

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 476/2011 (Jayne YEO v. Secretary General)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Mr Angelo CLARIZIA
Mr Hans G. KNITEL, Judges,

assisted by:

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

has delivered the following judgment after due deliberation.

PROCEDURE

1. The appellant, Ms Jayne Yeo, lodged her appeal on 23 March 2011. It was registered the same day under No. 476/2011.
2. On 19 May 2011 the appellant filed a further memorial.
3. On 6 April 2011 the Secretary General submitted his observations. The appellant filed a memorial in reply on 20 June 2011.
4. The public hearing in the present action took place in the hearing room of the Tribunal in Strasbourg on 3 November 2011. The appellant was represented by Ms Carine Cohen-Solal, a lawyer practising at the Strasbourg Bar, while the Secretary General was represented by Ms Christina OLSEN, an administrator in the Legal Advice Department within the Directorate of Legal Advice, assisted by Ms Maija Junker-Schreckenber and Ms Sania Ivedi, administrators in that Department.

THE FACTS

I. THE FACTS OF THE CASE

5. The appellant is a British national born in 1958. She was a staff member of the Council of Europe employed for an indefinite duration and occupied a post in Strasbourg.

6. The appellant joined the Council of Europe in 1995 as a grade B1/B2 staff member. From 1 January 2000 she held a permanent staff post in the Registry of the European Court of Human Rights. During the period September 2003 to July 2005 the appellant was seconded to the Human Resources Directorate (“the HRD”), where she held a grade B2 post. She subsequently returned to the Court, where she held a grade B3 post in 2006.

7. From 1 November 2007 the appellant was on unpaid leave pursuant to Article 3 paragraph 1 b.iii of Appendix VII: Regulations on unpaid leave (see paragraph 7 above). During that period of leave the appellant held a grade A post as Human Resources officer at the European Railway Agency.

8. On 5 August 2009 the appellant requested the Secretary General of the Council of Europe to transform her unpaid leave into secondment within the meaning of Rule No. 1293 of 12 April 2008 on secondment to another international organisation, or national, local or regional administration of staff members confirmed in employment for an indefinite duration. The appellant maintained that her interest in requesting secondment also lay in the fact that its duration was not explicitly limited in the relevant provisions. That particular feature was relatively important, as she envisaged applying for the special assessment procedure organised for L and B grade staff pursuant to Article 24e of Appendix II to the Staff Regulations as amended by Resolution Res(2006)19 of 8 November 2006.

9. On 18 September 2009 the appellant received a negative response from the Secretary General to her request that her leave be transformed into secondment, based on the difference between her current responsibilities and her duties within the Council of Europe.

10. On 14 December 2009 the appellant applied for the special assessment procedure under Article 24. Having been informed that she had been pre-selected, the appellant approached the HRD again on 28 May 2010 to ensure that she would be able to continue that procedure until the end of her unpaid leave. On 13 August 2010 the appellant thus requested the Director of the HRD to extend the period of her unpaid leave until the end of the special assessment procedure, in accordance with Article 3.1.b.iv of the Appendix, for “other reasons linked to the staff member’s personal development”.

11. On 7 September 2010 the appellant received an e-mail from a staff member of the Temporary Staff Service informing her that her request had been refused. The e-mail was worded as follows:

“Following your message date[d] 13 August 2010, I would like to inform you that it will not be possible to extend your unpaid leave as from 1st November 2010. As you rightly pointed out in your memorandum, you are currently in your third and final year of unpaid leave for personal reasons.

I refer to Article 4.1 of Appendix VII of Staff Regulations which states ‘The maximum length of leave for personal reasons [authorised] in respect of the reasons set out in Article 3, paragraph 1, b, i, iii and iv shall be restricted to three years.

I remain at your disposal for any information you may need. ...”

12. On 18 October 2010 the appellant received an e-mail from a staff member of the Human Resources Development and Career Management Division indicating that she wished to meet the appellant in order to discuss the appellant's unpaid leave.

13. By a memorandum of 15 November 2010 the HRD informed the appellant that as she had not resumed her duties at the Council of Europe at the end of her unpaid leave, that is to say, on 1 November 2010, she had been deemed to have resigned within the meaning of Article 9 of Appendix VII to the Staff Regulations. The memorandum stated, *inter alia*:

“You have been granted unpaid leave for personal reasons from 1st November 2007 to 31 October 2010
...

On 13 August 2010, you requested an extension of your unpaid leave from 1st November 2010 to 31 October 2011. This request was denied on 7 September 2010 as the total length of unpaid leave granted to you in the course of your career was, on 31 October 2010, 3 years which represents the maximum total period allowed by the regulations (Article 4 of the Regulations on unpaid leave).

Under Article 9 of the Regulations on unpaid leave, a staff member who – without due cause – has not resumed his or her duties on expiry of the period of leave is deemed to have resigned.

As you have not resumed your duty on 1st November 2010 and without any notice from you as [of] today, the Directorate of Human Resources considers that you have resigned. ...”

14. On 15 December 2010 the appellant lodged an administrative complaint, whereby she challenged the preceding decision. On 14 January 2011, however, the Secretary General rejected her complaint, in the following terms:

“... You were granted unpaid leave from 1 November 2007 and have been employed since that date at the European Railway Agency as a Human Resources officer. In December 2009 you submitted an application for the special assessment procedure organised pursuant to Article 24(e) of the Regulations on appointments (Appendix II to the Staff Regulations), for L and B grade staff members wishing to become eligible for appointment to category A posts or positions. You were successful in the pre-selection tests and in the written tests for the abovementioned special procedure.

On 13 August 2010 you submitted ... a request for your unpaid leave to be extended from 1 November 2010 until 31 October 2011. That request was rejected on 7 September 2010 on the ground that on 31 October 2010 the total period of unpaid leave granted to you reached the maximum period of three years provided for in the Staff Regulations. Article 4(1) of the Regulations on unpaid leave (Appendix II to the Staff Regulations) provides that ‘[t]he maximum length of leave for personal reasons authorised in respect of the reasons set out in Article 3, paragraph 1, b, I, III and IV shall be *restricted to three years*’.

On expiry of your unpaid leave you did not resume your duties. Accordingly, the HRD took note and, in accordance with Article 9 of the Rules on unpaid leave, informed you by letter of 15 November 2010 that it interpreted your absence as resignation with effect from 1 November 2010.

...

You are challenging the decision contained in the letter of 15 November 2010 that the fact of ceasing to be a member of the staff of the Council of Europe deprives you of the opportunity of completing the special assessment procedure, the oral tests which will take place in January. In that regard, it should be made clear that it was decided, when you lodged your administrative complaint, to allow you to take part, on a provisional basis, in the oral tests pending the outcome of the present proceedings.

...

By not resuming your duties at the Council of Europe on 1 November 2010 you deprived yourself of the right to continue to participate in the special assessment procedure. That procedure is open only to

permanent staff members of the Organisation and you no longer satisfy that requirement. Your automatic resignation results from the clear words of the Staff Regulations, since Article 9 of the Regulations on unpaid leave provides that '[a] staff member who, without due cause, has not resumed his or her duties on expiry of the period of leave shall be deemed to have resigned'. Being provided for in the Staff Regulations, your resignation became mandatory when you decided not to resume your duties on expiry of your unpaid leave.

You were fully aware when you applied to take leave on personal grounds that such leave could be granted, where the staff member exercises a professional activity outside the Council of Europe, for a period of three years only. You were therefore also aware that by not returning to the Council of Europe on 1 November 2010 you would be deemed to have resigned under the relevant provisions of the Staff Regulations. In the present case the Administration had no discretionary power and merely applied the clear provisions of the Staff Regulations pertaining to the matter, according to which, on expiry of the unpaid leave, staff members must return to the Council or resign. The HRD was therefore correct to consider that you had resigned on expiry of the unpaid leave which you were granted.

It should be noted that unpaid leave always has a limited duration in all international organisations. Because the employment relationship between the organisation and the staff member is maintained during his or her absence, and because that results in an administrative burden for the organisation, unpaid leave must be limited and must satisfy certain conditions. It is also a settled principle that a staff member who decides not to resume his or her duties on expiry [of a period of unpaid leave] is deemed to have resigned: see judgment of the European Union Civil Service [Tribunal] of 15 December 2010 in Case F-66/09 *Roberta Saracco v. European Central Bank*, and also judgment of the Court of First Instance in Case T-70/01 *Pier V. Aimone v. Court of Justice of the European Communities*.

...

You also claim to have been treated unfairly by being unable to continue the special assessment procedure on the ground that you are thereby denied the opportunity to develop your career at the Council of Europe. You maintain that you have not actively resigned but that, on the contrary, you attempted to preserve your status as a staff member by submitting a request for secondment and then a request to extend your unpaid leave, both of which were rejected.

However, it should be noted that the Administration acted in all good faith in dealing with your case. It never gave you precise assurances that could have given rise to legitimate expectations on your part. The situation in which you find yourself of being unable to continue the special assessment procedure to completion is imputable solely to your decision not to return to the Council of Europe at the end of your unpaid leave and therefore to resign. In any event, the loss of any possibility of obtaining promotion by taking part in the special assessment procedure has no connection with the legality of the decision, adopted on the basis of the rule limiting the duration of unpaid leave to three years, to consider that you had resigned.

Indeed, the fact that you are unable to take part in the remaining stages of that procedure because you have lost your status as a staff member cannot place the Council of Europe under an obligation to grant you either an extension of your leave – which would be contrary to the terms of the Staff Regulations – or secondment – which in your case was not considered to be in the interests of the Council of Europe.

...

It follows from all of the foregoing elements that there has been no breach of the provisions of the Staff Regulations, of other regulations, of the general principles of law or of practice, or any formal or procedural defect, that all the relevant elements were taken into account, that no incorrect conclusions were drawn from the documents in the file and, last, that there has been no misuse of powers. ...”

15. As early as 11 March 2010 the appellant was informed by the HRD that she had been successful in the competition and that her name was included, on a provisional basis, on the list of staff eligible to occupy a grade A post or position, pending the outcome of these proceedings. She was thus informed that in the light of the decision of 15 December 2010 she no longer had the status of a staff member of the Council of Europe and that she was therefore

no longer eligible to take part in grade A internal competitions, which are open only to permanent staff members.

16. On 21 March 2011 the appellant brought the present action, which was registered on 23 March 2011.

II. RELEVANT LAW

Appendix VII to the Staff Regulations: Regulations on unpaid leave, as amended by Resolution Res(2004)7 of 8 July 2004 and Resolution CM/Res(2010)9 of 7 July 2010

17. Article 3 provides:

“1. Two different types of unpaid leave are to be distinguished:

- leave for family events;
- leave for personal reasons.

Leave may be granted at the staff member’s request in particular for the following reasons:

a. in respect of leave for family events:

- i. to bring up a child;
- ii. to look after a close family member suffering from a disability or an infirmity, necessitating continuous care;
- iii. following an accident or a serious illness of a child, spouse or partner or ascendant;
- iv. to look after a close family member nearing the end of his/her life;
- v. following the death of a child, spouse or partner or ascendant;
- vi. for personal health reasons.

b. in respect of leave for personal reasons:

- i. for study or research work of value for the staff member’s training and/or the Council;
- ii. because of establishment of the staff member’s usual residence in a distant place from the place where he or she is serving, when such residence is in particular determined by the spouse’s or partner’s occupation;
- iii. to exercise a professional activity outside the Council, provided that such activity is not incompatible with the duties and obligations of staff as set out in staff and administrative regulations. Such activity must not be contrary to the principles set out in the Staff Regulations or with the aims pursued by the Organisation, and should not be such as to cause moral or material prejudice to the Council;
- iv. other reasons linked to the staff member’s personal development.

...”

18. Article 4 reads as follows:

“1. In principle, the total length of the two types of unpaid leave, in combination or in isolation, shall not exceed six years in the course of the staff member’s career. The maximum length of leave for family events may be extended in exceptional circumstances. The maximum length of leave for personal reasons authorised in respect of the reasons set out in Article 3, paragraph 1, b, i, iii and iv shall be restricted to three years.

2. Each period of leave shall be for a minimum period of one year. The period of leave may be renewed for not more than one year at a time. The Secretary General may decide otherwise in exceptional circumstances related to family events, upon a duly substantiated request. An application for renewal must be submitted three months before the end of the period of leave in hand.

...”

19. Article 9 provides:

“A staff member who without due cause has not resumed his or her duties on expiry of the period of leave shall be deemed to have resigned.”

Staff Regulations

20. Article 23 reads as follows:

“1. Any contract shall terminate at the latest on the last day of the month in which the staff member reaches the age-limit laid down in Article 24 of these Regulations.

...

3. A contract for either a fixed or an indefinite period may be terminated at the end of a calendar month by:

a. the staff member, as a result of his or her resignation; such resignation shall take effect at the end of a period of notice of at least three months from the date on which resignation was tendered, unless the Secretary General agrees to shorten this period at the request of the staff member, who shall give reasons therefor;

b. the Secretary General, on one of the following grounds:

...

iii. manifest unsuitability or unsatisfactory work on the part of the staff member, calling for the imposition of a termination-of-contract under-performance measure under Article 22 bis, in cases where the individual-performance-enhancement process has not had any positive results. A termination-of-contract measure shall carry prior notice of at least three months;

...”

Appendix II to the Staff Regulations: Regulations on appointments

e) Special procedure for L and B grade staff wishing to become eligible for appointment to category A posts and positions

21. Article 24 governs, inter alia, passage between categories of posts or positions. The relevant passage is worded as follows:

“...

15. A formal assessment procedure, which shall include a competitive examination, shall be organised every three years for L and B grade staff members wishing to become eligible for appointment to category A posts or positions. The procedure shall be open to all L grade staff members who have, in the opinion of the Appointments Board, fully met the requirements of their post/position during the previous three years. It shall be open also to B grade staff members who fulfil all of the following conditions: they have served for six years in the Organisation and they have, in the opinion of the Appointments Board, fully met the requirements of their post/position during the previous three years. A positive assessment will result in the staff member concerned being able to participate in internal competitions for vacant category A posts or positions.”

THE LAW

22. The appellant challenges the decision of the Human Resources Directorate of 15 November 2010 deeming her to have resigned.

23. The Secretary General, for his part, asks the Tribunal to dismiss the appeal.

I. ARGUMENTS OF THE PARTIES

A. The lack of a legal basis

24. The appellant claims that the HRD's decision has no legal basis and that, in the light of the circumstances of the case, the Administration ought to have initiated a disciplinary procedure in order to sever her contract of employment. In addition, the Administration had a discretionary power to grant the appellant's request that her unpaid leave be extended, without remuneration, pending the results of the assessment procedure.

25. The appellant maintains that Article 23 of the Staff Regulations sets out an exhaustive list of the various ways in which contracts of employment within the Organisation can be severed. It is thus stated that 'resignation' is at the initiative of the staff member. The international case-law has confirmed that resignation must result from an explicit or at least unequivocal intention on the part of the official (UNAT, 22 November 1995, *Manson*, 742). Consequently, the HRD could not deem the appellant to have resigned, as she had made numerous approaches to the Administration, before the end of her unpaid leave, fixed at 31 October 2010, in order to preserve her contract of employment. The appellant thus clearly manifested her intention to remain at the Council of Europe.

26. The appellant maintains that Article 9 of Appendix VII expressly states that a staff member is deemed to have resigned if he or she has not resumed his or her duties "without due cause". In the appellant's submission, the Administration cannot deem *ipso facto* a staff member to have resigned merely because he or she has not resumed his or her duties. The HRD's decision is thus open to challenge in so far as the Secretary General stated in his response that the Administration had no discretionary power. That provision must correspond to a clear and unequivocal intention on the part of the staff member to sever his or her contract of employment, failing which the Administration cannot rely on the staff member's resignation within the meaning of Article 9 in conjunction with Article 23 of the Staff Regulations.

27. The appellant put forward a legitimate and valid reason for her absence at the end of her unpaid leave. The Administration could not disregard the reason put forward by the appellant and apply Article 9 of Appendix VII, which, moreover, provides no definition or indication of the scope of that concept. If the Administration considered that the reason put forward was not valid and that, consequently, her absence amounted to misconduct, it ought to have initiated disciplinary proceedings for unauthorised absence (Appendix X to the Staff Regulations), first ordering her to resume her duties. Had such proceedings been initiated, moreover, the appellant would have been interviewed and had the opportunity to comment on the reprehensible acts before the Administration took the decision to sever her contract of employment. The severance of the appellant's contract of employment is therefore the result of a decision of the Administration and not of the appellant's intention. Consequently, the HRD's decision automatically to deem the appellant to have resigned has no legal basis. In

any event, the “automatic resignation” decision is not consistent with the provisions of Article 23.3.a of the Staff Regulations and Appendix X to the Staff Regulations.

28. The Secretary General, for his part, observes that the possibility of not deeming a staff member to have resigned if he or she does not resume his or her duties on expiry of his or her unpaid leave without “due cause” within the meaning of Article 9 of the Regulations on unpaid leave can only be given an extremely restrictive interpretation. The existence of such “due cause” falls to be appraised by the Administration. In fact, the appellant was perfectly capable of returning to the Council of Europe if she so desired in order to be able to continue the special assessment procedure to its conclusion, but she chose to give priority to the occupational activity which she is exercising outside the Council of Europe.

29. By not resuming her duties at the Council of Europe on 1 November 2010 the appellant manifested her intention to be deemed to have resigned. Her automatic resignation results from the wording of Article 9 of the Regulations on unpaid leave, which constitutes a *lex specialis* by reference to Article 23 of the Staff Regulations, which, at paragraph 3(a), deals with the resignation of staff members. The appellant’s resignation, as provided for in the Staff Regulations, was automatic when she decided not to resume her duties on expiry of her unpaid leave. This was a voluntary and explicit decision of the appellant, who was duly notified by the decision of 7 September 2010 that her unpaid leave would not be extended beyond 31 October 2010 and cannot have been unaware of the consequences of her absence from the Council of Europe on 1 November 2010.

30. The appellant was fully aware when she applied for such leave that leave for personal reasons can be granted, where the staff member exercises a professional activity outside the Council of Europe, for three years only. She was therefore fully aware that by not returning to the Council of Europe on 1 November 2010 she would be deemed to have resigned, under the relevant provisions of the Staff Regulations. As her request to transform her unpaid leave into secondment, and then her request to extend her unpaid leave, had been refused, the only way in which the appellant could preserve her status as a staff member was to resume her duties.

31. The Administration had no discretionary power and merely applied the clear provisions of the Staff Regulations pertaining to the matter, which provide that, on expiry of unpaid leave, staff members must return to the Organisation or resign. The HRD was therefore correct to take the view that the appellant had resigned on expiry of the unpaid leave which was granted to her.

B. The Administration’s good faith

32. The appellant maintains that the Administration, in full knowledge of her reasons for continuing the special assessment procedure pursuant to Article 24e, decided, in breach of its duty to act in good faith, to sever her contract of employment. In fact, the appellant never received an official reply to her request to extend her unpaid leave. The e-mail does not mention any decision taken on behalf of the Director of the HRD (see paragraph 11 above).

33. In fact, while it was indicated on 7 September 2010 that her unpaid leave was not granted, it was on 15 November 2010 that she learnt that she was deemed to have resigned. The appellant therefore thought that her request was still being considered and that without an official response from the Director of the HRD, without first being called for interview or put on notice, her contract of employment could not be severed without prior notice. The

appellant contends that that decision is wholly disproportionate in the light of the facts of the case.

34. The Secretary General, for his part, admits that the appellant satisfied the conditions necessary to take part in the special assessment procedure at the admission stage, the pre-selection tests stage and, last, the written tests stage, she is henceforth no longer a staff member of the Council of Europe and therefore no longer satisfies the essential condition in order to take part in the next stage of that procedure, which, for successful candidates, consists in applying to take part in internal competitions to fill grade A posts or positions. The appellant therefore deprived herself of the right to continue to participate in the special assessment procedure. The fact that the appellant is unable to take part in the next stage of that procedure because she has lost her status as staff member cannot place the Council of Europe under an obligation to grant her either an extension of her leave – which would be contrary to the terms of the Staff Regulations –, or secondment – which was not considered in her case to serve the interests of the Council of Europe. In any event, the appellant is barred from complaining of the decision rejecting her request that her unpaid leave be transformed into secondment and of the rejection of her request for an extension of her unpaid leave, since she did not challenge those decisions within the time-limits and in the forms required by Articles 59 and 60 of the Staff Regulations. Accordingly, this part of her appeal is inadmissible on the ground that it is out of time.

35. Nor is there any indication that the appellant challenged the formal value of the e-mail of 7 September 2010 in her administrative complaint. This part of her appeal is therefore inadmissible for non-exhaustion of internal remedies.

36. The Secretary General also maintains that the e-mail of 7 September 2010 from the HRD administrator rejected the appellant's request for an extension of her unpaid leave, as the administrator's signature clearly reveals her capacity as administrator and the fact that she was in the Time and Work Management Unit, of which she is head. The decision was also copied to the Director of the HRD and also to the Head of the Department responsible for the administrative, social and financial management of staff, thus clearly conferring on that decision the formal nature that was binding on the HRD. As for the contents of that e-mail, in the Secretary General's submission the terms used leave no room for doubt and clearly reveal that the e-mail constituted the HRD's response to the appellant's request of 13 August 2010 and that it was a rejection decision (see paragraph 11 above). No ambiguity can be detected in that decision, which constitutes the formal and final decision taken on the appellant's request, as the appellant, moreover, acknowledges in her administrative complaint.

37. Last, as regards the decision of 21 December 2010 admitting the appellant to participate in the oral tests in the special assessment procedure, the letter referred expressly to the introduction of the appellant's administrative complaint of 15 December 2010 and informed the appellant that she was being admitted only on a provisional basis, pending the outcome of the present contentious proceedings. According to the Secretary General, that letter, of which there is no copy in the file, was worded as follows: "Following your complaint under Article 51.1 of the Staff Regulations of 15 December 2010, I should like to inform you that you are admitted on a provisional basis to participate in the next stage of the selection procedure which will be an interview with the Appointments Board".

38. The Secretary General submits that the HRD never adopted contradictory positions that might have misled the appellant and that each of the communications which she challenges was both clear and sufficient.

C. The unfair treatment of the request to extend the appellant's unpaid leave

39. The appellant maintains that she always acted in good faith and that she formulated her request for an extension of her unpaid leave in accordance with Article 4, which provides in paragraph 2 that the Secretary General may grant an extension of unpaid leave in exceptional circumstances. In the present case, the exceptional circumstances were, first, the appellant's participation in the special assessment procedure, which takes place approximately every ten years, and, second, the imminent expiry of her unpaid leave. Indeed, if the Council of Europe had complied with the time-limits prescribed for the organisation of that procedure, the appellant should have known the results of that competition before her unpaid leave expired and would thus have been able to take the best decision with respect to her professional future. Owing to the fact that the time taken to organise the procedure was much greater than she was entitled to expect, the appellant sustained serious harm as a result of the Organisation's act. That procedure began late in November 2009 and ended in March 2011, more than fifteen months later.

40. In the appellant's submission, the Secretary General had the power to make good the harm which she was about to sustain by extending her unpaid leave until the end of the special assessment procedure. The Secretary General had already decided that the appellant should be included, on a provisional basis, on the list of candidates for that procedure, the oral tests in which were to take place in January 2011. There was therefore nothing to prevent the appellant from sitting the oral test. In effect, success in that competition was an exceptional situation which would allow her to return to the Council of Europe in a grade A post, a grade which she already held for the purposes of the European Railway Agency. The Secretary General's decision was all the more unfair because some staff members of the Council of Europe have already had their unpaid leave extended and because, in the light of the reasons on which the appellant relied, she could legitimately expect to receive a favourable decision.

41. The Secretary General reiterates that the part of the appeal whereby the appellant challenges the HRD's decision not to extend her unpaid leave is inadmissible on the ground that it is out of time. The appellant ought to have lodged an administrative complaint within 30 days after the decision of 7 September and failed to do so.

42. The Secretary General then recalls the terms of Article 4 paragraph 2 of the Regulations on unpaid leave and maintains that the appellant's interpretation of that provision, according to which she could have been granted an extension of her unpaid leave, owing to the existence of exceptional circumstances, beyond the maximum duration provided for, is incorrect. That provision deals not with the maximum duration of unpaid leave but with the annual nature of requests for unpaid leave. The principle is thus established that each period of unpaid leave is normally granted for a minimum period of one year and may be extended, up to the maximum duration prescribed, for periods of one year on each occasion. That is clear from Article 4 paragraph 1 of the Regulations on unpaid leave. According to that provision, only the maximum duration of leave in respect of family events may be extended. The maximum duration of leave for personal reasons is limited to a maximum period of three years and cannot be extended. That provision provides for no exception to that principle. The

Secretary General therefore had no legal basis on which to grant the appellant's request for an extension of her unpaid leave.

43. It is true that some staff members have sometimes been able to extend their unpaid leave beyond three years by substituting for leave for personal reasons leave for family events within the meaning of Article 4 paragraph 1, which provides that the total length of the two types of unpaid leave, in combination or in isolation, is not to exceed six years in the course of the staff member's career. However, the appellant did not submit such a request and cannot therefore complain that she has been treated unfairly by comparison with other staff members who are not in the same situation as the appellant.

44. As for the appellant's complaint concerning the alleged delay in organising the special assessment procedure, the Secretary General emphasises that that procedure took place in three stages, which required time in order to enable the tests to proceed smoothly. In his submission, a period of 15 months between the call for candidatures and the announcement of the results is a reasonable time.

D. The parties' conclusions

45. The appellant requests the Tribunal to annul the Secretary General's decision of 15 November 2010. She claims the sum of EUR 60,000 by way of damages for the non-pecuniary and financial harm sustained and EUR 5,000 for the costs incurred in connection with her appeal.

46. The Secretary General, for his part, requests the Tribunal to declare the appeal inadmissible and/or manifestly ill founded and to dismiss it.

II. THE TRIBUNAL'S ASSESSMENT

47. The Tribunal considers it unnecessary to examine in detail the questions of admissibility raised by the Secretary General, as the appeal is in any event ill founded.

A. The lack of a legal basis

48. The Tribunal observes, first of all, that a staff member may benefit from two types of unpaid leave, namely leave for personal reasons or leave for family events (see paragraph 17 above). Their length, "in combination or in isolation", cannot in principle exceed six years (see paragraph 18 above). However, the relevant provision expressly stipulates that the maximum length of leave for personal reasons granted for study or research work, in order to exercise a professional activity outside the Organisation or for other reasons linked to the staff member's personal development (see paragraph 18 above) is limited to three years and that only unpaid leave for family events can exceptionally be extended (*ibid.*, paragraph 18 above).

49. The Tribunal recalls the case-law of the European Court of Human Rights, according to which the expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V). As regards foreseeability, a norm cannot be regarded as a "law" unless it is formulated with sufficient

precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences do not need to be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (*Kokkinakis v. Greece*, 25 May 1993, paragraph 40, series A no. 260-A). The same principle incontestably applies to the internal rules of the Council of Europe and it is for the Tribunal to ensure that it is observed.

50. In the present case, the Tribunal observes that the appellant was granted unpaid leave within the meaning of Article 3 paragraph 1 b.iii of Appendix VII – and therefore for personal reasons – from 1 November 2007. She does not dispute before the Tribunal, or in any document submitted to the Administration, in particular in the administrative complaint, that she was fully aware of the relevant provision, namely Article 4 paragraph 1 of Appendix VII, which expressly limits the maximum length of leave for personal reasons to three years.

51. The Tribunal also observes that Article 9 of Appendix VII states, with the same clarity, that a staff member who has not resumed his or her duties on expiry of the leave is to be deemed to have resigned. However, the failure to resume duties is qualified by the existence of “due cause” (see paragraph 19 above). It follows that the internal rules of the Council of Europe satisfied the desired requirements of quality (see paragraph 49 above).

52. In the appellant’s submission, she did indeed rely on “due cause” to justify her failure to resume her duties within the Council of Europe on 1 November 2010, thus clearly manifesting her intention to remain in the Organisation and to take part in the special assessment procedure, while continuing to work at the European Railway Agency, where she held a grade A post (in spite of the risk that the special assessment procedure would not end before the end of the maximum length of her unpaid leave for personal reasons provided for in Article 4 paragraph 1 of Appendix VII).

53. Although the Tribunal can understand the appellant’s approach, it is not convinced by her arguments, which are certainly not relevant for the purposes of the interpretation of Article 9 of Appendix VII. It was for the appellant to comply with the internal rules of the Council of Europe, her original employer, and to resume her duties with that organisation, while preserving the professional opportunity offered to her by the special assessment procedure and to become a grade A staff member.

54. As for the appellant’s argument that the decision to terminate her permanent staff member’s contract of employment at the Council of Europe is contrary to Article 23 of the Staff Regulations, the Tribunal considers that that article sets out the ordinary circumstances in which contracts come to an end. However, the Regulations on unpaid leave constitute a special regime (*lex specialis*), made available to staff members of the Organisation for personal reasons or for family events, which has specific features by comparison with the general rules laid down in the Staff Regulations. The Tribunal is therefore of the opinion that the Administration correctly interpreted and applied the provisions of the *lex specialis*, which prevail over the general law. Last, although the Administration decided to apply *stricto sensu* Article 9 of Appendix VII, without pronouncing in detail on the existence or otherwise of “due cause”, its action still remains legal in the light of the internal rules of the Organisation.

55. In the light of those circumstances, the Tribunal is of the opinion that the Secretary General's decision did indeed have a legal basis.

B. The Administration's good faith

56. In the appellant's submission, the Administration had not acted in good faith, for, although it was aware of her intention to continue the special assessment procedure, it decided to sever her contract of employment. The appellant refers to the e-mail of 7 September 2010 from the administrator of the HRD, which did not mention that a decision had been taken on behalf of the Director of the HRD (see paragraph 11 above), and takes issue with the Secretary General for not having given her an official reply to her request for an extension of her unpaid leave.

57. The Tribunal has already observed that it does not consider it necessary to adjudicate on the admissibility of this part of the appeal (see paragraph 47 above), and more specifically on the nature of the e-mail of 7 September 2010. However, the Tribunal would like to take the opportunity to encourage the Administration, given the way in which it acted in the present case, to take greater care as to the correct and appropriate form of its decisions, in order to enable staff members to be in a position to act accordingly.

58. The Tribunal recalls that the principle of good faith places the authorities and individuals concerned under an obligation to act in a spirit of fairness, observing the law and being faithful to their commitments. In the present case the appellant takes issue with the Administration for having deliberately taken an ambiguous and equivocal approach by allowing her to continue the procedure without clearly informing her of the risk involved if she did not present herself at her post on 1 November 2010. However, as the appellant herself states, she was admitted, on a provisional basis, to continue the special assessment procedure "pending the outcome of the contentious proceedings"; she was successful in the three stages of the procedure, namely the pre-selection tests of 27 May 2010, the written tests of 24 September 2010 and the oral test. The Tribunal does not consider that the appellant's argument that the Secretary General went back on his decision by removing the appellant from the list of successful candidates is convincing.

59. In fact, the appellant applied to take part in the special assessment procedure on 14 December 2009, that is to say, a little more than ten months before the expiry of the maximum and non-extendable period prescribed for her unpaid leave for personal reasons. It is true that she made a number of approaches with a view to transforming her unpaid leave into secondment (see paragraph 8 above) or extending her leave in order to ensure that she would be in a position to continue the special assessment procedure to its conclusion. The fact that the Organisation did not grant her requests does not mean that it acted in bad faith. On the contrary, it automatically applied its internal rules in order not to disadvantage the other candidates who had applied as permanent staff members of the Organisation.

60. Consequently, the Tribunal is of the opinion that the Administration did not violate the principle of good faith in the conduct of the procedure in issue.

C. The unfair treatment of the request to extend the appellant's unpaid leave

61. The appellant maintains that she formulated her request to extend her unpaid leave in accordance with Article 4 of Appendix VII, which states in paragraph 2 that the Secretary General may grant an extension in exceptional circumstances. In the appellant's submission, the exceptional circumstances related, first, to her participation in the special assessment procedure, which takes place only approximately every ten years, and, second, the imminence of the end of her unpaid leave. Furthermore, the appellant maintains that the Secretary General engaged in unfair conduct or acted unfairly, since some staff members of the Council of Europe, unlike the appellant, had already been granted an extension of their unpaid leave.

62. The Tribunal cannot uphold the appellant's arguments. First of all, although the two types of unpaid leave, in combination or in isolation, can last only six years, it is clear from Article 4 paragraph 1 of Appendix VII that the maximum length of leave for personal reasons is strictly limited to three years. Consequently, the Tribunal considers that the Secretary General's argument that he can grant an extension of unpaid leave only for family events, which did not apply in the present case – which the appellant does not deny – is plausible, logical and consistent with the spirit and the letter of the unpaid leave regime.

63. While it is true that, as the appellant maintains, some staff members of the Council of Europe have been granted an extension of their unpaid leave, the Tribunal emphasises that their situation was distinguished from the present case (see paragraph 42 above) and, moreover, the appellant does not show that that amounted to unfair or discriminatory treatment.

64. Consequently, the Tribunal also declares that this part of the appeal is not substantiated.

For these reasons,

The Administrative Tribunal:

Declares the appeal unfounded and dismisses it;

Orders each party to bear its own costs.

Adopted by the Tribunal in Strasbourg on 8 December 2011 and delivered in writing pursuant to Rule 35 paragraph 1 of the Tribunal's Rules of Procedure, on 13 December 2011, the French text being authentic.

The Registrar
of the Administrative Tribunal

The Chair
of the Administrative Tribunal

S. SANSOTTA

C. ROZAKIS