

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF

## ADMINISTRATIVE TRIBUNAL

**Appeal No. 589/2018 (Victor SOLOVEYTCHIK  
v. Secretary General of the Council of Europe)**

The Administrative Tribunal, composed of:

Mr András BAKA, Deputy Chair,  
Ms Françoise TULKENS,  
Mr Christos VASILOPOULOS, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

### **PROCEEDINGS**

1. The appellant, Mr Victor Soloveytchik, lodged his appeal on 2 April 2018. On 3 April 2018, the appeal was registered under N° 589/2018.
2. On 18 May 2018 the Secretary General submitted his observations on the appellant's appeal. The latter filed submissions in reply on 28 June 2018.
3. The public hearing took place in the Tribunal's hearing room in Strasbourg on 25 September 2018. The appellant conducted his own defense. The Secretary General was represented by Ms Sania Ivedi, legal officer in the Directorate of Legal Advice and Public International Law assisted by Mr Kevin Brown, legal officer in the same Directorate.

### **THE FACTS**

#### **I. THE CIRCUMSTANCES OF THE CASE**

4. The appellant is a permanent staff member of the Council of Europe since 1994. Between 1 September 2012 and 31 August 2017, he was on unpaid leave, resuming his duties on 1 September 2017. During the five years of unpaid leave, he worked as permanent staff

member of the European Commission in Brussels, on the post of Director for Quality of Legislation within the Commission's Legal Service. Since 1 September 2017 the appellant, upon his initial request of 29 May 2017, is on unpaid leave for personal reasons from the European Commission. According to the Staff Regulations applicable to the personnel of the European Union, a staff member may remain on unpaid leave for up to twelve years.

5. Under relevant European Union staff rules, entitlement to pension benefits arises only after more than ten years of contributions. Since the appellant had only five years of pension contributions to the European Union scheme, in case he eventually resigns from the European Commission, he would need to transfer his pension rights.

6. Having been informally told by the Administration of the Council of Europe that he should initiate a pension rights transfer within six months of resuming his functions, he raised an issue before the Director of Human Resources (hereinafter "the DHR"), on 8 December 2017, that there was no legal basis for that time-limit, and asked to be allowed to transfer his pension rights beyond the six months. Referring to the difficult budgetary situation of the Organisation, he did not wish to resign from the European Commission. He contested the applicability of the Agreement between the European Communities and the Council of Europe on the transfer of pension rights (hereinafter "the Agreement") to persons who continued to be EU officials, seeking the correct application of the law, not a privileged treatment derogating from the law.

7. By a memorandum DRH(2017)869 of 20 December 2017 the DHR informed the appellant that the Agreement does not expressly provide for a transfer of pension rights acquired during an unpaid leave. However, the DHR confirmed that it was possible by analogy to apply the provisions of the Agreement applicable to the transfer of pension rights following recruitment which provide for a period of six months to be applied. The Director stated in particular (original version):

*« Après avoir consulté les membres du Comité d'Administration des Pensions des Organisations Coordonnées (CAPOC) lors de leur dernière réunion le 13 décembre 2017, je vous confirme que l'accord entre les Communautés Européennes et le Conseil de l'Europe relatif au transfert de droits à pension ne prévoit pas expressément la possibilité de transférer des droits acquis pendant une période de congé sans traitement. Le CAPOC a néanmoins confirmé, par assimilation, la pratique visant à permettre à l'agent de transférer ses droits à l'issue d'un congé sans traitement sur un mode de fonctionnement identique à celui prévu dans les accords de transfert ou, à défaut, sur la base des dispositions prévues par l'article 12 du Règlement de pension.*

*Aussi, le délai de 6 mois prévu par l'accord de transfert (...) est également applicable en cas de transfert suite à un congé sans traitement. Ce délai, comme pour le cas d'un transfert lors d'un engagement, est ferme et ne peut être remis en cause quelles que soient les circonstances, y compris celles auxquelles vous faites référence.*

*Tout en comprenant votre situation et vos motivations tout à fait légitimes, il ne nous est malheureusement pas possible de faire exception au règlement en vigueur pour des raisons de cohérence globale du système de pension et des accords de transfert en vigueur.*

*(...) Au-delà de [la date du 28 février 2018], un éventuel transfert de vos droits à pension de l'Union européenne vers le Conseil de l'Europe ne pourra pas être pris en compte. »*

8. On 2 January 2018 the appellant submitted to the Secretary General an administrative complaint challenging the decision to apply to his situation the provisions of the Agreement applicable for the recruitment, in particular the six-month time-limit. He underlined that he

wished to maintain the possibility to transfer his pension rights until he would decide to resign from the European Union, so until the end of his unpaid leave which could be extended until 31 August 2029.

9. On 3 January 2018 the appellant applied for a stay of execution of the decision notified to him via memorandum DRH(2017)869 of 20 December 2017 whereby the Administration had decided that he could not transfer pension rights from the European Union to the Council of Europe later than 28 February 2018 (see also paragraph 10 below).

10. On 18 January 2018 the Chair of the Administrative Tribunal granted the stay of execution which would expire at the latest one month after the delivery of a judgment by the Administrative Tribunal.

11. On 1 February 2018 the Secretary General dismissed the appellant's administrative complaint. He stated in particular (original version):

« (...)

*Le 2 janvier, vous avez introduit la présente réclamation administrative à l'encontre de la décision d'appliquer à votre situation les dispositions de l'accord conclu entre l'Union européenne et le Conseil de l'Europe relatif au transfert de droits à pension à la suite d'un recrutement. Vous contestez en particulier le délai de six mois – à compter de votre réintégration au sein du Conseil de l'Europe – dans lequel doit intervenir votre décision de transférer ou non le droits à pension que vous avez acquis auprès de l'Union européenne. Vous souhaitez préserver la possibilité de transférer vos droits à pension aussi longtemps que vous n'aurez pas décidé de démissionner de l'Union européenne, jusqu'à la fin de votre congé sans traitement qui peut s'étendre jusqu'au 31 août 2029.*

(...)

*[La] décision, que vous contestez et dont vous demandez l'annulation, ne saurait être considérée comme vous faisant grief puisqu'elle vise à rendre possible un éventuel transfert de vos droits à pension à l'issue de votre congé sans traitement. En l'absence d'une telle décision de rendre applicable à votre cas, par analogie, les dispositions réglementaires applicables au transfert des droits à pension à la suite d'un recrutement, votre demande de transfert de vos droits à pension serait dépourvue de toute base légale et ne serait juridiquement pas possible.*

(...)

*Il convient de souligner que vous n'êtes aucunement contraint de démissionner de l'Union européenne si vous ne le souhaitez pas. Vous pouvez renoncer à transférer vos droits à pension si vous estimez que les conséquences qu'entraîneraient pour vous un tel transfert ne sont pas dans votre intérêt.*

*La solution adoptée par la DRH pour vous permettre de transférer vos droits à pension est dans votre intérêt en ce qu'elle vise à vous ouvrir la possibilité de procéder à un tel transfert, alors même que cette possibilité n'existe pas selon les textes applicables.*

*C'est à vous qu'il appartient d'effectuer ce choix et si vous estimez qu'il n'est pas dans votre intérêt de transférer vos droits à pension selon les modalités qui vous sont offertes, ce choix vous appartient.*

*En revanche, le simple fait que vous soyez dans l'incapacité d'exercer un choix définitif à l'heure actuelle sur cette question ad hoc, en dehors de toute base réglementaire, qui vous permettrait de conserver la possibilité de transférer vos droits à pension jusqu'au jour où vous déciderez de démissionner de l'UE, à une date incertaine durant les douze années à venir. Une telle durée est manifestement disproportionnée et rien ne justifie de traiter à ce point différemment votre situation de celle des agents nouvellement recrutés, y compris des agents qui*

*comme vous sont des fonctionnaires de l'UE bénéficiant d'un congé sans traitement, qui ne disposent quant à eux que d'un délai de six mois pour décider d'effectuer un tel transfert de droits. »*

12. On 3 April 2018 the appellant introduced the present appeal to the Administrative Tribunal.

13. In a letter of 4 May 2018, the Head of Unit of the Office for the Administration and Payment of Individual Entitlements stated in particular:

“You have submitted a request regarding a possible transfer of your pension rights acquired during the years you have been working for the European Institutions to the Council of Europe. You base your request on the Agreement signed by the European Commission and the Council of Europe in 2008 with regard to the execution of such transfers.

The agreement with the Council of Europe (CoE) was signed in order to facilitate transfers of pension rights between both Organisations.

Indeed, the purpose of the possibility to transfer pension rights is to facilitate the change of employment among Member States and/or International Organisations and to allow the portability of pension rights as an inherent consequence of the free movement of workers established in Article 45 on the Treaty of the Functioning of the European Union.

In this context, transfers of pension rights from the Pension Scheme of the European Union Institutions (PSEUI) to another pension scheme or fund are governed by Article 11(1) of Annex VIII to the Staff Regulations (SR).

According to Article 11(1) of Annex VIII to the SR only officials who leave the service of the EU institutions will be entitled to have the equivalent actuarial of their pension rights, updated to the actual date of transfer, transferred to the pension fund of the administration or organization where they have started to work.

In this regard, it should be noted that officials on leave on personal grounds are still officials and have not left the service (see Article 35 of the EU Staff Regulations).

The agreement concluded with the Council of Europe with regard to the transfer of pension rights only applies within the conditions laid down in the EU Staff Regulations, i.e. to staff members who have left the service of the EU institutions.

In this context, the basic premise to request a transfer of your acquired pension rights under the PSEUI to the pension scheme of the Council of Europe is not fulfilled in your case, since you are an official and your link with the European Union Institutions is still present.

As to the interpretation of Article 2 of the agreement, it should be noted that such agreements are signed in full respect of the legislation of each party. That includes the time limits and deadlines imposed by the respective Staff Regulations and provisions laid down by means of General Implementing Provisions, from the EU side, or Instructions from the side of the Council of Europe.

Finally, an interpretation of Article 2 of the agreement would be meaningless since that agreement is related to the transfer of pension rights and transfers are only possible for officials who have actually left the service.”

## II. RELEVANT LAW

14. Regulations on unpaid leave of staff members of the Council of Europe are governed by Appendix VII to the Staff Regulations. Under Article 7, paragraph 3, the pension rights of the staff member on unpaid leave and of persons entitled under him or her shall be governed

by the Pension Scheme Rules and the Instructions for their implementation. Article 12 states that a staff member on unpaid leave shall remain subject to overall administrative regulations if not provided otherwise.

15. The Pension Scheme Rules are included in Appendix V to the Staff Regulations. Article 12, paragraph 1, reads as follows:

English version: “A staff member who enters the service of the Organisation after leaving the service of a government administration or national organisation, or international organisation not listed in Article 1, paragraph 1, or a firm, may arrange for payment to the Organisation in accordance with the provisions laid down by Instruction, of any amounts corresponding to the retirement pension rights accrued under the pension scheme to which he was previously affiliated in so far as that scheme allows such a transfer. ...”

French version: « *L'agent qui entre au service de l'Organisation après avoir cessé ses fonctions auprès d'une administration, d'une organisation nationale ou internationale non visée à l'article 1, paragraphe 1 ou d'une entreprise, a la faculté de faire verser à l'Organisation, selon les modalités fixées par voie d'instructions, toute somme correspondant à la liquidation de ses droits au titre du régime de retraite auquel il était antérieurement affilié, dans la mesure où ce régime permet pareil transfert.(...)* »

16. Instruction 12.1 – Inward transfer of previously accrued rights, provides in particular as follows:

English version: “i) Previous periods of affiliation to a pension scheme

a) Reckonable years of service shall be credited pursuant to Article 12, paragraph 1, subject to the conditions set out in this Instruction, in respect of a period of affiliation to the last pension scheme prior to appointment in the Organisation. Such affiliation may cover periods served in several administrations, organisations or firms, on condition that all these rights have been taken into account by the pension scheme of the last administration, organisation or firm before appointment in the Organisation.

...

v) Time limits for application and revocation

Failing any special provisions in a reciprocal transfer agreement entered into by the Organisation, application for the amounts referred to in sub-paragraph ii) above to be taken into account by the Organisation shall be made in writing:

a) either within 6 months from the date of notification of confirmation of appointment after the probationary period;

b) or within twelve months from the date on which the previous pension scheme allowed such transfers; ...”

French version: « *i) Période d'affiliation antérieure*

*a. Des annuités de pension sont accordées en application de l'article 12, paragraphe 1 dans les conditions prévues par les présentes dispositions, au titre de la période d'affiliation au dernier régime de retraite qui précédait l'entrée au service de l'Organisation. Cette affiliation peut tenir compte de périodes accomplies au service de plusieurs administrations, organisations ou entreprises, à condition que l'ensemble de ces droits ait été pris en compte par le régime de retraite de la dernière administration, organisation ou entreprise, avant l'entrée au service de l'Organisation.*

(...)

v) *Délais de demande et de révocation*

*Sauf dispositions particulières contenues dans un accord de transfert réciproque conclu par l'Organisation, la demande de prise en compte par l'Organisation des montants visés par l'alinéa ii) ci-dessus doit être introduite par écrit :*

*a. soit dans un délai de six mois à compter de la notification de la confirmation de l'engagement après le stage probatoire ;*

*b. soit dans un délai de douze mois à compter de la date à laquelle la possibilité de transfert a été ouverte par le précédent régime ; (...)* »

17. Under Article 35 of the EU Staff Regulations, officials may have assigned different administrative statutes including a leave on personal grounds (letter c)) which, in accordance with Article 40, paragraph 2, cannot exceed twelve years in the course of the official's entire career.

18. The EU pension scheme is regulated by Annex VIII to the EU Staff Regulations. Under Article 11, paragraph 1, an official who leaves the service of the European Union to enter the service of a government administration or a national or international organisation which has concluded an agreement with the Union, shall be entitled to have the actuarial equivalent of his retirement pension rights transferred.

19. Transfer of pension rights between the European Union and the Council of Europe is regulated by the Agreement between the European Communities and the Council of Europe on the transfer of Pension Rights (hereinafter "the Agreement") which entered into force on 1 November 2008. It was issued in order to secure the continuity of rights of staff members transferring between these organisations, notably to ensure the transfer of pension rights and their continuity. Transfers from the Community scheme are governed in Article 2. The first sub-paragraph of this provision states:

English version: "A former official who has received no benefit under the Community scheme and becomes a staff member of the Council of Europe ... may elect to have his pension rights transferred to the Council of Europe Scheme, under the following procedure:

a) the staff member shall, not later than six months after becoming a staff member, inform in writing the Council of Europe of his interest in transferring his rights. ..."

French version: « *Un ancien fonctionnaire qui n'a pas reçu une prestation au titre du Régime communautaire et qui devient agent du Conseil de l'Europe peut, s'il remplit les conditions requises et après avoir pris connaissance des informations utiles pour exercer son option, opter pour le transfert de ses droits à pension au Régime du Conseil de l'Europe, selon les modalités suivantes:*

*a) l'agent informe le Conseil de l'Europe, par écrit dans un délai maximal de six mois à compter de la date à laquelle il est devenu agent, de son intention de transférer ses droits. ... »*

## THE LAW

### I. THE PARTIES' SUBMISSIONS

#### A. As to the admissibility

##### 1. *The Secretary General*

20. The Secretary General argues, at the outset, that the decision which the appellant seeks to quash does not have the status of an adversely affecting act within the meaning of Article 59, paragraph 2, of the Staff Regulations. His administrative complaint not being in accordance with the requirements of this provision, the present appeal is therefore inadmissible.

21. The decision to apply the provisions of the Agreement as a result of recruitment does not adversely affect the appellant. On the contrary, this decision is favorable to him.

22. The regulatory framework of the Council of Europe does not provide for a subjective right of agents to transfer the pension rights they would have acquired during an unpaid leave. Indeed, Article 12 of the Pension Scheme (Appendix V to the Staff Regulations) only refers to the possibility of transferring pension rights at the moment of "entry the service of the Organisation", so at the moment of recruitment. The case of a transfer after an unpaid leave is not provided for in the current regulatory framework.

23. Staff members cannot avail themselves of any right to transfer pension rights acquired during the unpaid leave from another employer upon their reintegration into Europe. It is for the sole purpose of offering a favorable solution to the appellant that the Administration made it possible to transfer his acquired pension rights in such a context, but the appellant cannot avail himself of a right whose ignorance will make him an adversely affecting act.

24. Under Article 59, paragraph 2, of the Staff Regulations, an administrative complaint claim, and thus an appeal, must be directed against an administrative act adversely affecting the appellant and causes him or her damage. That condition is not fulfilled in the present case since no subjective right is conferred on the appellant by the applicable statutory provisions which would allow him to transfer his pension rights at the end of his unpaid leave. Accordingly, his action is inadmissible.

##### 2. *The appellant*

25. The appellant challenges the interpretation of Article 7, paragraph 3, of Appendix VII to the Staff Regulation. According to him, the only logical interpretation of this provision is that it makes applicable *mutatis mutandis* to the specific situation of staff on unpaid leave those rules in Appendix V which are formulated there only with regard to the most common situation. This, in his view, is the case of Article 12 of Appendix V. Construed in conjunction with Article 7, paragraph 3, of Appendix VII, it therefore provides for a right to pension contributions transfer for those returning from unpaid leave.

26. The appellant adds that it is difficult to imagine any reason for the Staff Regulations limiting the right to a pension contribution transfer only to the situation of newly recruited staff. Furthermore, it is significant that there is an established practice according to which the

Council of Europe permits staff returning from unpaid leave to undertake a pension rights transfer under the same or similar conditions as newly recruited staff. In these circumstances, any suggestion that the Administration is free to refuse him a pension transfer altogether because he was returning from unpaid leave, is contrary to the elementary principles of legality, equal treatment and good administration.

27. The appellant states that the impugned decision is not an act “creating” a right of transfer for him but an act restricting that right. According to him, a decision which is partly favourable but affects the individual adversely by imposing unlawfully and without justification a time-limit that has adverse consequences, can be subject to an administrative complaint under Article 59, paragraph 2, of the Staff Regulations and to an appeal to the Administrative Tribunal, insofar as the time-limit causing adverse consequences is concerned.

**B. As to the merits**

*1. The appellant*

28. The appellant argues that the impugned decision of 20 December 2017 has as its sole legal basis Article 2 of the Agreement which, in his opinion, does not apply to his situation: he remains the member staff of the European Union being currently on unpaid leave, contrary to the provisions of the Agreement which applies to newly recruited staff members. He therefore considers that the Agreement cannot be a valid legal basis for the impugned decision which, having no other legal basis is unlawful and must be quashed. According to him, the Secretary General disregards the relevant provisions of the Staff Regulations, i.e. Article 12, paragraph 1, of Appendix V (Pension Scheme Rules) read in conjunction with Article 7, paragraph 3, of Appendix VII (Regulations on unpaid leave), which provided for a right to a pension transfer for newly recruited staff and for staff returning from unpaid leave. There is therefore no room for applying provisions by analogy since there exist applicable provisions of the Staff Regulations and, furthermore, it is highly questionable whether an international agreement can be applied by analogy without the consent of the other party to it.

29. Moreover, the Council of Europe permits staff members returning from unpaid leave to undertake pension rights transfer under the same conditions as newly recruited staff. In these circumstances, any suggestion that the Administration is free to refuse the appellant a pension rights transfer because he is returning from unpaid leave, disregarding the relevant provisions and while allowing it for all other staff members returning from unpaid leave, is unacceptable as being contrary to the elementary principles of legality, equal treatment and good administration.

30. The appellant considers being inconceivable that without explicit mention of the situation of staff on unpaid leave, through an agreement concerned with facilitating pension transfers, the European Union intended to derogate from its staff regulations under which staff on unpaid leave are entitled to preserve this status as long as they remain on unpaid leave. According to him that is not legally possible under Article 5.1. of the Agreement.

31. As there does not exist an applicable transfer agreement, within the meaning of Article 12, paragraph 1 of Appendix V (Pension scheme rules) to the Council of Europe regulations, the time-limit for the appellant to exercise his right to initiate a transfer can only be derived from this general provision and the Instruction for its implementation, as



mandated by Article 7, paragraph 3, of Appendix VII (Regulations on unpaid leave). However, the decision in question, insofar as it imposes 28 February 2018 as a time-limit, is not based on these provisions but on an inapplicable text (the Agreement).

32. The appellant further points out that the decision in question cannot be considered necessary to maintain a coherent practice of the coordinated organisations because staff members of the European Union on unpaid leave and former officials are in a fundamentally different situation. The first category has a legal status as EU staff, with corresponding rights and obligations, and the second category have no legal link to the European Union. Most importantly, in the case of the first category, imposing a six-month time-limit for pension rights transfer creates an impossible dilemma which strongly discourages mobility of permanent staff, whereas in the case of the second category such time-limit is nothing more than a procedural formality. Treating different situations in the same manner mechanically is not coherent and may be seen as discriminatory.

33. The appellant argues that he should be allowed to transfer his pension rights when the question of a transfer arises, within a time-limit of his future resignation from the European Union, which is perfectly compatible with the existing administrative practice of allowing such transfers from persons who return to the Council of Europe after having resigned or otherwise terminated their EU employment.

34. The appellant also maintains that the impugned decision placed him in a “lose-lose” situation: either to lose for good a status that provides important career and job security perspectives or to lose the benefits of pension rights continuity, which may potentially engender a significant pecuniary loss. Therefore, what is at stake is not a simple administrative formality, but a restriction with very significant personal and pecuniary consequences. Moreover, the effect of the decision is to put undue pressure on the appellant to resign from the European Union. Such a result is unnecessary, contrary to the Council of Europe policy on mobility and in conflict with the Organisation’s vital interest in good cooperation with the European Union, including as regards staff exchange.

35. The appellant adds that in his dealings with the Administration, he always maintained a fully transparent and conciliatory approach and stated openly what was at stake for him. Moreover, the system of actuarial calculation of pension benefits resulting from transfer of pension contributions is clear and permits to calculate with precision the exact amount in pension benefits he would obtain from a transfer and exactly how this amount diminishes if the transfer is made later in time. The benefits the appellant will obtain will diminish if he delays the transfer and he therefore incur a loss with every month. Nevertheless, the appellant is willing to incur this loss in order to preserve an important professional opportunity, the potential possibility to work for the European Union again if the budgetary crisis at the Council of Europe worsens. Moreover, if the appellant decides not to make a transfer and return to work for the European Union, the situation is also clear: he can calculate exactly what pension he could obtain from the European Union for each additional year of work there. The appellant further states that by delaying a pension rights transfer cannot prejudice the Council of Europe pension scheme because that scheme gives lesser benefits for a transfer of the same amount by an older person.

36. In reply to the argument of the Secretary General that accepting his position would discriminate against in particular newly recruited staff in the Council of Europe who are on unpaid leave from the European Union, in that they have only six months after recruitment to

make a transfer, under Article 2 of the Agreement, the appellant maintains that the Agreement does not apply to these staff members and the Council of Europe acts unlawfully when it imposes on such persons, on the basis of the Agreement, a six-month time-limit counted from their recruitment.

## 2. *The Secretary General*

37. The Secretary General maintains that it clearly appears from the wording of Article 12, paragraph 1, of the Pension Scheme Regulation that the personal and material scope of that provision is the same as that of the Agreement: the only situation in which a staff member can transfer pension rights which he or she had previously acquired is at the moment his or her recruitment, when he or she enters into the service of the Council of the Europe. This requires that the staff member ceased his duties with his or her previous employer - otherwise the question of transfer of pension rights does not arise - and that the pension plan to which he was previously affiliated allows such a transfer of pension rights. In other words, Article 12, paragraph 1, of the Pension Scheme Regulations does not cover a situation when an agent re-enters the Organization after an unpaid leave.

38. With regard to the rights set out in Article 7, paragraph 3, of the Regulations on unpaid leave, the Secretary General argues that the Agreement has been concluded pursuant to Article 12 of the Pension Scheme Regulations, which implements the provisions of the Pension Scheme Regulations. In that respect, the application of the provisions of that agreement to the appellant's situation does not contradict Article 7, paragraph 3.

39. The Secretary General admits that the solution proposed by the DHR to the appellant is not expressly provided for by the texts in force. This approach makes it possible for staff members who have acquired pension rights during their unpaid leave to transfer their entitlements at the end of the leave, under the same conditions as those provided for a transfer of pension rights upon a recruitment. In this respect, the HRD applies, *mutatis mutandis*, the regulatory provisions for transfers of pension rights following recruitment to staff reinstated after their unpaid leave during which they acquired pension rights. Otherwise, the transfer of pension rights after an unpaid leave would simply not be possible since Article 12 of the Pension Scheme Regulations and, consequently, the Agreement does not provide for the possibility of transferring pension rights after the unpaid leave. The Secretary General affirms that this solution is in line with the desire expressed in the preamble of the agreement with the European Union "facilitate the exchange of personnel" and "to secure, ... the continuity of rights of staff members transferring these between these organisations".

40. The Secretary General maintains that each organisation remains sovereign in the management of its pension scheme in accordance with the applicable regulations. Only the difficulties in executing the Agreement require the parties to it to consult each other. According to him, the question which is the subject of the present case does not constitute a difficulty in execution of the Agreement and there is no need to obtain any agreement from the European Union to allow the Council of Europe to apply its rules in a sovereign manner to allow the implementation of pension rights transfers to the Council of Europe pension scheme.

41. The Secretary General underlines that the appellant is not compelled to resign from the European Union if he does not wish so. He may decide to waive the transfer of his pension rights if he considers that the consequences that such a decision would entail for him

– in particular, the need to resign to allow a transfer of pension rights - are not in his interest. Indeed, the transfer of pension rights acquired from another pension plan is not an obligation, but an option that each staff member exercises according to his or her personal interests.

42. It is now up to the appellant to make the choice whether or not to transfer his pension rights. The mere fact that he is unable to make a definitive choice at the moment cannot justify the adoption of an *ad hoc* decision, without any regulatory basis, which would allow him to retain the possibility of transferring pension rights on a wholly discretionary basis until he would decide, at any moment during next twelve years, according to the economic situation and in order to optimise his risks according to his interests whether to resign from the European Union or not.

43. Such a period is clearly disproportionate and there is no reason to deal with the appellant's situation differently from that of all newly recruited staff, including staff who, like the appellant, is staff members of the European Union enjoying an unpaid leave, who have six months to decide to make a transfer of rights. Indeed, all the newly recruited staff and all the staff reinstated after a leave without pay are treated in the same way with regard to the time they have to request the transfer of pension rights: the request must be made within six months of the confirmation of the appointment at the end of the probationary period or within six months of the reinstatement of the staff member.

44. The Secretary General maintains that it is only the appellant's choice to be on unpaid leave from the European Union, which places him in the present situation with regard to the transfer of his pension rights. It is therefore up to him to determine the financial implications of one or the other option he has, and this responsibility cannot bear by the Council of Europe.

45. If the appellant transferred his rights to the Council of Europe and then finally decided to resign from the Organisation to re-join the European Union, he could then benefit from the Agreement and repatriate all his pension rights to the European Union pension scheme. He is therefore not liable to lose the rights on one side or the other. In any case, if he was never to return to the service of the European Union and was therefore forced to resign, he would be obliged to transfer his pension rights from the European Union scheme to another system as it requires so. Such a late transfer would be to the detriment of the appellant since according to the terms of the calculation provided for in the Pension Regulations, the transfer of his pension rights will be unfavourable financially if it intervenes in 12 years compared to a transfer that would be made today.

46. In the light of these considerations, the Secretary General concludes that the present appeal is ill-founded.

### III. THE TRIBUNAL'S ASSESSMENT

47. In the present appeal, the appellant seeks to annul the decision of the Director of Human Resources of 20 December 2017, insofar as it determines that a pension transfer request submitted by the appellant after 28 February 2018 shall be refused.

The appellant also asks the Tribunal to order to the effect that the Administration of the Council of Europe shall accept any future transfer from the European Commission of his pension rights accumulated with them if such transfer is requested within a period of time, to

be determined in the order, after the termination of the appellant's status of European Union official and before his retirement from the Council of Europe.

**A. As to the admissibility**

48. The Tribunal notes at the outset that an act adversely affecting a person is an act that has a negative impact on the legal position of a person and may therefore be challenged before the Tribunal under Article 59, paragraph 2, of the Staff Regulations. It has therefore to examine whether the decision of 20 December 2017, challenged by the appellant, constitutes such an act.

49. The Tribunal notes in this respect that the Staff Regulations do not contain any particular provision which would expressly provide for a time-limit for transfer of pension rights concerning a staff member who is coming back from his or her unpaid leave. This is not disputed by the Secretary General (see paragraph 22 above).

50. The Tribunal observes that, although this was not expressly required by the Council of Europe, the request for transfer of pension rights was *de facto* conditioned by the resignation of the staff member concerned from the European Union. This is clearer after the position taken by the European Union in the letter of 4 May 2018 (see paragraph 13 above). However, as it has been mentioned above, the aim of the appellant was the opposite. Accordingly, while the decision of 20 December 2017 could appear to be beneficial for the appellant, as the Secretary General argues, when allowing him to transfer his pension rights within the six-month time-limit, in reality it was detrimental to him because compelling him to resign from the European Union in a short period of time.

51. In these considerations, the Tribunal finds that the decision of 20 December 2017 by which the Administration constrained the appellant to transfer his pension rights by 28 February 2018 constitutes an act which has a negative impact on the legal position of the appellant and may therefore be challenged under Article 59, paragraph 2, of the Staff Regulations.

52. Accordingly, the Tribunal concludes that the present appeal is admissible, and rejects the objection of the Secretary General.

**B. As to the merits**

53. The Tribunal recalls that an administrative decision adopted by the Organisation, which adversely affect its staff members has to be based on applicable regulations valid at the moment when the decision is taken. The regulations have to be precise and foreseeable as to their application.

54. The Tribunal observes that the pension scheme rules are embodied in Appendix V to the Staff Regulations. The memorandum of 20 December 2017 mentions the potential applicability of Article 12 (see paragraph 7 above). Paragraph 1 of this provision provides for the possibility to transfer pension rights to the Council of Europe pension scheme from the regime to which a staff member was previously affiliated. In respect of the wording of this provision, the Tribunal notes that although the wording of the English version "after leaving the service of ... international organisation" could be interpreted more extensively because it does not specify whether such a leave is limited in time, the French version is more precise. It

indicates “[l]’agent qui entre au service de l’Organisation après avoir cessé ses fonctions auprès d’une (...) organisation internationale”, not permitting any doubt that the possibility to transfer pension rights provided for in Article 12, paragraph 1, of Appendix V does concern only newly recruited staff members. The Tribunal therefore considers that this provision cannot apply in the present case where the appellant was reintegrated into the Organisation after his five-year unpaid leave. The Tribunal adds that the same conclusion is valid in respect of Instruction 12.1 issued in application of Article 12, paragraph 1, of Appendix V.

55. The Tribunal further observes that the memorandum in question is mainly based on the Agreement, interpreted *per analogiam*, which, similarly to Article 12 of Appendix V, applied only to former staff members of both the European Union and the Council of Europe (see paragraphs 7, 13 and 19 above).

56. Hence, the Tribunal finds that neither the Staff Regulations and Appendix V nor the Agreement expressly provide for the possibility of transferring the pension rights acquired by a staff member during a period of unpaid leave.

57. The question therefore arises whether the Agreement applied to the appellant *per analogiam* could constitute a legal basis in the present case. The Tribunal recalls in this respect that any international treaty has to be interpreted in accordance with the ordinary meaning of its terms in their context and with regard to the object and purpose of that treaty. It observes that the aim of the Agreement is the continuity of pension rights of staff members of the European Union and the Council of Europe (see 19 paragraph above).

58. As it has already been mentioned, it clearly appears from the terms of the Agreement that its explicit object is the transfer of pension rights of former staff members (see paragraphs 13, 19 and 55 above). However, the appellant is not a “former” staff member either of the European Union or of the Council of Europe but he is a staff member of both of them. The Tribunal therefore considers that by applying the Agreement *per analogiam* to the appellant’s situation, the Organisation disregarded the purpose and object of the Agreement and contrary to the ordinary meaning of its terms.

59. The Tribunal notes the arguments of the Secretary General that the DHR consulted the Pensions Administrative Committee of the Co-ordinated Organisations (PACCO) and that allowing the appellant the transfer of his pension rights, the Organisation acted in his favour. It stresses, however, that the PACCO did not submit its official opinion in the matter, having been contacted rather informally (see paragraph 7 above). Moreover, the appellant addressed to the DHR aiming the future transfer of his pension rights once he would decide to resign from the European Union (see paragraph 5 above). Indeed, there is no provision in the Staff Regulations which would compel a staff member, who is on unpaid leave from another national or international organisation, to transfer his or her pension rights. Neither the Staff Regulations forbids a staff member working for the Council of Europe to be simultaneously a staff member of another national or international organisation.

60. Furthermore, the Tribunal considers that requiring from the appellant to transfer his pension rights within the six-month period of time, when he was still an official of the European Union, it acted not only against the interests of the appellant but also against the interests of the European Union.

61. In the light of these considerations, the Tribunal finds that the Agreement applied to the appellant's situation *per analogiam* cannot constitute the legal basis for the decision of 20 December 2017.

62. Accordingly, the Tribunal concludes that the appeal is well founded and that the contested act must be declared null and void.

As far as the appellant asks the Tribunal to order to the effect that the Administration of the Council of Europe shall accept any future transfer from the European Commission of his pension rights (see paragraph 47, second sub-paragraph, above), the Tribunal rules in this respect that its finding cannot be extended to any eventualities which may arise in the future, having the jurisdiction only on the current case.

#### IV. CLAIMS FOR COMPENSATION AND REIMBURSEMENT OF PROCEDURAL COSTS

63. Since the appellant does not submit any claim for compensation or reimbursement of costs, the Tribunal does not make any award in this respect.

#### V. CONCLUSION

64. In conclusion, the appeal is admissible and the act complained of, i.e. the decision of 20 December 2017, must be annulled.

For these reasons, the Administrative Tribunal:

Declares appeal No. 589/2018 admissible and annuls the act complained of;

Decides that each party shall bear its own costs.

Adopted by the Tribunal in Strasbourg on 22 November 2018 and delivered in writing on 29 November 2018 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the English text being authentic.

The Registrar of the  
Administrative Tribunal

The Deputy Chair of the  
Administrative Tribunal

S. SANSOTTA

A. BAKA