CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 548-553/2014 (Clelia CUCCHETTI RONDANINI and others 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,
Mrs Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Before the Tribunal are six appeals, submitted and registered on 17 April 2014, and lodged by:

- Ms Clelia CUCCHETTI RONDANINI,	Appeal No. 548/2014;
- Ms Sevda GÜNDÜZ,	Appeal No. 549/2014;
- Ms Marie-Paule GUTFREUND,	Appeal No. 550/2014;
- Ms Nasera KESSOUR,	Appeal No. 551/2014;
- Ms Martine LANG,	Appeal No. 552/2014;
- Ms Anne GURY,	Appeal No. 553/2014.

2. On 27 June 2014 the Secretary General forwarded his observations on the appeal.

3. On 14 August 2014 the appellants submitted their observations in reply.

4. The public hearing on the appeals was held in the Administrative Tribunal's hearing room in Strasbourg on 5 December 2014. The appellants were represented by Mr Mikaël Poutiers. The Secretary General was represented by Mr Jörg Polakiewicz, jurisconsult, assisted by Ms Maija Junker-Schreckenberg and Ms Sania Ivedi, administrative officers in the

Directorate of Legal Advice and Public International Law.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The appellants are former members of the Council of Europe staff employed under fixed-term contracts which expired either on 30 June 2013 or on 31 July 2013.

6. The third appellant (Appeal No. 550/2014), who had been recruited as a temporary staff member, was informed in an email of 6 January 2003 from the Directorate of Human Resources (hereinafter "the DHR") that she could no longer make individual Assedic contributions.

7. On 5 April 2005 the Directorate of Human Resources (DHR) produced a document entitled "New Contractual Policy (NCP)" which contained the following conclusions (original English text):

> **"I. Principles of the NCP**
>
> ...
>
> The **total duration of fixed-term contracts** for any individual will be limited to a maximum of 5 years.
>
> The Secretary General expects that within that time the great majority if not all persons recruited on a fixed term contract will have been able to accede to indefinite term permanent employment. ...
>
> Recruitment procedures without written examinations (for fixed-term employment only) are to be carried out in very exceptional cases only and will require prior personal approval by the Secretary General. ...
>
> **III. Unemployment Cover**
>
> The Secretary General undertook to submit to the Committee of Ministers the Provisions on unemployment cover that had been agreed upon by his predecessor and the Staff Committee. However, he made it clear that he would not argue in favour of these proposals at GR-AB or CM meetings.
>
> The DHR would also draft guidelines on the notice that should be given to a permanent staff-member on a fixed-term contact concerning the non-renewal of such a contract and the measures that should be taken to facilitate his/her search for employment on the external market. The guidelines in question figure in Appendix No. 1. The DHR would also provide practical guidance to managers as regards the handling of individual cases of staff looking for employment on the external market before the end of a fixed-term contract. ..."

8. The appellants were recruited in 2008 following an external competition to recruit office support assistants in finance/accounting (grade B1/B2) which was organised, following the publication of Vacancy Notice No. e25/2008, under Article 16 of the Regulations on Appointments (Appendix II to the Staff Regulations), in the version in force up to 31 December 2013. The purpose of the external recruitment procedure was to fill fixed-term positions. The vacancy notice clearly stipulated that:

> "The successful candidate(s) will be appointed on an initial one-year contract, constituting a probationary period. At the end of this probationary period and provided the staff member's work is considered satisfactory, he/she may be offered a contract of fixed term duration. However, the total length of

> employment will not exceed five years. Candidates who are appointed to a position due to this competition will not be eligible for any subsequent internal competition, promotion or transfer to a post, nor for secondment. (...)."

9. In communications sent to them between 26 March and 18 April 2013 the appellants were notified that their contracts were coming to an end, in line with Article 20 bis of the Regulations on Appointments, in the version in force up to 31 December 2013, which stated that "Total employment with the Organisation on fixed-term contracts in the same category shall not exceed five years".

10. On publication of Vacancy Notice No. e59/2013, five appellants – all of them except the second – applied to take part in the competition to recruit office support assistants in finance/accounting (grade B1/B2), organised under the old Article 16 of the Regulations on Appointments.

11. In an automatically generated email of 17 May 2013 the DHR informed these appellants as follows that their applications had been rejected:

> "A list has been drawn up of those candidates whose profile best met the criteria of the vacancy notice. I am sorry to have to tell you that we have decided not to accept your application."

12. Some of the appellants asked the DHR to explain why their applications had been rejected, as per the aforementioned email. On 22 and 23 May 2013 the DHR replied to them as follows:

> "The letter you received does not state the reasons for the rejection of your application. It is a standard message that was sent to you automatically, and we are sorry for this. We are currently working on ways in which our software can send out various types of rejection letters.
>
> Your application was not accepted because you are coming to the end of the five years of your fixed-term contract which, under Article 16 of the Regulations on Appointments, is the maximum length of employment under this type of contract for jobs in the same category."

13. A new email was subsequently sent out by the DHR to say that the relevant article of the Staff Regulations was Article 20 bis of the Regulations on Appointments and not Article 16.

14. On 5 June 2013 the appellants made a request under Article 59, paragraph 1, of the Staff Regulations for payment of the total amount of benefit which they could have drawn over a period of 18 months (30 months in the case of the first appellant) under the 'special expatriate' unemployment insurance cover provided by *Pôle Emploi* if they had had better advice and support from the DHR.

15. On 14 June they lodged an administrative complaint under Article 59, paragraph 2, of the Staff Regulations against the decision of 17 May 2013 to reject their applications. They also alleged that they had not been properly informed by the DHR as to whether they could pay individual contributions to the French unemployment insurance scheme. They asked that their complaint be referred to the Advisory Committee on Disputes under Article 59, paragraph 5, of the Staff Regulations.

16. On the same date the appellants applied to the Administrative Tribunal for a stay of execution under Article 59, paragraph 9, of the Staff Regulations. They asked that the

decision to end their contracts be suspended pending a reply from the Secretary General to their administrative complaint, claiming that they would suffer grave prejudice difficult to redress if they had to leave the Organisation at the time stipulated in their contracts. The application for a stay of execution was rejected by an order dated 28 June 2013.

17. In a decision of 29 July 2013 the Director of Human Resources rejected the appellants' request of 5 June 2013.

18. On 17 January 2014 the Advisory Committee on Disputes delivered its opinion on the administrative complaint, which said, *inter alia*:

> "14. The Advisory Committee on Disputes agrees with the Secretary General that it is clear from Article 20 bis of the Regulations on Appointments that the total length of employment in the Organisation under fixed-term contracts in the same category may not exceed five years. It is also clear that this principle, introduced into the Staff Regulations on 7 September 2005, was not applied retroactively in this case, since the appellants were recruited on the basis of Article 16 of the Regulations on Appointments after that date.
>
> 15. However, the way in which the Administration handled the appellants' situation was, to say the least, clumsy. Firstly, because the initial message telling them that their applications had been rejected gave an incorrect reason. Secondly, because they were dismissed on the basis of provisions which, at that same time, were the subject of a reform which abolished them. It is especially regrettable since the individuals concerned had given many years of loyal service to the Council of Europe. We would also point out, along with the appellants, that the situation in which they found themselves arises from a use by the Administration of Article 16 of the Regulations on Appointments which is, to say the least, inappropriate. The Advisory Committee on Disputes finds that the appellants were recruited to these positions on the basis of Article 16. When their contracts expired after five years, the Administration began a new recruitment procedure for the same positions, which suggests that there was a long-term, indeed a permanent need for them; so it would have made sense to create posts, and in any case to recruit on the basis of Article 15 of the Regulations on Appointments."

19. On 20 January 2014 the Secretary General rejected the appellants' administrative complaint.

20. On 17 April 2014 they lodged this appeal against the rejection of their administrative complaint.

21. In the meantime, on 1 April 2014, the Director of Legal Advice and Public International Law wrote to the Deputy Head of Strategy, Coordination and Institutional Relations at *Pôle Emploi*, asking about the "expatriate scheme" of unemployment insurance, whether or not Council of Europe staff could join it, and the date on which the scheme had been launched. The letter of 14 May 2014 which the Deputy Head of *Pôle Emploi* sent in reply makes it clear that the "special expatriate" scheme was not open to the appellants, specifically because they did not come under France's general social insurance scheme. He also pointed out that:

> "(…) Section 2.3. of Annex IX, Chapter 2, allows expatriate employees who are nationals of a member state of the EU, the EEA or Switzerland to apply for individual membership of the unemployment insurance scheme if they work for an embassy, consulate or international organisation based abroad.

Given that officials of the Council of Europe are not affiliated to the general social security scheme, I can confirm that they are not able to be covered by the unemployment insurance scheme.

(…)"

II. APPLICABLE LAW

22. Article 59 of the Staff Regulations, as amended by Committee of Ministers Resolution CM/Res(2010)9 of 7 July 2010, reads as follows:

"1. Staff members may submit to the Secretary General a request inviting him or her to take a decision or measure which s/he is required to take relating to them. If the Secretary General has not replied within sixty days to the staff member's request, such silence shall be deemed an implicit decision rejecting the request. The request must be made in writing and lodged via the Director of Human Resources. The sixty-day period shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.

2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression 'administrative act' shall mean any individual or general decision or measure taken by the Secretary General.

(...)

8. The complaints procedure set up by this Article shall be open on the same conditions *mutatis mutandis:*

(...)

d. to candidates outside the Council, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure."

23. The wording of Article 15 of the Regulations on Appointments (Appendix II to the Staff Regulations), applicable to the first contract, was as follows, prior to its amendment by Resolution CM/Res(2013)59 of 11 December 2013 which took effect on 1 January 2014:

"1. Staff members shall be engaged on a contract drawn up in accordance with a standard form and concluded by them with the Secretary General under the conditions defined by the Regulations on Appointments.

2. The contract shall state the date on which the appointment becomes effective; on no account may this date precede that on which the official take up his or her duties.

3. The content of the contract shall be communicated to the candidate in a letter of appointment."

24. Article 16 of these Regulations which, at the time of the events in question had the heading "Selection based on qualifications", read as follows prior to its amendment by Resolution CM/Res(2013)59 of 11 December 2013 which took effect from 1 January 2014:

"1. When selection is based on qualifications, the applicant's qualifications shall be examined, and short-listed candidates shall be interviewed by a representative or representatives of the administrative entity where the post or position is to be filled and by the Director of Human Resources or his/her representative(s). The administrative entity concerned may also decide to organise, with the agreement of the Director of Human Resources and the cooperation of his/her Directorate, job-related tests with short-listed candidates. At the end of the procedure, the Board shall submit a recommendation to the Secretary General on the basis of the relevant information at its disposal. Where a number of applicants are included in the recommendation, they shall be listed in the order of merit.

2. The selection procedure based on qualifications plus an interview by a representative or representatives of the administrative entity concerned and by the Director of Human Resources or his/her representative(s) shall be followed when recruiting to posts or positions filled by securing the services of civil servants or specialists as provided in Article 12, paragraph 3, of the Staff Regulations.

[...]"

25. Article 20 concerning the limitation to five years of fixed-term contracts, inserted into these Regulations by Committee of Ministers Resolution Res(2005)6 of 7 September 2005, specifically provided as follows prior to its replacement by Article 20 bis, the wording of which was adopted by Resolution CM/Res(2010)7 of 7 July 2010 which took effect on that same date:

"2*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 but the total length of employment of the staff member under fixed-term contracts shall not exceed five years."

26. Article 20 bis of these Regulations, on the maximum length of fixed-term employment, read as follows, prior to its deletion by Resolution CM/Res(2013)59 of 11 December 2013 which took effect from 1 January 2014:

"Total employment with the Organisation on fixed-term contracts in the same category shall not exceed five years. A probationary period under Article 17, paragraph 1, leading to an indefinite term contract shall not count towards this limit."

THE LAW

I. JOINDER OF THE APPEALS

27. As the six appeals are closely interconnected the Administrative Tribunal orders their joinder under Rule 14 of its Rules of Procedure.

II. SUBMISSIONS OF THE PARTIES

28. In their appeals the appellants call on the Tribunal to annul the Administration's decision to exclude them from competition no. e25/2008 and ask the Secretary General to admit them to a competition held under Article 16 of the Regulations on Appointments for grade B office support assistants in finance/accounting; to pay them the total amount of benefit which they could have drawn under the 'special expatriate' unemployment insurance cover provided by *Pôle Emploi* since their departure from the Organisation, less the amount of contributions they would have paid if they had been properly advised and supported by the DHR.

29. The Secretary General, for his part, asks the Tribunal to declare the appeals inadmissible and/or ill-founded and to dismiss them.

A. Regarding the decision to exclude the appellants from competition no. e59/2013

i) Admissibility of the claim

30. The Secretary General contends that the appeals do not meet the admissibility criteria laid down by the Staff Regulations in Article 59, paragraphs 2 and 8 d). He notes that the competition advertised in Vacancy Notice No. e59/2013 was an external recruitment procedure. Consequently, as the appellants were not allowed to take part in this competition, they have no entitlement under the Staff Regulations to lodge an administrative complaint, or an appeal, against the decision to exclude them. In other words, they have no justification in law for lodging an administrative complaint against the act complained of and have no legal interest in alleging an irregularity in the examination procedure.

31. In reply to the appellants' argument that Article 59, paragraph 2, of the Staff Regulations breaches their fundamental "right to a fair hearing", as guaranteed by Article 6 of the European Convention on Human Rights, the Secretary General states that the right to a fair hearing, secured by Article 6, paragraph 1, of the Convention, is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. The States that are parties to the Convention have a measure of discretion here, though the final decision as to whether the terms of the Convention have been met rests with the Court. It must be satisfied that the limitations applied do not curtail the access available to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6, paragraph 1, if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany* [GC], No. 26083/94, paragraph 59, ECtHR 1999-I). The amendment of Article 59 of the Staff Regulations by Committee of Ministers Resolution CM/Res(2010)9 of 7 July 2010 does pursue a legitimate aim, namely that of ensuring the smooth running of recruitment procedures.

32. The Secretary General adds that the situation which obtained prior to the amendment of Article 59 gave rise to unjustified discrimination between two categories of applicants, internal and external. The Tribunal's case-law meant that staff members of the Council of Europe were entitled to appeal against the rejection of their application at any stage of a competition, whereas external candidates had only limited scope for legal action against exclusion. The contractual relationship between the Organisation and its staff members can hardly justify their receiving privileges disadvantageous to external applicants, who ought to be on an equal footing with staff members when responding to an external vacancy notice. This part of the appeals is thus incompatible *ratione materiae* with the Staff Regulations.

33. As for the appeal lodged by the second appellant (No. 549/2014), the Secretary General notes that she did not apply to participate in the recruitment procedure in question. She thus has no direct and existing interest in challenging an administrative act adversely affecting her.

34. The appellants point to the decision in *Verneau v. Secretary General* (ATCE, No. 413/2008, decision of 31 March 2009), in which the Tribunal criticised the difference in treatment between staff members and external applicants regarding access to the Tribunal in the context of an external competition, saying that in order to eliminate this difference in

treatment "the governing bodies of the Council of Europe must take whatever positive steps are necessary". In amending Article 59 of the Staff Regulations, the governing bodies decided to restrict access to the Tribunal for all those applying to take part in an external competition.

35. The appellants consider that the Secretary General cannot curtail staff members' right of access to a tribunal, secured by Article 6 of the European Convention on Human Rights, even by asserting the wish to ensure "the smooth running of recruitment procedures". They conclude that the addition of the words "staff member" to paragraph 8 of Article 59 of the Staff Regulations on 7 July 2010 obstructs their basic right of access to a tribunal, and cannot be invoked against them to deny the admissibility of their complaint.

ii) Merits of the claim

36. The appellants contend that at the time they sat the competitive examination in 2008 they had good reason to expect that they would be staying with the Organisation. All of them were, at that time, already temporary members of staff at the Organisation. After sitting and passing competition no. e25/2008, which gave them the status of fixed-term permanent staff, the appellants naturally assumed that they would be able to remain with the Organisation, especially since they were performing the same tasks as their colleagues with contracts of indefinite duration and their respective superiors assured them that they would do everything possible to keep them in the Organisation.

37. The appellants believe that the wording of Article 20 bis of the Regulations on Appointments does not mean that they cannot apply for a new competition organised to fill jobs in the same category. They see this article as setting a five-year limit on the length of fixed-term contracts awarded to a staff member as a result of a specific competition. In other words, success in a competition entitled the staff member concerned to remain with the Organisation for five years. There is nothing in the wording of Article 20 bis to stop a staff member who is successful in a second competition from starting a new five-year cycle of employment with the Council of Europe.

38. The appellants state that they were unable to ascertain clear guidelines on this matter from the texts and practices current within the Organisation. They further remark that even the DHR was not too sure about the legal basis it had invoked to exclude them, since the initial message telling them that their applications had been rejected gave an incorrect reason. And then, the email they received on 22 and 23 May said that the five-year limit was imposed by Article 16 of the Regulations on Appointments.

39. The appellants point out that implementation of the contractual policy effective from 1 January 2006 was a total muddle and far removed from its underlying principles. As ordinary staff members with no special knowledge of the law, they needed rules that were accessible and foreseeable as to their effects, but these were lacking.

40. From autumn 2012 onwards a new contractual policy was under negotiation and the persistent rumour was that all time limits on fixed-term contracts were to be removed. The ambiguities of the situation were made worse still by the bad faith shown by the Organisation's governing bodies in their implementation of the policy which they had themselves devised. According to the appellants, this bad faith is particularly apparent in the fact that the Administration knew full well that Article 16 of the Regulations on

Appointments was due to disappear from the internal rules when the new policy on contracts came into force on 1 January 2014, but for over a year, between September 2012 and January 2014, no competitive examination was held under Article 15. The Administration is thus deliberately continuing with these "light" contracts, including contracts for structural positions, thereby creating a new generation of "light" staff members. In the appellants' case, the competition to find replacements for them and from which they were excluded was also a competition under Article 16.

41. In the light of all this the appellants believed they had good reason to suppose that they would be able to remain with the Organisation after the end of the five-year contracts they had been given after their success in competition no. e25/2008. They believed in good faith that there was nothing to stop them from applying for competition no. e59/2013 and nothing and nobody told them otherwise until they received the DHR's email rejecting their applications (this did not apply to the second appellant who had been dissuaded from applying).

42. The appellants point out that the Organisation held a "light" competitive examination to fill their jobs, even though a new contractual policy was nearing completion and Article 16 was due to disappear, as indeed it did on 1 January 2014. They see this as a deliberate move on the Administration's part to continue using these "light" contracts for as long as possible, blithely ignoring the fact that they create situations of precarious employment that are unacceptable in human terms.

43. In their observations in reply to the Secretary General's observations the appellants maintain that, on the matter of the five-year limit, the rules applicable to them were those in force at the time they were recruited in 2008, namely Article 20, paragraph 2 b) of the Regulations on Appointments. This was replaced by Article 20 bis, following Resolution CM/Res(2010)7 of 7 July 2010 which took effect on the same date. The fact that this replacement was made confirms that the earlier text was ambiguous. In other words, Article 20, paragraph 2 b) did not meet the requirement that the law should be foreseeable as to its effects, as understood by the case-law of the European Court of Human Rights (see, most recently, *Mennesson v. France*, No. 65192/11, paragraph 57, 26 June 2014).

44. The Secretary General contends that the content of Article 20 bis of the Regulations on Appointments, in force at the time of the relevant facts, made it clear that the five-year limit applied to the total length of employment within the Organisation. He also refers to the Deputy Secretary General's memorandum of 25 February 2010, submitted by the appellants, which explains the background to the amendment made by Resolution CM/Res(2010)7. It appears from this memorandum that it was necessary to clarify the scope of this provision in respect of staff members who had been successful in a new external recruitment procedure. It was decided that the five-year limit on total length of employment would not apply in the event of a change of category, i.e. if a staff member was successful in an external recruitment procedure that entailed a move between categories C, B, A and L. In addition, pending the entry into force of this amendment, it was decided that for a brief period the most favourable interpretation of the provision in question would be applied *ex gratia* to staff members in that position, including staff members who had been successful in a new external recruitment procedure not entailing a change of category.

45. According to the Secretary General, the appellants cannot legitimately claim that they were unaware of the five-year limit, that they had failed to appreciate its impact on their

contractual situation, or that it had been applied retroactively to their case, particularly since Vacancy Notice No. e25/2008 for the competitive examination they sat in 2008 and following which they were recruited stated that "the total length of employment will not exceed five years". Likewise their respective contracts of employment reproduced the terms of Article 20 of the Regulations on Appointments and clearly stipulated that the total length of their employment with the Organisation could not be more than five years.

46. In accordance with the applicable law and because the Organisation was not able to employ the appellants for longer than the maximum period of five years, the decision to exclude them from competition no. e59/2013 was correct. The Secretary General adds that the five-year limit on the total length of employment under fixed-term contracts continues to apply – since the entry into force on 1 January 2014 of the reformed contractual policy and the deletion of Article 20 bis of the Regulations on Appointments – to staff members recruited by selection based on qualifications in a competition organised in accordance with the old Article 16 of the Regulations on Appointments. The five-year limit on the total length of employment under fixed-term contracts was abolished only for staff members appointed following a competitive examination organised in accordance with the old Article 15 of the Regulations on Appointments.

B. Regarding the lack of information from the DHR on whether the appellants could pay individual contributions to the French unemployment insurance scheme

i) Admissibility of the claim

47. The Secretary General, referring to Article 59, paragraph 1, of the Staff Regulations, states that the appellants submitted their request on 5 June 2013. On 14 June 2013 they lodged their administrative complaint against what they deemed to be an implicit rejection of it. But the appellants are wrong to argue that failure to reply within nine days amounts to an implicit rejection of their request, because the relevant provisions of the Staff Regulations allow the Secretary General sixty days in which to reply to an administrative request. The fact that the appellants stated in their request that if no reply was received by 12 June 2013 they would assume it had been rejected has no bearing on the rules applicable here.

48. Consequently, because the Secretary General had not taken a decision on the appellants' request by the time they lodged their administrative complaint, their claim is premature. He thus contends that this part of the appeal is inadmissible. According to the Secretary General, his reply of 29 July 2013 to the request in no way regularises the situation *a posteriori*. In order to be compliant with the procedural rules laid down in Article 59 of the Staff Regulations, the appellants should have lodged a new administrative complaint within 30 days of their request being rejected. He thus contends that this part of the appeal is also inadmissible because internal remedies have not been exhausted. Referring to Article 59, paragraph 8 a), of the Staff Regulations, the Secretary General adds that the appellants could have lodged a new administrative complaint even after their contracts with the Council of Europe had ended.

49. In addition, the appellants are wrong to claim, on the basis of information in an email from *Pôle Emploi* to a third party who had personally requested it, that they were eligible to join *Pôle Emploi*'s unemployment insurance scheme, and to infer that the DHR had been negligent in not informing them about this. On the contrary, *Pôle Emploi* informed this third

party that she did not meet one of the criteria for membership of the unemployment insurance scheme, namely the need to have applied within 12 months of starting work as an expatriate. This is just one of the conditions which applicants to join *Pôle Emploi*'s unemployment insurance scheme must meet; other conditions also apply.

50. The appellants draw a distinction, firstly, between their case and the Kravchenko case in which the appellant referred her complaint to the Tribunal before learning the Secretary General's response to her administrative complaint. In addition, several weeks before lodging her appeal she had been told by the Legal Advice Service that a reply to her administrative complaint had been sent to her and returned to the Organisation unread; she had not come to collect it from the Administration as suggested, thereby demonstrating a culpable failure to act. The appellant had not proved that the matter was so urgent as to have justified the premature lodging of her appeal.

51. In this case, the act which triggered the appellants' claim is the email from *Pôle Emploi* received on 23 May 2013, in which they learned that they would have been entitled to contribute to the expatriate unemployment insurance scheme offered by that body if they had applied to join it within 12 months of their recruitment, but they had been misled by the DHR. But that email could not be deemed an "administrative act adversely affecting them" within the meaning of Article 59, paragraph 2, of the Staff Regulations, since it did not originate with the Secretary General. Before being able to lodge an administrative complaint, then, they had first to submit a request, which they did on 5 June 2013.

52. But the maximum period of sixty days allowed for a reply to requests was too long because the appellants were all due to leave the Organisation on 30 June or 31 July, after which date they no longer had the status of staff members. When the Secretary General had not replied by the deadline named by the appellants, they lodged their administrative complaint.

53. According to the appellants, the differences between their circumstances and those of the Kravchenko case are more than clear: their concern was not to refer the matter to the Tribunal, but to obtain a reply to their request so that they could safeguard their right to make an administrative complaint; the appellants did not fail to act or abide by the Staff Regulations; their situation was urgent and fully warranted a speedy lodging of their administrative complaint, because otherwise they would have irretrievably lost all chance of launching the complaints procedure.

54. The appellants also doubt that the phrase "former Council of Europe staff members" used in Article 59, paragraph 8 a), of the Staff Regulations can be interpreted as opening the complaints procedure to individuals who have previously worked for the Council of Europe under a fixed-term contract, once their contract has expired. They point out that this would give access to the Administrative Tribunal to individuals who no longer had any contractual or other connection with the Organisation, which seems excessive measured against the general principles of law and case-law regarding access to a tribunal. The appellants thus assumed the principle to be that "former Council of Europe staff members" meant pensioners of the Organisation, and did not believe they could rely on it to lodge an administrative complaint once they had left the Organisation.

ii) Merits of the claim

55. The appellants believe they were misled by the DHR which clearly told one of them, in an email of 6 January 2003 shortly after she was recruited as a temporary staff member, that she could not join an unemployment insurance scheme. The other appellants cannot produce an equivalent written record, but say that this was what the Administration told them whenever the question was asked. The situation of all six appellants may thus be deemed the same in this regard.

56. It is their belief that persons recruited by an international organisation based in France *would* have been able to join the unemployment insurance scheme. It is apparent from the information received from *Pôle Emploi* on 23 May 2013 that if they had applied to join that body's "special expatriate" scheme within 12 months of being recruited, and if they had paid monthly contributions of 6.40% of their salary for at least 18 months (36 months in the case of one of them), they would have qualified for a fixed monthly payment of 57.4% of their salary for 18 months (30 months in the case of one of them) after leaving the Organisation. The appellants state that this unemployment insurance is open to "employees of an international organisation based in France or abroad", with no other conditions. They cite the case of a former staff member with whom they had an exchange of emails; he paid contributions first as a temporary staff member of the Council of Europe (paying into the French social security scheme) and then as the holder of a fixed-term contract (paying into the private social insurance scheme), and at no time did he misrepresent to *Pôle Emploi* the contractual terms of his employment with the Organisation.

57. The appellants take the view that the DHR was negligent and failed to fulfil its managerial and advisory role, as a result of which the appellants sustained extremely grave material and non-material damage.

58. The Secretary General states firstly that there is no obligation on the Council of Europe to enrol its staff in the French unemployment insurance scheme. The DHR informs all staff of this fact at the time of their recruitment. Staff members are thus free to research the various options they have for joining, individually and optionally, any insurance scheme which provides cover against the risk of unemployment. It is not the responsibility of the DHR to advise staff members on their options for taking out private cover against certain risks not covered by their employment relationship with the Council of Europe; the Council, moreover, constantly warned the appellants that its medical and social insurance did not cover them for the risk of unemployment. The Secretary General refers to the relevant texts from which it is clear that permanent Council of Europe staff are not eligible for individual membership of the French unemployment insurance scheme, contrary to what the appellants claim. Under heading 2.3 "Individual membership for expatriate employees" of Annex IX to the General Rules appended to the Convention of 6 May 2011 on the payment of unemployment benefits (Annex I), employees eligible to enrol as individuals in the unemployment insurance scheme are "(...) employees covered by the general social security scheme and working for embassies, consulates or international organisations based in France who are not members of the unemployment insurance scheme under the terms of heading 2.1". The Secretary General adds that the Convention of 6 May 2011 provides the legal framework for unemployment insurance in France, setting the rules and conditions of unemployment insurance which are to be applied by *Pôle Emploi*.

59. Consequently, employees of an international organisation based in France can only be covered individually by the French unemployment insurance scheme if they are members of the general social security scheme. But permanent Council of Europe staff are members of the private scheme and so are not eligible as individuals to join the French unemployment insurance scheme. The Secretary General also refers here to the email from *Pôle Emploi* (see paragraph 49 above).

60. In conclusion, the appellants have not shown the DHR to have done anything in any way detrimental to them. They cannot, therefore, claim the repayment of benefits under this scheme.

III. THE TRIBUNAL'S ASSESSMENT

A. Regarding the decision to exclude the appellants from competition no. e59/2013

i) Admissibility of the claim

61. In the case of the second appellant the Tribunal agrees with the Secretary General that, as she did not take part in competition no. e59/2013, she cannot complain of an administrative act adversely affecting her. Her appeal is thus inadmissible.

62. Regarding the other appellants, the Tribunal recalls that in the cases of *Schmitt v. Secretary General* (ATCE, Appeal No. 250/1999, decision of 9 June 1999) and *Verneau v. Secretary General* (ATCE, Appeal No. 413/2008, decision of 31 March 2009), there was a finding of discrimination between external applicants and those who were already members of the Organisation's staff; they had all taken part in an external competition, but only the latter group were able to exercise the right to lodge an administrative complaint against the decision to exclude them from the tests. In both judgments the Tribunal ruled that the Organisation had to take whatever positive steps were necessary. However, with Resolution CM/Res(2010)9 of 7 July 2009 the Organisation got rid of this discrimination by adding new wording to Article 59, paragraph 8 d) of the Staff Regulations and abolishing the right for all candidates, external and internal alike, to lodge an administrative complaint, and thus an appeal, against decisions to exclude them (see also ATCE, *Prinz and Zardi v. Secretary General*, Appeals Nos. 474/2011 and 475/2012, paragraphs 71-72, decision of 8 December 2011).

63. The Tribunal finds that whilst the Organisation was asked to "take whatever positive steps are necessary" it opted to get rid of the discrimination in question by curtailing the rights of existing staff members rather than broadening the rights of external candidates. The Tribunal points out that all persons believing themselves to be the victim of an act adversely affecting them are entitled to challenge that act through the courts. That is a general principle which holds good in the member states of the Council of Europe and, in the matter of access to employment in the international civil service, in other international organisations too.

In the light of these circumstances the Tribunal cannot accept the amendment of 7 July 2010 to the Staff Regulations – which is inconsistent not only with its case-law but also with a general principle of law – and consequently, considering itself bound, uphold the objection of inadmissibility on grounds of the Secretary General's claim of incompatibility *ratione materiae*, based on the wording of Article 59, paragraphs 2 and 8 d), of the Staff Regulations as amended; on the contrary, the Tribunal has a duty to reject it.

64. This part of the appeal is thus admissible.

ii) Merits of the claim

65. The Tribunal points out firstly that 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. 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 (ATCE, *Yeo v. Secretary General*, Appeal No. 476/2011, decision of 13 December 2011, paragraph 49).

66. The Tribunal also points out that a right is acquired if its holder can enforce it, regardless of any amendments to a text. A right conferred by rule or regulation and significant enough to have induced someone to join an Organisation's staff must be deemed an acquired right. Curtailment of that right without the holder's consent is a breach of the terms of employment which civil servants are entitled to assume will be honoured (ATCE, *Baron and others v. Secretary General*, Appeals Nos. 492-497/2011, 504-510/2011, 512/2011, 515-520/2011 and 527/2012, decision of 26 September 2012).

67. In this case the appellants were recruited as permanent staff members in 2008 following an external competition to recruit office support assistants in finance/accounting (grade B1/B2), held subsequent to the publication of Vacancy Notice No. e25/2008. This said "the total length of employment will not exceed five years. Candidates who are appointed to a position due to this competition will not be eligible for any subsequent internal competition, promotion or transfer to a post, nor for secondment" (see paragraph 8 above).

68. Moreover, at the time of their recruitment the five-year limit on employment derived from Article 20, paragraph 2 of the Regulations on Appointments, and it was tied to "a contract" which might be renewed several times but subject to the proviso that the total length of employment on contracts could not exceed five years. From a reading of these two texts together (ATCE, *Devaux v. Secretary General*, Appeal No. 546/2014, decision of 30 January 2015, paragraph 35), the Tribunal believes that the appellants might have assumed that their five-year appointment as administrative support assistants for finance/accounts (grade B1/B2) was restricted to that specific post only. If the legislator's intention had been different, namely that all professional staff appointments should be limited to five years regardless of number of contracts and/or posts, he would have had to formulate the relevant provision with sufficient precision to enable the individuals concerned to regulate their conduct and foresee, to a degree that was reasonable in the circumstances, the consequences which their appointment in 2008 might entail. In the Tribunal's view this was not the case and the provision in question was not sufficiently clear (see also the aforementioned Devaux decision, paragraph 34).

69. The position of staff members employed by the Organisation on the basis of fixed-term contracts was clarified by the introduction of Article 20 bis of the Regulations on Appointments, which took effect from 7 July 2010 (see paragraph 25 above). However, bearing in mind the aforementioned principle of acquired rights the Tribunal believes that this rule could not validly be applied to the appellants' case, since they had been recruited two years previously when the content of the old Article 20 of the Regulations on Appointments gave them a legitimate expectation of being able to continue their respective professional careers with the Council of Europe, one option being that they would be able to take part in a new recruitment competition.

70. The appellants thus applied for competition no. e59/2013, advertised by the Organisation for duties similar if not identical to those they had been performing since 2008. The DHR decided to exclude them, however, referring most recently to Article 20 bis of the Regulations on Appointments (see paragraph 13 above). The Tribunal reiterates its earlier argument (see paragraph 66 above) and holds that the decision of the DHR was not legitimate and must thus be annulled.

71. For the sake of completeness the Tribunal adds that the Administration of an international organisation such as the Council of Europe, which is responsible for "human resources" questions, must treat staff in a manner that respects their human dimension. This rule applies in particular in the case of questions relating to their professional career (see, *mutatis mutandis*, the aforementioned Devaux decision, paragraph 22). The Tribunal is, firstly, concerned by the highly bureaucratic manner in which the Administration handled these appellants' cases (see paragraphs 10-12 above) and, secondly, sharing the view expressed in the opinion of the Advisory Committee on Disputes, it finds the way in which the Organisation pursues its contractual policy regrettable (see paragraphs 7, 10 and 18 above).

B. Regarding the lack of information from the DHR on whether the appellants could pay individual contributions to the French unemployment insurance scheme

Regarding the admissibility and merits of the claim

72. The Tribunal sees no need to examine the question of admissibility in detail since the appellants' claim is, in any event, ill-founded.

73. The Tribunal finds, firstly, that only the third appellant has produced written evidence that she received the information to the effect that she could not pay contributions on an individual basis to Assedic (see paragraph 7 above). The Secretary General for his part has submitted the email from *Pôle Emploi* which says that Council of Europe staff, not being covered by the general social security scheme, are not eligible to join the "special expatriate" scheme (paragraph 21 above). The Tribunal also notes that the appellants, having become permanent staff members in 2008, were covered by the private health insurance scheme. It is true that the appellants point to the case of a former colleague who allegedly contributed as a temporary staff member and then as a permanent staff member on a fixed-term contract without ever misrepresenting his status to *Pôle Emploi*. But it is hard for the Tribunal to accept this information as proof positive that staff members of the Council of Europe – whether temporary or permanent – can join the *Pôle Emploi* scheme.

74. The Tribunal also notes that the appellants submit a document of March 2002 entitled *Le régime expatrié de l'assurance chômage: adhésion individuelle des salariés* (Unemployment insurance scheme for expatriates: individual membership). Whilst conceding that the Administration should act as a "*pater familias*" and take care of its staff by informing them of their rights and obligations in respect of various insurance options, the Tribunal takes the view that staff members should also show initiative on such matters. But the Tribunal is not convinced that these appellants, who served as temporary staff members for years – the third of them since 2003 – and whose status was thus less secure than it became after they were given permanent contracts, showed sufficient interest in this matter.

75. Having reached that conclusion, the Tribunal believes that the Organisation ought to introduce a system of clear and transparent information, so that all members of the Council of Europe staff can receive details of their various insurance options and their rights and obligations in the matter. It also believes that the Organisation should explore the question with an eye to differences in the way staff members may potentially be treated by reason of their nationality or their membership either of the general French social security scheme or the "private" scheme in which the appellants were enrolled.

76. In the light of these circumstances the Tribunal finds that this ground of appeal is unfounded and dismisses it.

IV. CLAIMS FOR DAMAGES AND COSTS

77. The six appellants ask for payment of the total amount of benefit which they could have drawn under the "special expatriate" unemployment insurance cover provided by *Pôle Emploi* since their departure from the Organisation, less the amount of contributions they would have paid if they had been properly advised and supported by the DHR. They also ask for damages to be set by the Tribunal *ex aequo et bono.* Each appellant asks for costs in the amount of 500 euros, to reflect the time and effort spent on the case by themselves and the colleague representing them.

78. The Secretary General asks the Tribunal to dismiss the appellants' claim for damages in respect of the second ground of appeal and, regarding the payment of costs, he states that they produced the same documents in the course of the proceedings. If it should be decided to award a sum of compensation to the appellants, the Secretary General believes that payment of the sum of 500 euros to each of them would not be justified.

79. The Tribunal dismisses the appellants' claim for damages, having rejected the second ground of appeal to which it pertains. On the matter of costs, the Tribunal notes that only the five appellants whose first ground of appeal has been declared admissible are eligible to claim costs, whilst the case of the second appellant does not warrant the application of Article 11, paragraph 3, of Appendix XI to the Staff Regulations. The other five appellants used the services of the same representative, lodged identical documents and, furthermore, their cases were conducted concurrently. The Tribunal considers it reasonable for the Secretary General to pay each appellant the sum of 300 euros (Article 11, paragraph 2, of Appendix XI to the Staff Regulations).

V. CONCLUSION

80. In conclusion, the appellants' first ground of appeal is inadmissible in Appeal No. 459/2009 and, in the other appeals, it is admissible and the impugned decision must be annulled. The second ground of appeal is unfounded and must be rejected. The Secretary General must pay each appellant the sum of 300 euros in costs.

For these reasons, the Administrative Tribunal:

Orders the joinder of Appeals Nos. 548/2014, 549/2014, 550/2014, 551/2014, 552/2014 and 553/2014;

Regarding the first ground of appeal:

Declares Appeal No. 548/2014 inadmissible;

Declares the other appeals admissible and annuls the impugned decision;

Declares the second ground of appeal in all the appeals to be unfounded and dismisses it;

Orders the Secretary General to pay costs in the sum of 300 euros to the five appellants whose first ground of appeal has been declared admissible.

Adopted in Strasbourg on 28 April 2015 and delivered in writing, pursuant to Rule 35, paragraph 1 of the Tribunal's Rules of Procedure, on 28 April 2015, the French text being authentic.

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