. As a rule, termination of the appointment is the last option that the decision-making authority will consider in cases involving the administrative suppression of a post.
27. Furthermore, an attentive study of the Staff Regulations shows that the Secretary-General has the discretion as to whether or not to terminate an appointment under the conditions set out in Regulation 11 of the Staff Regulations. The Secretary-General is in fact at liberty to opt whether or not to notify his intention to terminate an appointment when the functions to which the official is assigned are no longer necessary or have become redundant (Regulation 11a). The use of the verb "may" rather than "shall" lends itself to the criterion of relevance in exercising the decision incumbent on the Secretary-General.
28. However, the Secretary-General's discretionary authority is tempered by Instruction 111/1.5 which lays down the rules of application of Regulation 11a) iii). The Instruction clearly establishes that, once notification of the intention to terminate the appointment has been given, the Organisation is obliged to assist the official in looking for a vacant and equivalent

post in the Organisation, unless the official frees it of that obligation by deciding in advance not to benefit from any reassignment measures.

29. However, nowhere do the Staff Regulations say that the Secretary-General is obliged to give notification of his intention to terminate an official's appointment when his post is liable to be suppressed and it is possible to reassign him to equivalent functions. The decision to reassign an official, in compliance with the provisions of the Staff Regulations, when an equivalent post is available is part of the exercise of managerial authority.
30. In the case in point, moreover, the decision to reassign the applicant to the functions of Head of Translation division was taken before her post as Head of the Joint Pensions Administrative Section was suppressed, and she was not notified by the Secretary-General of any intention to terminate her appointment.
31. The applicant justifies her position by producing proof of past practice. Using a series of letters and memoranda, the veracity of which is not disputed by the Secretary-General, she argues that for more than 20 years the constant and uniform practice, which has thus acquired the status of a legal norm, has been for the Secretary-General always to abide by the rules of application contained in Instruction 111/1.5 in post suppression cases.
32. Past practice does assuredly constitute a source of law, provided it is known, constant and uniform. According to the principle of equality, officials who find themselves in the same de facto and de jure situation must, other than in exceptional circumstances, receive equal treatment under the law.
33. In the above-mentioned cases, there was always notification of an intention to terminate the appointment. In the present case, however, the Secretary-General did not in any way envisage terminating the applicant's appointment. Rather he exercised the authority conferred on him by Regulation 10/3 of the Staff Regulations to reassign her since an equivalent post was in need of a post-holder. This said, no notice was sent to the applicant and the proof of past practice is not admissible in this particular case. In addition, the reassignment had already taken place when the post was officially suppressed.



34. What is more, it needs to be stressed that the applicant's reassignment did not take place in the normal context of the Organisation's activities, but in the exceptional framework of the restructuring of the services provided by 6 Co-ordinated Organisations. That reorganization was the subject of a consensus among the Organisations. The reassignment of the applicant to an equivalent post was in response to the specific needs of the Organisation in the context of structural changes.
35. In light of the above, the applicant failed to demonstrate that the decision of the Secretary-General was illegal, and that conclusion has as a result to be rejected.
36. That said, the Organisation ought to have paid special attention to the repeated requests made by the applicant who has given the Organisation the benefit of her competence and devotion to duty for almost 30 years<sup>10</sup>. The administrative prevarication surrounding the applicant's reassignment, the slowness of the process, the administration's sustained ambiguity and the unfortunate rumours occasioned by this tedious process were prejudicial to the applicant. There is documentary evidence to the effect that these years of uncertainty caused the applicant stress and anxiety. She is awarded €5 000 in compensation.

FOR THESE REASONS

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<sup>10</sup> Annex 13

DECIDES

The OECD shall pay the applicant a sum of €5 000 in damages for moral suffering

The applicant is entitled to €8 000 in expenses.

The other conclusions in the application are rejected.

Done in Paris, 6 May 2013

Jan PAULSSON  
Chairman

Nicolas FERRE  
Registrar