Schlagworte: Reorganisation, Einstufung der Position, Ernennung, freies Ermessen, Persönlichkeitsverletzung, Leistungsbewertung, Anstellungsgarantie, Treuepflicht, Stellenbeschrieb

Mots-clefs: Réorganisation, classement de poste, nomination, pouvoir d'appréciation, atteinte aux droits de la personne, évaluation de performance, garantie d'emploi, devoir de loyauté, description de poste

Key words: Re-organisation of services, classification of position, appointment, discretionary power, violation of personal rights, performance review, employment guaranty, duty of loyalty, job description

1/2005

Judgment of 15 September 2006

Administrative Tribunal of the Bank for International Settlements

Prof. Dr. Jacques-Michel Grossen, President,
Prof. Dr. Franz Kellerhals, Reporting Judge,
Ms. Elizabeth Slade, QC, Panel Member,
lic. iur. Felix Heusler, Registrar.

X. _____,
represented by P_____. and F_____., attorneys at law in Basel,

Applicant

versus

the Bank for International Settlements, international organisation with registered office in Basel,
represented by M._____, attorney at law in Basel,

Respondent.

As to the facts

[...]

The Administrative Tribunal of the Bank for International Settlements ('the Administrative Tribunal') has before it complaints lodged by X. _____ ('the Applicant') arising from the cessation on 16th February 2005 of her engagement as Head of _____ of the Bank for International Settlements (Exhibit 26 to the Statement of Claim).

[...]

As of 1 January 2000, the Applicant was entrusted, by letter dated 14 December 1999, with the management of the _____ of the Respondent (Head of _____), at Job Category G.

[...]

After Z. _____ was newly appointed by the Board of Directors of the Respondent, at its meeting of 8 November 2004, to the position of Secretary-General (Exhibit 10 to the Answer to the Statement of Claim), he drafted, in consultation with the General Manager of the Respondent, the job description for a new position to be created, namely that of _____with strategic competences. This position was classified as a Grade H position by the Executive

Committee on the basis of recommendations by the H. _____ management consultancy. This classification was confirmed by the Job Evaluation Committee at the start of 2005 (Exhibit 45 to the Answer to the Statement of Claim).

On 16 February 2005, the General Manager of the Respondent announced to Applicant that this position (Head of _____) had been filled. Thereupon, Applicant was entrusted, by letter of appointment dated 8 April 2005, with the management of an _____ project in the position of a "_____" also at Grade G (Exhibit 26 to the Statement of Claim).

[...]

On 17 June, the Applicant filed an application with the Administrative Tribunal.

The Administrative Tribunal gives consideration to the following:

Formal considerations

[...]

1.
Injunction

[...]

The Tribunal considers the argument put forward by the Respondent, that an injunctive order can only be granted once the jurisdiction of the Tribunal in the main proceedings has been determined, to be incorrect. This approach is not compatible with generally recognised court practice and with the essential nature of an injunctive order, which can be granted in the event that there is a certain degree of urgency. The decision of 7 September 2005 is limited to upholding the Applicant's employment status during the present proceedings. Any and all assertions of fact and law put forward by the Parties at that time which went beyond the scope of this issue were reserved for the Chamber's review at a later point in time.

[...]

3.
Admissibility of the Claim pursuant to Art. VI (2)(a) of the Statute

[...]

3.1
Claim No. 1

Claim No. 1 is, to a large extent, aimed at achieving the Applicant's reinstatement to the position of Head of _____ and assuring her of the right to prove herself able to fulfil the newly defined job specifications of Head of _____.

[...]

3.2
Claim No. 2

With Claim No. 2, the Applicant requests, in similar terms, that the Tribunal make a declaratory finding that the reinstatement to her previous position, as requested, constitutes a continuation of the employment relationship as it has existed hitherto.

[…]

3.3
Claim No. 4

Claim No. 4 seeks to have the Respondent ordered to pay a sum of money in reparations, in favour of a charitable organisation.

[…]

3.4
Claim No. 5

In sum, Claim No. 5 seeks to obtain a declaratory finding that in dismissing the Applicant as Head of _____, internal regulations of the Bank for International Settlements (Staff Regulations) were breached and obligations of care arising from the employment contract were violated.

4.
Claim No. 3

Claim No. 3 seeks to have an entry in the Applicant's personnel file removed.

[…]

Material considerations:

[…]

1.
Claim No. 1

[…]

b. The Applicant recognises "that the Respondent has the right to decide upon and execute a restructuring", and she also concedes that "the Head of _____ can also be affected, in principle, by such a decision" (Note to the Oral Pleadings of the Applicant II-4, top of page 2). The Administrative Tribunal of the International Labour Organization (ILO) has repeatedly ruled that "une organisation internationale a nécessairement le pouvoir de restructurer certains ou la totalité de ses départements ou unités" (see in this context, in particular Decisions No. 269, No. 1614 and No. 2510). It is clear to the Administrative Tribunal that the restructuring of how the area of _____ is to be managed is closely related to *far-reaching changes in the Bank's organisation*.

[…]

The oral evidence of Z. _____ and Y. _____ [his predecessor in office] convinced the Administrative Tribunal that the redefinition of the position of Head of _____ and particularly empowering this position with strategic responsibilities was of primary importance in the course of the Bank's reorganisation. In coming to this conclusion, the Tribunal is certainly conscious of the fact that even in this situation, the decision as to whether a new position has been created or the existing position has been expanded or changed, cannot be made on the basis of clearly defined criteria, but rather following an appraisal of the circumstances, which, ultimately, allows for a large margin of discretion. Answering the question as to whether one is dealing with a newly created or an existing position is thereby an evaluative determination (see ruling of the ILO AT in Decision No. 2510). The Administrative Tribunal has undertaken just such an appraisal with regard to the position of Head of _____, advertised at the start of 2005, taking into account all the circumstances. In doing so, it comes to the conclusion that the reasons for finding in favour of a newly created position clearly outweigh the arguments put forward to support the assertion that one was merely dealing with the expansion or modification of an existing position.

[…]

A comparison of the job description as it applied to the Applicant (Exhibit 11 to the Answer to the Statement of Claim) with that of the position to be newly filled (Exhibit 12 to the Answer to the Statement of Claim) shows this decisive difference in clear terms: the latter unambiguously emphasises, in the subheading entitled "Purpose of the Job", the importance of strategy, which is not the case in the corresponding title of the description outlining the previous position. The new job description devotes an entire Paragraph (A), under the title of "Principal accountabilities" to "Strategic direction", whereas the corresponding paragraph is missing in the description of the previous position.

[…]

For the reasons set out above, the Administrative Tribunal comes to the conclusion that the position advertised on 5 January 2005 for Head _____ was a new position. This ruling shall form the basis for the judgment which follows of the Claims of alleged violations of legal rules.

[…]

Pursuant to Article X (2) of the Statute of the Administrative Tribunal, the Tribunal is not authorised to substitute its decision for the discretionary decisions of the Bank in matters of appointments. Derogations from this principle may only be made, where it is apparent that the selection procedure was gravely defective or the decision on selection for appointment was manifestly based on incorrect facts. In this context we refer to the ruling of the ILO Administrative Tribunal in Decision No. 2522, A.F. v. AIEA, and to the following passage in particular:

"Selon sa jurisprudence constante, la décision d'une organisation internationale de procéder à une nomination relève de son pouvoir d'appréciation et ne peut être annulée que si elle a été

prise par un organe incompétent, est entachée d'un vice de forme ou de procédure, repose sur une erreur de fait ou de droit, omet de tenir compte de faits essentiels, est entachée de détournement de pouvoir ou tire du dossier des conclusions manifestement erronées."

Derogations from the principle set out in Art. X (2) cannot be made save on exceptional groundstreme. Any intervention by a court in matters of selection for appointments, which is much less familiar with the prevailing circumstances within an institution, with the qualifications of the employees working in it, and with the requirements involved in the position to be filled, than the body actually making this decision, represents a serious intervention in the operational running of the institution, which affects not only the management, but, as a rule, also affects third parties such as the individuals appointed, who are not involved in the dispute being adjudicated. With regard to the matter before us here, one must consider carefully, whether it would be justified to annul the appointment of V. _____, after the latter has occupied his new position for more than a year, and given the fact that his superiors have given him a good report for his performance.

[…]

2.
Claim No. 2

[…]

(1) In Claim No. 1, the Applicant requests, inter alia, that the Respondent be instructed (performance claim), "to appoint her at least to a Grade "G" position and to classify her at the same salary level in the context of an open-ended employment relationship […]". The claim for a declaratory judgment contained in Claim 2 is therefore is not an independent claim, but rather represents an elaboration of the performance claim. One should recall in this context, that purely declaratory judgements are very rare in the practice of the administrative tribunals of international organisations and that Article X (1) of the Statute of the Administrative Tribunal does not provide for this possibility. Most national procedural codes require that, for a declaratory claim to be admissible, a legally protected interest must effectively exist. This is an approach which has been adopted in Switzerland (see Vogel/Spühler, Grundriss des Zivilprozessrechts und des internationalen Zivilprozessrechts der Schweiz, 8th edition, Berne 2006, § 34 Para. II 2. [a], p. 193 ff.; Leuch/Marbach/Kellerhals/Sterchi, Art. 174 ZPO BE, N 1c and 3c [2]), as well as in France and Germany (see Solus/Perrot, Droit judiciaire privé, volume I, § 235 with further references), and is also recognised in countries in which the Common Law system prevails, despite the fact that courts in these counties tend to be slightly more generous when it comes to admitting motions for a declaratory finding (see, by way of example, U.S. Code Title 28, Judiciary and Judicial Procedure, § 2201). Given that a legally protected right has neither been demonstrated nor is one apparent, we consider that the Applicant's motion for a declaratory finding is not well founded.

(2) An interest in the requested declaratory finding also does not exist, given the fact that the Applicant continues in employment at the same grade and salary. Even before the commencement of the present proceedings (17 June 2005), the Respondent confirmed to the Applicant, in its letter of 8 April 2005, that she would be allocated a new assignment, but that otherwise the terms and conditions of her employment would remain unaffected ("Other con-

ditions of your employment remain unchanged"; Exhibit 26 to the Statement of Claim). In the context of extending her assignment as _____, the Respondent again confirmed to the Applicant, by its letter of 18 November 2005, that the terms and conditions of her employment remained unaffected (Exhibit 15 to the Rejoinder). However, the fact that the employment relationship is open-ended can be seen from the employment contract between the Respondent and the Applicant of 11 September 1990 (Exhibit 5 to the Statement of Claim). There is no legally protected interest in having a court hand down a declaratory ruling with regard to an uncontested legal relationship. For these reasons as well, Claim No. 2 is inadmissible.

[...]

3.
Claim No. 3

[...]

Our starting point is the generally applicable principle that discretionary decisions in the area of evaluating staff performance (performance review, employee references) are not subject to judicial review, much as is the case with selective appointments as explicitly set out in Art. X (2) of the Statute. An exception to this principle can, inter alia, be made where it becomes clear that the evaluation being complained of is based on incorrect facts (see the ruling of the ILO AT in Decision No. 182, Glynn).

[...]

4.
Claim No. 4

[...]

(1) Violation of the Applicant's personality rights by the lack of information

[...]

Reparations are only justified in the event of an egregious violation of an individual's personality rights (see above, Para. 178). To illustrate this point, we refer in this context to the following decisions from the case law, which affect a person's professional status:

Damage to a person's professional credibility (see, for examples of court practice, Heinz Hausheer [editor], Berner Kommentar, Kommentar zu Art. 41-61 CO, VI/1/3/1, 2nd edition, Berne 1998, CO 49, N. 60 ff.), can result in a reparations claim such as the allegation, published in the press, that a judge was systematically and consciously biased (Ticino, Rep. 1932 375/382), the allegation that a dentist had deliberately diagnosed as faulty, the perfectly normal teeth of children (SJZ 29 (1933) 205 f. No. 37), the allegation that the director of a financially troubled bank had embezzled funds (BGE in Semjud, 1938 177/185) as well as the wrongful information of an employer given to the unemployment insurance authorities, that he had dismissed an employee due to lack of performance (egregious attack on a person's professional reputation; Semjud 1958 305/308).

Also a breach of contract (see Hausheer [editor], Berner Kommentar, Kommentar zu Art. 41-61 OR, VI/1/3/1, 2nd edition, Berne 1998, OR 49, No. 77 f.). can, under certain circumstances, lead to reparations beingawarded; in this context, it represents an egregious violation of a professional football player's personality rights when a football club does not allow him to participate in matches and denies him the possibility of transferring to another club (BGE 102 II 211/224 f.). Also deemed to be an egregious violation of a person's personal sphere is the hiring of an engineer with the sole purpose hereof being so that the employer may be entered in the professional register in place of the engineer he has appointed (BGE 87 II 143/145 f.).

Sudden notice of termination (see Hausheer [editor], Berner Kommentar, Kommentar zu Art. 41-61 OR, VI/1/3/1, 2nd edition, Berne 1998, OR 49, No. 76) has, up to now, resulted only very rarely in reparations being awarded (exceptions: BGE in Semjud 1928 325/335 f. and Geneva, 17.3.1987 in Schweiz. Arbeitgeber-Zeitung 1987 815; Wallis, Rapport 1950 70 No. 37: unjustified dismissal; as a rule, reparations would have been justified. However the amount in question was already included in the compensation granted for damages). Either the employer complied with his contractual obligations (Vaud, SJZ, 1982 313 No. 54; Aargau, AGVE 1971 15/17: dismissal prior to Christmas is allowed) or the violation was too minor (BGE in Semjud 1981 314/320; BGE in Semjud 1984 554/558 [the decision of the cantonal courts in: SJZ 1983 394/396 No. 69 did not become legally binding]; Graubünden, PKG 1977 46 No. 9).

From the case law set out above, one can see that the courts tend to be very cautious in finding egregious violations of personality rights, which would justify granting reparations. A comparison of the present case with those in which a claim to reparations was granted as well as those in which such a claim was denied, clearly shows that the case under consideration lacks the objective degree of harshness and also, given the short-term nature of the harm suffered, fails to fall into the category which would justify granting reparations.

[…]

(2) Violation of the Applicant's personality rights by handing over her performance review

[…]

The Administrative Tribunal bases its analysis, […] on a performance review of the Applicant, which is based on correct facts. It furthermore finds that the Applicant does not accuse the Secretary General of having handed over this performance review, but rather contends that it was "drawn upon" in order to evaluate her application for the position. Finally, it is not clear to the Administrative Tribunal, how, from the email of 6 January 2006, the background of which is a matter of contention between the Parties, it is shown that a "clear" practice on the part of the Bank existed with regard to handing over performance reviews; the mere statement contained in this email that "We do not have an official policy covering access to performance reviews for selection committees or recruiting line managers" does not allow us to come to this conclusion.

In light of the principle of protection of personality rights, it is first and foremost of decisive importance for the Administrative Tribunal that an applicant for a management position must

count on the fact that information shall be shared as to previous performance. A selection committee requires such information if it is to be able to carry out a fair selection procedure and is not merely content to rely on impressions gleaned during interviews or on formal selection criteria. From the point of view of the Tribunal, we do not see anything wrong in the fact that the Applicant's immediate superior as "owner" of the confidential document provided information to the selection committee about the Applicant's performance, via her performance review, subject to the principle of "need-to-know".

[…]

5.
Claim No. 5

[…]

It should be pointed out from the outset that the Applicant was never dismissed by the Respondent. The position previously held by her, Head of _____, was abolished and she was offered a new position, which she accepted. There was no interruption of the employment relationship. It is thus somewhat misleading, even wrong to speak of "dismissal of the Applicant as Head of _____".

As set out above, this is not a matter of determining whether the General Manager of the Bank for International Settlements "failed to observe numerous provisions of the Staff Regulations"; rather, one must ask whether the Bank, acting through its General Manager, illegally violated the personality rights of the Applicant. The Applicant has neglected, in this context, and with regard to Claim No, 5, to substantiate which acts, specifically, were liable to violate her in her personality. It is asserted, in an allusive manner, that the General Manager has demonstrated the behaviour proscribed in Para. II.1 (i) of the Special Staff Rule to Article 3 of the Staff Regulations "which although not representing any kind of harassment or encroachment, contributes to an atmosphere of animosity or intimidation". (Statement of Claim Para. 17; Rebuttal, Para. 17). It is not clear, on the basis of these vague assertions that a violation of personality rights has occurred. Any analysis as to whether the other preconditions for a declaratory judgment can thus be dispensed with.

[…]

In conclusion, the Administrative Tribunal reaches the conclusion that the Claim of 17 June 2005 is fully dismissed, insofar as it is deemed admissible.

D.
Costs

Pursuant to Art. XIV (1) of the Statute of the Administrative Tribunal, the Bank is required to bear the costs of the proceedings regardless of the outcome of the dispute. These costs shall thus be borne by the Bank. The Bank shall also bear its own legal costs. The Applicant has lost the case on every count. For this reason, she shall be required to bear her own legal costs. The Tribunal does not see any reason which might cause it to derogate from this rule.

Therefore the Administrative Tribunal finds

1.
The Petition is rejected in its entirety, to the extent that it is admissible.

2.
The costs of the proceedings shall be borne by the Respondent pursuant to Article XIV (1) of the Statute.

3.
The Parties shall bear their own costs.

The Judgment shall be communicated to the Parties in writing.

Basel, 15 September 2006

The President of the Tribunal:	The Registrar:
Prof. Dr. Jacques-Michel Grossen	lic. iur.Felix Heusler