



ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 7 February 2014

JUDGEMENT IN CASE N° 73

XXX

v/ Secretary General

Translation (the French version constitutes the authentic text).

JUDGEMENT IN CASE No 73 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Friday 24 January 2014
at 10.00 a.m. in Château de la Muette,
2 rue André-Pascal in Paris

The Administrative Tribunal consisted of:

Mrs. Louise Otis, Chairman,
Mr. Luigi CONDORELLI,
and Mrs. Hevdig FORSSELIUS,

with Mr. Nicolas FERRE and M. Jean LE COCGUIC providing Registry services.

The Tribunal heard:

Mr. Jean-Didier Sicault, Counsel for the applicant. He was assisted by Mrs. Laura Forest

Mr. Nicola Bonucci, Head of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General. He was assisted by Mr. Rémi Cèbe and Mrs. Diana Benoit.

Mr. Jean-Pierre Cusse, President of the Staff Association, assisted by Anya Demarle.

The case was adjourned until further deliberation on 24 January 2014.

It handed down the following decision:

Introduction

1. The Applicant began employment in OECD on 28 April 1997; and on 17 September 2012 the Applicant was notified of the decision confirming that his appointment as "Senior Policy Analyst" would be terminated on 31 December 2012.
2. By letter of 16 November 2012 to the Secretary-General, the Applicant formulated a prior request for withdrawal or modification of this termination decision.
3. On 8 February 2013, the Applicant was notified by the Executive-Director on behalf of the Secretary-General of his decision to reject the prior request.
4. The Applicant then took the matter to the OECD Administrative Tribunal and filed an application (No. 73) dated 30 April 2013, requesting the Tribunal to order the Organisation to reinstate him within the OECD and grant him an open-ended contract effective on 1 January 2013 or failing that to order payment of the equivalent of four (4) years of salary including pension entitlements. The Applicant also requested payment of an indeterminate amount for moral damages and the reimbursement of his expenses in the amount of €26,250.

The Facts

Fixed-term contracts

5. From 1987 to 1997, the Applicant worked for the European Institute of Public Administration (hereinafter EIPA) as Project Manager and Trainer, being also entrusted with an advisory mission to the institutions and public administrations of the Member States of the European Union. His status within EIPA was deemed equivalent to that of civil servants of the central administration in the Kingdom of the Netherlands.¹
6. On 28 April 1997, the Applicant was appointed by the Organisation for Economic Co-operation and Development (hereinafter the Organisation) as an Administrator (A3) under a fixed-term contract terminating on 28 February 1998. He was assigned to the Programme for Support for Improvement in Governance and Management (hereinafter SIGMA) for Central and Eastern European Countries.
7. For 15 years and 8 months following his appointment, the Applicant remained in the employment of the Organisation by the successive renewal of 20 fixed-term contracts.
8. On 1 February 2001, the Applicant was promoted and appointed Expert in Management of Public Affairs, grade A4, step 2, in the Directorate for Public Governance and Territorial Development.
9. On 9 July 2002, the Applicant was transferred back to SIGMA, staying there until the end of his final fixed-term contract on 31 December 2012.
10. For a period of six (6) months, from 12 March 2012 to 17 September 2012, the Applicant was on sick leave by reason of acute pulmonary problems leading to his hospitalisation.
11. On his return to work on 17 September 2012, the Applicant was notified of the termination of his appointment when his contract reached full term on 31 December 2012.

Conversion of fixed-term contracts

12. On 27 March 2012, the Senior Administrative Assistant of SIGMA remitted to all officials, including the Applicant, an e-mail informing them of the contract conversion policy applicable to officials totalling five years of service.²
13. For the purposes of reviewing applications for contract conversions, SIGMA's administration specified in this e-mail:

“ ...how to best apply the process in Sigma in order to give you as much opportunity as possible to input information that may help this consideration (...)

...

¹ Annex 37 of the Application, testimony of Mr Guggenbühl, Senior Lecturer at EIPA, 8 March 2013.

² Annex 23 of the Application.

Your input is optional but it will ensure that we have as much relevant information as possible to submit for you as an individual so it is very much in your interests to take this opportunity.

We need an up-to-date CV from you- I am attaching a template for this which you may find useful (...) and certain additional information which is sought as standard practice during the consideration of OECD conversion cases, summarised in the attached form.

...

The deadline for providing this information is by close Tuesday 3 April . "

14. It appears from evidence not contradicted by the Administration that the Applicant was unable to send either his curriculum vitae (CV) giving details or the completed information form, since he was on sick leave; and as his medical condition was serious, he could not be aware of the circular e-mails sent "To All" officials, but only of those sent directly to him for specific work purposes.³
15. Hence the Applicant received e-mails sent from SIGMA directly to his personal address ("gmail") for the purpose of specifying mandates but was never specifically informed by the Administration that it was in his best interests to submit a detailed application for the review of his contract conversion.⁴ It must be mentioned that all the other officials to whom the conversion policy was applicable had the possibility of remitting detailed applications.

Conditions attached to the conversion of fixed-term contracts

16. The Administration's decision not to convert the Applicant's contract to an open-ended appointment and subsequently to terminate his appointment were embedded in a two-part administrative and decision-making process: first, the human resources restructuring process and set up of a new employment framework within the Organisation; second the reorganisation of SIGMA's services within the context of the generalized conversion of contracts.
17. The human resources restructuring process in particular provided for the conversion of fixed-term appointments for officials (1) having completed a minimum of five years satisfactory service and (2) whose appointment was consistent with the long term interests of the Organisation, taking into account organisational needs.
18. The review of conditions attached to the conversion of appointments was undertaken by the Human Resources Management department (HRM) with SIGMA management.
19. SIGMA (Support for Improvement in Governance and Management) is a programme in the Directorate for Public Governance and Territorial Development (GOV) created over twenty years ago. As a joint initiative of the OECD and European Union (EU), and mainly financed by the latter, SIGMA's purpose is to reinforce public governance by working in sectors that are nerve points for horizontal governance and the reform of public administration, namely civil

³ In hospital care until 27 March 2012 followed by long period of recovery; pulmonary embolism and acute respiratory insufficiency.

⁴ Annex 41 of the Application.

services, public finance and audit, rationalisation of public sector organisation, integrity and fight against corruption, public procurement, regulatory reform and policy-making.

20. SIGMA's mission takes place within geographical zones corresponding to the EU's relationship with member countries, candidate countries or potential candidate countries, as well as neighbouring countries.
21. SIGMA, in assessing appointment conversions for its senior advisors⁵ including the Applicant, examined the administrative situation of each official, specifying the organisational requirements arising from reorganisation of its services, namely: "eight to ten years experience in a national public administration in relevant functions".⁶
22. The comments in reply clearly indicate that the sole grounds for the decision not to convert the Applicant's appointment was a lack of relevant experience.

"However, when matching the Applicant's skills and experience to the job description, it was clear that the Applicant did not meet one of the criteria considered to be fundamental, namely "*eight to ten years experience in a national public sector administration in relevant functions.*"⁷

23. It appears that in the assessment of this last-mentioned criterion, only the Applicant's experience prior to his appointment in 1997 was taken into consideration. This has been admitted as a fact by the Organisation.
24. Furthermore, the Applicant's professional experience in EIPA was not considered significant experience in a national public administration in a field relevant to SIGMA's mission.⁸
25. With the exception of the Applicant, the seven (7) other SIGMA officials at administrator level were all granted appointment conversion.
26. It should be underlined that the Applicant's seven assessment reports, provided over some 16 years service within the Organisation, show that he carried out his functions adequately. Furthermore, the Applicant's professional aptitude is not in dispute.
27. Mr Francisco Cardona, SIGMA Coordinator for the Civil Service, Administrative Law and Integrity section, to which the Applicant was attached, produced a testimony in which he specifies the following:

"We were five in total (*in this sector*). Mr XX throughout the whole of this period worked in my view, in a satisfactory manner, neither better nor worse than the other members of my team. I was consulted at the end of 2010 or beginning of 2011 (...) by the Head of the Programme at the time, orally and informally on the possible conversion of temporary contracts to open-ended contracts for the colleagues I was coordinating in my sector.

⁵ Designated under the new title of Senior Policy Analyst – Country Coordinator.

⁶ Exhibit 7 of the comments in reply.

⁷ Comments in reply, paragraph 20. See also Annexes 32 and 36 of the Application.

⁸ Annex 36 of the Application.

My opinion, also expressed orally, was in favour of converting all the fixed-term contracts to open-ended contracts as I believed that all those employed were necessary.

...

The conversion of my contract was finally and definitively confirmed on 17 September 2012, as was also the case for my other administrator colleagues eligible for contract conversion, with the sole exception of Mr XX.”⁹

Law

General principles

28. Instruction 109/5 a) of Staff Regulations, Rules and Instructions applicable to officials of the Organisation lays down the criteria applicable to a conversion: “the conversion of fixed-term appointments to open-ended appointments shall be decided, on the recommendation of the Director concerned, after a minimum of five years satisfactory service and if considered to be in the long term interests of the Organisation, bearing mind organisational requirements.”

29. International tribunals have on many occasions acknowledged that international organisations enjoy largely extensive discretionary authority in the event of non-renewal or non-conversion of contracts. Hence, according to a judgement of the Tribunal:

“With regard to the non-renewal of a contract, the Tribunal notes again, as it already did in Judgments Nos. 30 of 27 March 1998 and 55 of 6 June 2002, that a decision by the Secretary-General not to renew a contract falls within his discretionary authority and that it is not for the Tribunal to substitute its assessment for that of the Organisation. It will condemn the Secretary-General’s decision only if the decision is issued by a body without authority to do so, is affected by a vice of form or procedure, is based on inaccurate facts or involves an error in law, a misuse of power or a manifest error of appreciation.”¹⁰

30. The International Labour Organisation Administrative Tribunal (ILOAT) adopted the same legal position. On a recent matter, the Tribunal ruled:

“10. In Judgment 1349, under 11 the Tribunal noted the wide discretion an organisation enjoys in relation to the decision to convert a fixed-term appointment to a permanent one. Given the highly discretionary nature of the decision, it is subject to limited review and will only be set aside ‘if it is taken without authority or in breach of a rule of form or procedure, or if it based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was an abuse of authority’.”¹¹

31. Thus, any action taken by the Administration in the exercise of its discretionary authority may be censured, notably in the case of manifest and decisive mistake in assessment, mistake in law and breach of legal process including arbitrary action.

⁹ Annex 42 of the Application.

¹⁰ OECDTA Ruling No. 64 (2009), page 3; and Ruling No. 30 (1998) page 3, para. 6.

¹¹ ILOAT Ruling 3005 (2011), consideration 10.

Application to this case

32. On examination of the application and having heard the parties, the Tribunal holds that the decision not to convert the Applicant's appointment must be overturned.
33. On examination, it appears that the decision not to convert the Applicant's appointment was not the outcome of a purely individual context which is customarily the determining factor. In the circumstances, the Applicant's legal standing must be examined in the particular context of the combined effect of the implementation of new rules framing employment and of the restructuring of SIGMA at a time when the administrative situation of all officials was assessed in the course of one and the same conversion process, by application of the procedure and assessment criteria contained in Instruction 109/5 of the Staff Rules and Regulations.
34. The particular circumstances of this conversion process, required that a standardised procedure be respected and that all officials be treated equitably.
35. It is clear from the documentary evidence, that the Applicant was not treated in the same manner as the other officials in that he was unable to submit the detailed file tracing his professional career either prior to joining the Organisation or in the course of his 16 years service within SIGMA.
36. The Organisation should have taken into consideration the Applicant's hospitalisation caused by pulmonary embolism and respiratory distress up to 27 March and subsequent 5 months sick leave. The Applicant was not aware of the e-mail of 27 March 2012 requesting a detailed curriculum vitae specifying that it was in the interest of officials to avail themselves of this measure. Even so, SIGMA communicated with the Applicant for professional purposes during the period of his sick leave. However, it was not deemed necessary to ensure that he had received the information relating to the conversion process provided for in the e-mail of 27 March.
37. Furthermore, the argument purporting that the Applicant's detailed curriculum vitae served no useful purpose once his experience prior to 1997 was known has no bearing on the matter. On examination of the form attached to the request issued on 27 March 2012, it is apparent that the entire work experience both after and before appointment should be mentioned.¹²
38. Additionally, it appears to the Tribunal that the decision not to consider the Applicant's prior experience as equivalent to "eight to ten years experience in a national public administration in relevant functions" is based on a manifest error of assessment, from which a wrong conclusion is drawn, unsupported by examination of the facts.
39. In the first instance, the evidence shows that EIPA was certainly a Dutch foundation under private law and not an international organisation. This foundation was however created on

¹² Annex 23 of the Application, CV and SIGMA staff information : Employment history (most recent first), Key achievement in Sigma, any horizontal work within the Directorate or across the Organization, the work accomplished in another division or Directorate.

the initiative of the Dutch government under the Dutch presidency of the European Union in 1981, as a European centre for the training of the public administrations of the Member States of the EU. According to Mr Guggenbühl, whose testimony has not been contradicted, the status of EIPA staff was deemed equivalent to those of civil servants of the Dutch central administration and officials benefitted from the same collective agreement.

40. Furthermore, the condition to be met for the purposes of conversion did not hinge either on the legal status under public or private law of the institution to which the person was attached, or on that person's status as a civil servant prior to his or her joining the OECD, but on the "*experience*" acquired in national administrations. However, it is undeniable that in the course of his ten (10) years in EIPA, the Applicant was essentially involved in the operation and modernisation of public administrations of the 14 Member States of the European Union, including the Netherlands, in regard to training dossiers for senior management in central civil services, public governance and analysis of public policies.¹³
41. It must furthermore be emphasised that in 2001 the Organisation formally recognised the previous experience of the Applicant in relevant functions in such a way that it cannot be claimed that he does not, at the present time, meet the condition considered to have been fulfilled several years ago. Indeed the Applicant, for the purpose of his promotion to Expert in Management of Public Affairs, had to provide evidence of "confirmed (10 years at least) experience in issues of public administration, fight against corruption... in a civil service acquired in a national administration or in an international organisation."¹⁴
42. These determining considerations in themselves would suffice to resolve the appeal, but a final consideration must furthermore be added.
43. It is readily understandable that the selection of two new senior analysts should be subject to their having significant experience at national public administration level in relevant functions. However, it can hardly be justified that the Organisation proceed to the examination of the Applicant's contract conversion in the particular context that has been identified,¹⁵ by assigning a decisive role in the assessment to the alleged lack of past experience prior to entry into the OECD and not to the importance of the experience acquired, in terms of level and duration, during the fifteen years that the Applicant spent in SIGMA in relevant functions.
44. Given his experience acquired prior to 1997 and also his long career within the Organisation in relevant functions, the Applicant had the legitimate expectation that his fixed-term contract would be converted to an open-ended contract.

ON THESE GROUNDS

45. The decision of the Secretary-General of 8 February 2013 confirming the decision not to convert the appointment of Mr XX at OECD is overturned. The Secretary-General is

¹³ Supra, note 1.

¹⁴ Annex 38 of the Application.

¹⁵ See paragraph 33.

consequently required to take the measures arising thereby, by reinstating Mr XX in the OECD retroactively from 1 January 2013 with salary and indemnities.

46. The Tribunal remains competent and withholds judgement in regard to alternative remedial action in the event of a request from the Secretary-General pursuant to Article 12 c) of the Resolution of the Council on the Statute and Operation of the Administrative Tribunal. At this stage, the Tribunal is not in a position to rule on the acceptability of the Applicant's proposed compensation in the form of four years salary including pension entitlements in the event of his not being reinstated.
47. The Tribunal grants the Applicant a sum of €10,000 to cover expenses incurred. The Tribunal turns down the claim for moral damages in view of absence of proof thereof.

Done in Paris, 7 February 2014

Louise OTIS
Chairman

Nicolas FERRE
Registrar