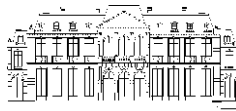


OCDE

ORGANISATION DE COOPÉRATION ET  
DE DÉVELOPPEMENT ÉCONOMIQUES



OECD

ORGANISATION FOR ECONOMIC  
CO-OPERATION AND DEVELOPMENT

**ADMINISTRATIVE TRIBUNAL**

Judgment of the Administrative Tribunal

handed down on 21<sup>st</sup> June 1999

**JUDGMENT IN CASE No. 40**

Mr. R.

v/ Secretary-General

JUDGMENT IN CASE No. 40 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Thursday 10 June 1999  
at 9.00 am in the Château de la Muette  
2 rue André-Pascal, Paris

The Administrative Tribunal was composed of:

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

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

On 29 February 1996, after four months' sick leave, Mr. R., a grade B3 official of the Organisation, was placed on non-active status in accordance with Regulation 14 of the Staff Regulations. On 28 September 1998, the Head of Human Resource Management sent the applicant a letter informing him that his post had been filled, there was no other suitable B3 post vacant and that his appointment would terminate on reception of the said letter, in accordance with Regulation 14 c) of the Staff Regulations.

On 15 October 1998, the applicant submitted a request to the Secretary-General, asking him to review this decision. On 3 November 1998, the applicant was informed that the Secretary-General had refused this request.

On 14 December 1998, Mr. R. filed an application (No. 40), asking the Tribunal to annul the Secretary-General's decision of 3 November 1998, and award him compensation of a sum corresponding to 34 months of his last basic salary, for material loss, and FF 100.000 for moral prejudice.

On 16 February 1999, the Secretary-General submitted his comments rejecting all the applicant's submissions.

On 25 February 1999, the applicant submitted a reply.

On 25 March 1999, the Secretary-General submitted his comments in rejoinder in which he again rejected the applicant's submissions.

The Tribunal heard:

Professor David Ruzié, Counsel for the applicant,

Mr. Rémi Cèbe, Lawyer, Legal Directorate of the Organisation, on behalf of the Secretary-General, and

Mr. Malcolm Gain, representing the Staff Association.

It handed down the following decision:

#### The facts

M. R. was recruited in June 1969 in Grade C2 as a security guard. In 1992 he was transferred to the Documentation Resources Division as an assistant archivist, at grade B3.

On 29 February 1996, after having taken the maximum entitlement of sick leave, Mr. R. was placed on non-active status, in accordance with the provisions of Regulation 14 a) i) of the Staff Regulations. In accordance with Regulation 14 the period of non-active status could not exceed 3 years; during that time Mr. R. was not entitled to any salary, and his former post became vacant. However he was entitled to certain benefits during the period of non-active status, in accordance with regulations made under Regulation 17.

On 28 September 1998, the period of non-activity having terminated because the applicant had been declared fit to return to work, the Administration informed Mr. R. that the post he had held before 29 February 1996 was occupied, and that no vacant post at level B3, for which Mr. R. had the necessary qualifications, was available. Instruction 114/4 provides that in such a case, the agent's "appointment shall terminate without notice". No provision is made for an indemnity for loss of employment in these circumstances.

The applicant attacked this decision as a violation of general principles of law, referring in particular to his legitimate expectation that the practice of granting an indemnity for loss of employment would be applied in his favour, even if under Regulation 14 this was not strictly required. He referred in particular to the criticisms directed at Regulation 14 by the Appeals Board in 1985 (P. case, Decision No 104) and, at least implicitly, by this Tribunal in 1995 (A. case, Judgment No 17). In addition, it was argued that the decision in question involved a breach of the obligation of solicitude towards the employees of the Organisation, or at least of the obligation not to cause excessive and unjustified harm to them.

The Administration denied that there had been a breach of any of these obligations, pointing to the fact that the relevant regulations were clear and specific, and noting that the two earlier decisions were distinguishable from the present in different ways and were, in any event, an inadequate basis on which to found a legitimate expectation.

#### The law

In the version considered by the Tribunal in the A. case, Regulation 14 and its associated instructions allowed for a long-serving agent to be placed on non-active status after the expiry of sick leave entitlement, and subsequently not to be reinstated, without any provision for indemnity, and this even though the sick leave was due to a work accident or occupational disease. This provision was rightly criticised as "lacunaire", and Instruction 114

was amended in 1997, following discussions in the Joint Consultative Committee, in an attempt to redress the problem. Instruction 114/1.2 now provides that in the case of a person placed on non-active status due to a work accident or occupational disease, the official's post is not to be filled "for a period exceeding the foreseeable duration of his incapacity, as determined by the Medical Officer of the Organisation". If the post is nonetheless filled, the person is to be temporarily assigned to other duties or to some other vacant post. If the vacant post no longer exists within the period of three years which, under Regulation 14 a) i) is the maximum allowable period of non-active status, the official's employment may be terminated under Regulation 11, which provides for certain allowances for loss of employment.

The earlier lacuna in the Regulations in the case of officials on non-active status has now been at least partially filled, and it is not for the Tribunal to seek to go further in completing them by reference to "general principles of law". The two previous decisions relied on for the applicant's legitimate expectation that allowances for loss of employment would be paid do not provide a sufficient basis for such an expectation. In one case, the agent was in fact redeployed; in the other, the reason for the Tribunal's non-intervention was that the agent had suffered no detriment from being treated, rightly or wrongly, as falling within Regulation 11. The Tribunal was assured that there had been no other comparable cases in the past 14 years. In the absence of evidence of discrimination or bad faith, an agent cannot have a legitimate expectation of being treated in a way other than that which the applicable regulations clearly and expressly envisage.

On the intervention by the Staff Association

The Tribunal takes note of the oral intervention of the Staff Association, which supported the position of Mr. R. on the grounds of his right to equitable treatment.

For these reasons the Tribunal:

rejects the application by Mr. R.;

orders the Organisation to pay FF 10.000 towards Mr. R.'s costs.