CONSEIL DE L'EUROPE
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TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 526/2012 (Ivana D'ALESSANDRO v. Secretary General)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Mr Jean WALINE,
Mr Rocco Antonio CANGELOSI, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEDURE

1. The appellant, Ms Ivana d'Alessandro, lodged her appeal on 16 March 2012. It was registered the same day under No. 526/2012.

2. The appellant submitted further pleadings on 21 May 2012.

3. On 27 July 2012 the Secretary General forwarded his observations on the appeal. The appellant filed a memorial in reply on 11 September 2012.

4. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 24 September 2012. The appellant was represented by Maître Carine Cohen-Solal, lawyer practising at the Strasbourg Bar, and the Secretary General by Ms B. O'Loughlin, assisted by Ms Maija Junker-Schreckenberg and Ms Sania Ivedi, both of the Legal Advice Department, Directorate of Legal Advice and Public International Law.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The appellant is a permanent member of the Council of Europe's staff. She holds grade A2.

6. The appellant began her career with the Organisation on 1 September 2004 as a temporary staff member and was recruited as of 1 October 2008 as a permanent member of staff under a fixed-term contract.

7. At the time of lodging this appeal she was assigned to the Directorate General of Democracy as Secretary to the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention). She had been assigned on 1 May 2010 to a position (No. 2705), specially created for the purpose and funded by the budget for the post (No. 466) of Secretary to the Bern Convention. This arrangement was made possible by the fact that the post's previous incumbent (Ms D.) had transferred to a position.

8. On 1 January 2011, post No. 466 became vacant following Ms D.'s appointment to another post. The appellant then took steps to obtain an indefinite-term contract.

In the meantime, on 2 December 2010, the Director General of Education, Culture and Heritage, Youth and Sport had approached the Directorate General of Human Resources to request an indefinite-term contract for the appellant. She wrote as follows:

> "*Having been informed that the Post 466 (ex [D.], assigned to the Biological Diversity Unit, will be available on 1 January 2011, I'm pleased to request the appointment of* [the applicant] *to the above mentioned post, as from 1st January 2011.*
>
> [The applicant] *is currently employed on Position n° 2705, serving as the Secretary of the Bern Convention. She successfully completed her probatory [sic] period and the Service recommended her to be employed by the Council of Europe with an indefinite-term contract as soon as the opportunity arose. She has proved in very little time her professional capacities as well as high commitment, hard work, common sense and diplomacy. She has a permanent learning attitude to issues, a professional approach to Administration, and enjoys her work".*

9. On 19 September 2011 the appellant was told that the Directorate of Human Resources had decided that it could not grant this request.

10. On 11 October 2011 the appellant submitted a request to the Secretary General under Article 59, paragraph 1 of the Staff Regulations. She asked him to consider giving her an indefinite-term contract straight away.

11. On 12 December 2011 the Director of Human Resources replied to the appellant on the Secretary General's behalf. After setting out arguments relating to the Staff Regulations and the appellant's case, he stated that there was no legal obligation to offer the appellant an indefinite-

term contract on the basis of her initial contract and he confirmed the initial decision that she was not to be given an indefinite-term contract.

12. On 19 December 2011 the appellant lodged an administrative complaint under Article 59, paragraph 2 of the Staff Regulations.

13. On 18 January 2012 the Secretary General dismissed the administrative complaint. In his reply, reference was made *inter alia* to a memorandum of 27 October 2010 in which the Director of Human Resources reminded heads of administrative entities that before recruiting new staff or transferring staff to posts, they must ensure that "every staff member with a contract of indefinite duration ("CDI") has a corresponding permanent post". The memorandum went on to say that it had become apparent "in a number of cases" that "this principle was not respected", which is contrary to the Organisation's rules, administrative practice and human resources policy.

14. On 16 March 2012 the appellant lodged the present appeal.

15. On 19 March 2012 the appellant informed her acting Director General that she had done this. Thereupon the said Director General told the appellant that she had just appointed someone else (Ms K.) to post No. 466. According to the information provided by the Secretary General, the Director General had decided, as her Directorate General included several staff on indefinite-term contracts, to give this post to the longest-serving of these staff members. The appellant also learned that her position would be funded by another post (No. 1289) and not by post No. 466, which was to be assigned to Ms K.

The appellant tried to ascertain the source of funding for her position and was told by the Director of Human Resources on 27 April 2012 that it was funded by her own Directorate General. He gave no further details.

16. In the meantime, in an email sent on 23 March 2012, the hard copy original of which was sent a first time on 27 March 2012 and received on 3 April 2012, and sent a second time on 29 March 2012 and received on 30 March 2012, the appellant requested the Chair of the Administrative Tribunal to grant a stay of execution of her line manager's decision to appoint someone else to the post in question (Article 59, paragraph 9 of the Staff Regulations). She asked him to order a stay of the Administration's decision to appoint a staff member to the post in question (post No. 466).

17. On 10 April 2012 the Chair dismissed this request.

II. APPLICABLE LAW

A. Staff Regulations and related texts

18. Article 1, paragraph 1 of the Staff Regulations states:

> "1. These Regulations shall apply to any person who has been appointed in accordance with the conditions laid down in them as a permanent staff member (hereinafter referred

to as "staff members" or "staff") of the Council of Europe (hereinafter referred to as the "Council").

B. Memorandum of 27 October 2010 from the Director of Human Resources

19. As indicated to the Tribunal by the Secretary General (paragraphs 18-20 of his memorial), the purpose of this memorandum was to alert the heads of major administrative entities to the problem that existed over the assignment of staff on indefinite-term contracts to posts. He asked them to make sure that, when vacancies were to be filled within their administrative entities, priority was given to staff on indefinite-term contracts within their administrative entity who did not have a corresponding permanent post. The memorandum did not make this priority an absolute requirement, since it explicitly said that it should be done as far as possible, with due regard for existing legal imperatives and "unless there [were] specific technical or legal constraints preventing this."

20. Thus, when a post is vacant in an administrative entity and there is no legal obligation to give an indefinite-term contract to a staff member on a fixed-term contract who is assigned to that post, in other words where there is a choice, the memorandum says that priority must be given to filling the post with a staff member on an indefinite-term contract who does not have a corresponding permanent post. The aim being to regularise the administrative status of these staff members before indefinite-term contracts are offered to persons on fixed-term contracts, who have no automatic right to have their employment made permanent.

21. On 18 July 2012, an identically worded memorandum was again sent to the heads of major administrative entities.

C. Regulations on Appointments

22. The provisions on staff movements are set out in Article 5 of Appendix II to the Staff Regulations (Regulations on Appointments). Following the addition of a paragraph 1*bis* adopted by the Committee of Ministers on 7 July 2010, this text now reads as follows:

Article 5 – Staff movements

"A. Transfers

1. Any staff member confirmed in employment may inform the Secretary General that he or she wishes to be assigned to another post or position in the same grade. In order to comply with the request, an exchange with another staff member or an appointment to a suitable vacancy shall be considered.

1*bis.* When a post or position at grades A2/3 to A5 or in categories L, B or C becomes vacant, the post/position shall be published internally as a "mobility notice" for ten working days (fifteen working days during the months of July and August). Permanent staff members at the same grade may express their interest to the Director of Human Resources who will forward the names of all interested staff members and, if applicable, relevant profiles from existing reserve lists to the major administrative entity concerned.

The Secretary General shall decide whether to assign one of the interested staff members to the post or position, following a recommendation by the head of the major administrative entity. If no one is assigned to the vacant post or position, the vacancy shall be published in accordance with the rules laid down in Article 6.

2. When vacancies occur, the Secretary General may decide exceptionally that they should be filled by transfer without an internal competition. In such cases, he or she shall approach the staff members considered for transfer and invite them to express their views.

3. Heads of major administrative entities [...] may transfer or exchange staff within the administrative entity for which they are responsible. In such cases, they shall invite the staff members concerned to express their views and inform them in writing of the decision and of their new duties. The Directorate of Human Resources shall be informed before the transfer takes effect and shall receive a copy of any correspondence related to such actions.

[…]"

23. Article 20 deals with confirmation in employment for an indefinite duration or for a fixed term. The relevant parts of it read as follows:

"Article 20 – Confirmation in employment for an indefinite duration or for a fixed term

1. Before the probationary period expires, the [Appointments] Board shall examine the staff member's file and, in particular, his or her appraisal reports made in accordance with Article 19.

2. a. If the staff member's work is satisfactory, the Board shall recommend that the Secretary General confirm him or her in his or her employment with a contract of indefinite duration or for a fixed term contract in accordance with the type of employment initially offered to the staff member.

b. A fixed-term contract may be offered for a duration of at least six months. It may be extended or renewed one or more times."

D. Article 11, paragraph 5 of Rule No. 1258 of 8 September 2006

24. Rule No. 1258 of 8 September 2006 laying down procedures for the implementation of the Regulations on Appointments was adopted pursuant to Article 1, paragraph 2 of the Regulations on Appointments, to add a description of the implementing procedures to those Regulations. Article 11 reads as follows:

"**Article 11 – Appointments to positions and posts**

1. Staff members who have passed a competitive examination in accordance with Article 15 of the Regulations on Appointments and are appointed on fixed-term contracts may

apply for vacancies notified in accordance with Article 7, paragraph 3 thereof; they may also be transferred in accordance with Article 5 of the same Regulations.

2. Should such staff members be transferred or promoted to posts in accordance with the provisions of the Regulations on Appointments, their fixed-term contract shall be replaced by indefinite-term contracts. They shall be asked to sign indefinite-term contracts starting on the date on which the transfer or promotion becomes effective. The same applies if their position is converted into a post.

3. Should such staff members be transferred or promoted to positions in accordance with the provisions of the Regulations on Appointments, their contracts shall be replaced by a new fixed term contract corresponding to the period for which the position they have been transferred or promoted to has been set up. However, in no case must the total length of employment of a staff member appointed on a fixed-term contract exceed five years.

4. Staff members appointed for an indefinite duration may be transferred or promoted to positions, in accordance with the provisions of the Regulations on Appointments, for a period not exceeding the one for which the position has been set up. In such cases, appointments made on posts held by the staff members concerned immediately prior to their transfer or promotion to a position may only be made for a fixed term not exceeding the period for which the positions in question have been set up.

5. Such appointments by transfer or promotion may be extended for periods corresponding to the existence of the positions concerned, or confirmed for an indefinite duration if the positions are transformed into posts. The fixed-term contracts of the staff members appointed on the posts vacated by the indefinite-term staff member as described in paragraph 4 above may be extended accordingly or replaced by indefinite-term contracts.

6. Staff members on indefinite-term contracts who are transferred or promoted to positions may subsequently be transferred to same-grade posts or positions or promoted to higher-grade posts or positions, in accordance with the provisions of the Regulations on Appointments. They shall be considered as holding the grade of their position for the purposes of Article 21 of the Regulations on Appointments.

7. Should positions be abolished, the staff members assigned to them shall return to their previous posts. Staff members who were promoted to positions which are abolished shall return to their previous grade and be assigned to the step which they would have reached if they had not been promoted.

8. Notwithstanding the provisions of paragraphs 4 and 7 above, staff members appointed for an indefinite duration who are promoted to positions in the external duty stations of the Council of Europe shall, subject to their satisfactory performance over two years following this promotion, remain at the grade they had reached by this promotion. The staff member’s satisfactory performance should be confirmed in the appraisal reports drawn up in conformity with Article 22 of the Staff Regulations.”

THE LAW

25. The appellant asks the Tribunal to annul the decision of 12 December 2011 by the Directorate of Human Resources. She also asks that the defendant "be ordered to grant [her] [...] an indefinite-term contract".

Lastly, the appellant asks for the sum of 20 000 euros as compensation for the non-pecuniary damage she has suffered, plus 5 000 euros to cover the full amount of her costs in this appeal.

26. The Secretary General asks the Tribunal to declare the appeal ill-founded and to dismiss it. He denies that the appellant has suffered any non-pecuniary damage. On the matter of the procedural costs requested by the appellant, the Secretary General believes this claim should be dismissed.

I. SUBMISSIONS OF THE PARTIES

A. The appellant

27. The appellant names [seven] grounds for her appeal: first, non-conformity of the memorandum of 27 October 2010 from the Director of Human Resources with the provisions of the Staff Regulations, then unequal treatment, breach of the terms of Article 11, paragraph 5 of Rule No. 1258 of 8 September 2006, breach of the provisions of Article 20, paragraph 2 b of the Regulations on Appointments, breach of the principle of good faith in the formation and execution of the contact of employment, and breach of the principle of reasonable expectation.

1. *Non-conformity of the memorandum of 27 October 2010 from the Director of Human Resources with the provisions of the Staff Regulations*,

28. Concerning the first ground, the appellant says that in rejecting her request the Director of Human Resources relied on his memorandum of 27 October 2010. But the instruction it contained was inconsistent with two principles established by the Staff Regulations.

Firstly, Article 5 A, paragraph 1bis (paragraph 22 above), requires the Organisation to publish an internal "mobility notice" when posts of certain grades (including that of the post in question) become vacant. This was confirmed by "Guidelines for filling posts and positions through mobility", published by the Directorate of Human Resources on its Intranet site. In the event, Ms K. was appointed to the post without any mobility notice being published. Nor did the Director avail himself of the option, provided by paragraph 2 of Article 5 A, to fill post no 466 exceptionally by simple transfer (paragraph 22 above).

29. Secondly, the appellant further claims that the memorandum was truly discriminatory in that it favoured permanent staff on indefinite-term contracts over those on fixed-term contracts, when the status of the latter is already precarious by virtue of the nature of their contracts. The appellant sees this as discrimination, inconsistent with the principle of equality between the two categories of permanent staff, in the implementation of the Staff Regulations, which state in

Article 1, paragraph 1 that they apply to any person who has been appointed in accordance with the conditions laid down in them as a permanent staff member of the Council of Europe. In breaching this provision the Director of Human Resources denied the appellant the benefit of an indefinite-term contract to which she was entitled under the Staff Regulations.

2. *Unequal treatment*

30. The appellant contends that, under Article 1, paragraph 1 of the Staff Regulations (paragraph 18 above), permanent staff have the same rights under the Staff Regulations regardless of whether they were recruited for a fixed term or an indefinite term. Consequently, the fact that the impugned decision is based solely on the nature of the employment contract, when the appellant is a permanent member of the Organisation's staff, is a breach of Article 1, paragraph 1 of the Staff Regulations.

31. The appellant adds that the reasons given by the Director of Human Resources do not reflect the true reality, because there were also differences in the treatment given to staff members recruited under fixed-term contracts. The appellant submits a list of persons who did finally secure indefinite-term contracts and contends that the decision of the Director of Human Resources to reject her request was in no way based on objective considerations. She concludes that the Organisation cannot treat these staff members differently without breaching the principle of equality between staff members.

3. *Breach of Article 11, paragraph 5 of Rule No. 1258 of 8 September 2006*

32. The appellant contends that under the terms of Article 11, paragraph 5 of Rule No. 1258 (paragraph 24 above), she has every right to ask for an indefinite-term contract of employment. She points out that when a post held by a staff member with an indefinite-term contract is vacated and is taken over by a staff member who has a fixed-term contract, the latter's contract may either be "extended accordingly or replaced by an indefinite-term contract". In her view this "either…or" clearly relates to the situation of the staff member being replaced, as mentioned in paragraph 4 of that same article. On the basis of these provisions the appellant believes she has every right to apply for an indefinite-term contract. Since Ms D. had been appointed to another post, the post she had initially occupied had fallen vacant and the appellant was legally entitled, under the terms of Article 11, paragraph 5 referred to earlier, to have her fixed-term contract replaced by an indefinite-term contract.

4. *Breach of the provisions of Article 20, paragraph 2 of Rule No. 1258 of 8 September 2006*

33. The appellant points out that the Organisation only offered her contracts of less than six months' duration, which is a flagrant breach of Article 20, paragraph 2b of the Regulations on Appointments (paragraph 23 above). She adds that failure to abide by this provision caused her damage for which she is entitled to seek fair redress.

5. *Breach of the principle of good faith in the formation and execution of the contract of employment*

34. According to the appellant, the fact that her contractual relationship continued, still in the same position, after 1 January 2011 when post No. 466 became vacant, proves beyond all doubt that the Organisation wanted to keep her in her role as secretary to the Bern Convention, but deliberately denied her an indefinite-term contract. The appellant points out that the job she is doing corresponds to a permanent job within the Organisation and that her position was created to be consistent with the provisions of Article 5 of the Regulations on Appointments. However, once post No. 466 became vacant, there was no reason for her position to continue since its *raison d'être* was removed by the vacancy in post No. 466. The appellant adds that the Organisation's decision to transfer her to another position, keeping her job title, and the decision to appoint someone else to post No. 466, taken after she had lodged her appeal, are measures that are all the more surprising in that the Administration has a duty to abide by the rules applying within the Organisation.

35. Lastly, basing herself on a judgment of the International Labour Organisation's Administrative Tribunal, delivered in the case of an "external collaboration contract" which was given instead of a short-term contract (judgment no 1385 of 1 February 1995), the appellant asks the Tribunal to rule that the same legal consequences be applied to her own situation and that her fixed-term contract be construed as an indefinite-term contract.

6. Breach of the principle of reasonable expectation

36. The appellant refutes the Secretary General's assertion in his reply of 12 December 2011 to the appellant's request under Article 59, paragraph 1 of the Staff Regulations, that the terms of her initial contract precluded her from entitlement to an indefinite-term contract of employment. She points out that when she was invited to sign a fixed-term contract she was never told that this would preclude her from subsequently being able to secure an indefinite-term contract, even if she was offered a different position. The appellant adds that the argument of the Director of Human Resources on this point was invalidated by the fact that other staff members who had passed the same competitive examination *were* given indefinite-term contracts. She further points out that because of the positive appraisals of her at the end of her probationary period and the requests made on her behalf for an indefinite-term contract, she never had the slightest doubt that she was qualified for and entitled to fill post No. 466 when it fell vacant.

37. In conclusion, the appellant asks the Tribunal to annul the impugned decision and to rule that she is entitled to seek an indefinite-term contract of employment.

B. The Secretary General

1. *Non-conformity of the memorandum of 27 October 2010 from the Director of Human Resources with the provisions of the Staff Regulations*

38. In answer to the first part of this ground advanced by the appellant (discrimination favouring staff on indefinite-term contracts over those on fixed-term contracts), the Secretary General says that the Organisation's commitments to these two categories of staff are different in that staff with indefinite-term contracts must be assigned to a permanent post. Moreover, "given the current budgetary constraints, it is a more pressing priority to regularise the administrative

status of staff who hold [indefinite-term] contracts and thus have the right to a permanent post, before we convert fixed-term contracts into indefinite-term contracts."

39. The Secretary General adds that his decision to give priority, when filling vacant posts, to staff members with indefinite-term contracts who were not as yet assigned to a permanent post was taken in this context.

40. According to the Secretary General, there was no discrimination because the situation of the two categories of staff was different; consequently it could not be argued that there had been any kind of discrimination here.

41. Regarding the argument based on Article 5 A, paragraph 1*bis*, the Secretary General concedes that this provision sets out the principle that a "mobility notice" must be published for posts and positions falling vacant so that permanent staff of the same grade can express their interest. However, a measure of discretion applies and, under paragraph 2 of the same article, he can fill a post or vacant position by transfer, without an internal competition. In the event, the decision was taken by the Director General. She had the authority to do this because it was a decision which affected her own administrative entity.

2. *Unequal treatment*

42. According to the Secretary General, those staff members on fixed-term contracts who had subsequently been given indefinite-term contracts were not in the same position as the appellant. Different administrative circumstances had entitled them to receive contracts of the latter kind. Firstly, those staff were assigned to different administrative entities. The Secretary General adds that when a vacancy arises and there is the option of offering an indefinite-term contract to a staff member who holds a fixed-term contract, the head of the entity to which the staff member is assigned has discretion in deciding whether this will be done. And these staff members, unlike the appellant, were entitled to have their contracts converted: either they were at the end of their probationary period, having been offered an indefinite-term contract at the outset, or they had been assigned to posts before any question of abolishing those posts arose, or they were staff in directorates which had enough vacancies to be able to assign fixed-term contract staff to indefinite-term posts.

43. The Secretary General infers that there was no breach of the principle of equal treatment of staff members recruited initially under fixed-term contracts because the *de facto* and *de jure* status of those staff members was different from that of the appellant.

3. *Breach of the provisions of Article 11, paragraph 5 of Rule No. 1258 of 8 September 2006*

44. According to the Secretary General, it is clear from the wording of Article 11, paragraph 5 of Rule No. 1258 of 8 September 2006 (paragraph 24 above) that converting a fixed-term contract into an indefinite-term contract for staff members in the position described by that article is merely an option and not an obligation. Thus, the application of Article 11, paragraph 5 is decided on a case-by-case basis as circumstances permit. In support of this the Secretary General points to the use of the words "may be", in contrast to other provisions, for example Article 1,

paragraph 2, which says “shall be replaced”. This proves that the provision in paragraph 5 is an option.

45. The Secretary General states that the Organisation’s body of rules allows only two instances in which the Organisation must replace a fixed-term contract with an indefinite-term contract: the case envisaged in Article 11, paragraph 2, of Rule No. 1258 and that envisaged in Article 15 of the Regulations on Appointments, the latter being concerned with the end of the probationary period of a staff member who, unlike the appellant, was offered an indefinite-term contract from the outset. Apart from these two instances the Secretary General has a broad measure of discretion regarding the conversion of contracts. Consequently the decision to give the appellant new fixed-term contracts rather than an indefinite-term contract was consistent with the applicable rules and it was justified.

4. *Breach of the provisions of Article 20, paragraph 2b of the Regulations on Appointments*

46. The Secretary General contends that, under this provision, only a staff member’s first fixed-term contract – in the appellant’s case the one which ran from 1 October 2008 – must be for six months or longer. Subsequent extensions may be for less than six months. The Secretary General adds that this practice is applied by the Directorate of Human Resources to all staff on fixed-term contracts.

47. The Secretary General thus infers that the extensions of the appellant’s fixed-term contracts for periods of less than six months are consistent with the applicable rules and with the relevant administrative practice.

5. *Breach of the principle of good faith in the formation and execution of the contract of employment*

48. The Secretary General makes the point at the outset that the appellant, having been assigned to a position, can be employed only on a fixed-term basis.

49. The existence of a vacancy does not automatically mean that a staff member with a fixed-term contract is entitled to fill that post on an indefinite basis, even if the budget appropriations earmarked for that post are used to fund the position to which the staff member was appointed. According to the Secretary General – who interprets the appellant’s claim as an allegation of abuse of power – it had long been the intention to fill post No. 466 with a staff member on an indefinite-term contract who had not been assigned to a permanent post, and it had been necessary to wait for the structural reform of the Organisation to be completed in order to have an overall view of the situation and make the necessary adjustments. The Secretary General infers that the Administration acted altogether transparently, in a manner consistent with the applicable rules, and the appellant was properly informed.

6. *Breach of the principle of reasonable expectation*

50. According to the Secretary General there is a misunderstanding on this point because, in his reply of 12 December 2011, the Director of Human Resources merely stated that the contract initially offered to the appellant was a fixed-term contract, not an indefinite-term one, and that

she was not in one of the two situations where conversion of the initial contract into an indefinite-term contract was mandatory. In the Secretary General's view there has never been any question of the appellant not meeting the requirements for employment on an indefinite basis: she is eligible if appointed or promoted to a post or if her position is converted into a post as envisaged in Article 11, paragraph 2, of Rule No. 1258. However, although this possibility exists, the appellant's present situation does not give her a right to have her contract converted. That was the thrust of the reply given to her on 12 December 2011.

51. The Secretary General concludes that the appeal is unfounded.

II. THE TRIBUNAL'S ASSESSMENT

52. Before examining the grounds submitted by the appellant the Tribunal must first decide whether or not she could reasonably have expected her fixed-term contract to be converted into an indefinite-term contract sooner or later. Clarification of this point is important for a detailed consideration of her various grounds of appeal.

53. In the light of the arguments and documents laid before it, the Tribunal concludes that the appellant has no right to such conversion. There is no general principle or provision of the Staff Regulations which confers such a right. More specifically, the Tribunal accepts the Secretary General's argument that the appellant's case is not covered by the two scenarios which, under the Staff Regulations, require a staff member to be recruited on an indefinite-term contract.

Likewise, no conclusion suggesting that this might be the case can be drawn from the contracts which the appellant signed or the exchange of memoranda between her and the Organisation. On the latter point the Tribunal deems it helpful to point out that, whilst it is true that the appellant's Director General asked for her to be given an indefinite-term contract, the fact remains that that step does not confer any right to such a contract on the appellant.

Such a right could only be created by an act of the Directorate of Human Resources, that is to say the department with the authority to act on behalf of the Organisation. But at no time did that Directorate tell the appellant – or give her reason to hope – that she would receive an indefinite-term contract. It appears from an examination of the documents submitted that after the appellant's first request to have her fixed-term contract changed into an indefinite-term one, the Directorate of Human Resources said on 9 December 2010 that "this request cannot be approved until we are sure what happen [sic] for the other A3 staff members in DG4 who do not have a blocked post currently. Blocking a post for them is a priority, cf. memo from [the Director of Human Resources to *[Major Administrative Entities]* end October 2010".

54. Having reached this conclusion the Tribunal must now consider whether the various grounds submitted by the appellant have any merit.

1. *Non-conformity of the memorandum of 27 October 2010 from the Director of Human Resources with the provisions of the Staff Regulations*

55. Regarding the first ground, namely non-conformity of the memorandum of 27 October 2010 from the Director of Human Resources with the provisions of the Staff Regulations, the Tribunal offers the following remarks.

56. The Tribunal wonders first of all whether this text is an administrative act within the meaning of Article 59, paragraph 1 of the Staff Regulations and thus susceptible of challenge via the complaints procedure. One wonders if it is not more of a "general measure" adversely affecting the appellant or rather, given its content, an instruction or office circular which would place it in the category of statutory instruments, a category which, by its nature, cannot be challenged before the Tribunal; only administrative acts implementing such instruments can be challenged via the complaints procedure. The very terms in which the appellant words her ground of appeal give room for doubt: "non-conformity of the memorandum of 27 October 2010 from the Director of Human Resources with the provisions of the Staff Regulations". In addition, if the reply was inclined to favour the first of the two solutions, the question would then arise of whether this administrative complaint had been lodged within the prescribed time limit.

57. Whatever the case, the Tribunal does not need to rule on the matter because even supposing that the memorandum can be deemed an administrative act within the meaning of Article 59 of the Staff Regulations, the Tribunal would not be able to dispute its merits.

58. On the matter of the first provision referred to concerning Article 5 A, paragraph 1*bis* of the Regulations on Appointments, the Tribunal doubts that the alleged failure to abide by this provision caused damage to the appellant. According to the final part of this provision (paragraph 22 above), the alternative to the procedure followed in the appellant's case would not necessarily have been to give her an indefinite-term contract but to start an appointments procedure. In any event, paragraph 2 of the provision gave the Secretary General the option of departing from that procedure.

Regarding the second provision relied on (Article 1 of the Staff Regulations, paragraph 18 above), the Tribunal notes that its wording does not so much prohibit discrimination between staff categories as state the principle that the Staff Regulations apply to all staff members. It is clear that, faced with a reform of its structures – perhaps not fully understood on this point – during which a number of staff members had not immediately been reassigned to a post, the Organisation had to find definitive posts for those of its permanent staff on indefinite-term contracts who did not have them. There is thus a weighing here of the general interest against the appellant's interest, which the Tribunal must take into account. Since this policy of the Organisation was applied without any existing right of the appellant's having been breached, there cannot be any breach as alleged by the appellant.

59. The appellant rightly states that the Staff Regulations apply to all members of staff. But the fact remains that her situation is *de facto* different from that of staff on indefinite-term contracts, so the Tribunal cannot find that she was treated in a manner which was discriminatory within the meaning of Article 1 of the Staff Regulations or contrary to the general principle of non-discrimination, all other things being equal.

60. Consequently, this ground must be rejected.

2. *Unequal treatment*

61. In her second ground the appellant claims that the reply of 12 December 2011 to her administrative request breached the principle of equality, on the one hand between staff with indefinite-term contracts and those with fixed-term contracts and, on the other hand, between staff on fixed-term contracts, because of the different treatment given to them.

62. Regarding the first part of this ground of appeal concerning discrimination between staff members on fixed-term contracts and those on indefinite contracts, the Tribunal has already taken account of this difference in its consideration of the first ground (paragraphs 58-59 above) and sees no reason to reach a different conclusion here.

63. As for the second part of the ground of appeal, concerning discrimination between staff in fixed-term employment who were subsequently given an indefinite-term contract and the appellant who did not receive one, the Tribunal considers that in view of the underlying purpose of the various changes of contract, there can be no question of the principle of equality being breached. Indeed, these changes were made either because the case of the staff member concerned was in one of the two categories where the change was mandatory, or because the specific circumstances of the department to which the staff member was assigned allowed it.

64. Consequently, this ground must be rejected.

3. *Breach of Article 11, paragraph 5 of Rule No. 1258 of 8 September 2006*

65. The Tribunal finds that Article 11, paragraph 5 does not give the appellant any right to an indefinite-term contract; nor does it oblige the Organisation to offer her one. That provision allows the Organisation, in the hypothetical circumstances it describes, to grant this kind of contract or to extend the fixed-term contract for a specified period. In choosing this second option for reasons which, moreover, do not concern the appellant, the Organisation exercised its power entirely lawfully and without breaching the appellant's rights.

4. Breach of the provisions of Article 20, paragraph 2b, of the Regulations on Appointments

66. The Tribunal does not consider this provision to be relevant here, because even if the fixed-term contracts which the appellant challenges as unlawful under this provision (paragraph 23 above) are irregular, the fact remains that the appellant was not able to have an indefinite-term contract in their place. And the appellant acknowledges this herself when she says that the Organisation "should have" offered her an indefinite-term contract, not that the Organisation had a formal obligation to do so.

67. She adds that failure to abide by this provision caused her damage for which she is entitled to seek fair redress. Replying to this statement, the Tribunal notes that this matter falls outside the scope of the dispute as defined by the administrative request of 11 October 2011 and the administrative complaint of 19 December 2011. Moreover, the appellant does not quantify this damage in monetary terms and does not return to it in her conclusions.

5. *Breach of the principle of good faith in the formation and execution of the contract of employment*

68. The Tribunal notes the appellant's contention that the Organisation "deliberately" denied her an indefinite-term contract as of 1 January 2011. But it appears that, under the rules in force, the Secretary General could only offer her a fixed-term contract to begin with, as the holder of the post had moved to a position. As for the decision not to give her an indefinite-term contract after January 2011, it is clear from the documents laid before the Tribunal that the Organisation acted in line with staff management policy – finding posts for staff members on indefinite-term contracts who did not have one, before recruiting new permanent staff on an indefinite-term basis. That policy had not been introduced for the purpose of thwarting the appellant's attempt to secure an indefinite-term contract.

69. Thus the Tribunal finds that the arguments put forward by the appellant do not prove that the Secretary General did not act in good faith. On the contrary, the Secretary General has shown that he upheld that principle. The Tribunal emphasises here that the Organisation examined the appellant's case, applying its own general rules with which the appellant was already familiar.

6. *Breach of the principle of reasonable expectation*

70. The Tribunal considers here that the reasons which led it to conclude that there had been no breach of the principle of good faith lead it to the same conclusion on the allegation concerning reasonable expectation.

71. The Tribunal must also note that the appellant has no entitlement to an indefinite-term contract under Article 15 of the Regulations on Appointments because there is no record anywhere to show, at the time of her recruitment, that she came within the contract category which allowed her to apply for an indefinite-term contract once her probationary period was completed.

72. In conclusion, the appellant's grounds of appeal concerning irregularities which prevented her from having an indefinite-term contract are without merit and her first request, namely that the decision of 12 December 2011 be annulled (paragraph 25 above) cannot be granted.

73. Having reached that conclusion, the Tribunal does not need to rule on the appellant's second request, namely that the defendant "be ordered to grant [her] [...] an indefinite-term contract" (paragraph 25 above).

74. However, the Tribunal deems it appropriate to make two observations.

75. Firstly, as it has already indicated in other appeals, under the terms of Article 60, paragraph 2 of the Staff Regulations the Tribunal can only annul administrative acts complained of, though it has unlimited jurisdiction in disputes of a pecuniary nature. Thus the Tribunal would have no power to order the granting of an indefinite-term contract, something that could only be done, by the Secretary General and under the scrutiny of the Tribunal as required by Article 60, paragraph 6 of the Staff Regulations, in execution of a judgment where the appellant had won his or her case (ATCE, Appeals Nos. 474/2011 and 475/2011 – Prinz and Zardi v. Secretary General,

judgment of 8 December 2011, paragraphs 84-86). In line with established practice, appellants who are not satisfied with the solution chosen by the Secretary General should subsequently avail themselves of the avenues of legal redress open to them and challenge the solution chosen, as, indeed, appellants have already done in other disputes.

76. The Tribunal certainly regards the appellant's case as unusual. Unlike the other staff members who passed the same competitive examination as the appellant, she found herself working in a job which should have been a permanent post, but she was not subsequently given an indefinite-term contract because, under the principle of staff mobility, the post's incumbent had moved not to another post but to a position, so it was legally not possible to appoint her to a post and she remained, nominally, in her old post. The appellant was then assigned to a position created especially for her and funded out of the budget for the post, which remained in the table of posts even though she could not officially occupy it.

Because of the rules in force the appellant, instead of securing an indefinite-term contract, was assigned to a position which was in effect the post which she ought to have occupied, by a different name. The Tribunal sees as proof of this the fact that her then Director General requested an indefinite-term contract for her on several occasions and, more conclusively still, she was given a one-month fixed-term contract whilst awaiting an indefinite-term contract, something that was a departure from the usual practice. Likewise, in its email of 19 September 2011 – quoted in the request made under Article 59, paragraph 1 of the Staff Regulations – the Directorate of Human Resources said that requests to convert fixed-term contracts into indefinite-term contracts were not accepted "in principle" and that the appellant's individual case would be reviewed before the extension to her contract ended. Whilst it is true that this statement does not constitute a commitment conferring rights upon the appellant, the fact remains that it is indicative of the exceptional obstacles which the appellant has encountered in the course of her career with the Organisation.

77. It is true, as the Tribunal has just said, that these things do not amount to a breach of the Organisation's rules, but the fact remains that through no fault of her own the appellant fell victim to a tightening of policy on the award of indefinite-term contracts, and would not have done if the case of Ms D. had been resolved earlier.

For these reasons the Administrative Tribunal:

Declares the appeal to be unfounded and dismisses it;

Orders that each party bear its own costs.

Adopted by the Tribunal in Strasbourg on 9 November 2012 and delivered in writing, pursuant to Article 35, paragraph 1 of the Tribunal's Rules of Procedure, on 9 November 2012, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. ROZAKIS