CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 604/2019
(Isabela MIHALACHE (I) v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Ms Nina VAJIĆ, Chair,
Ms Françoise TULKENS,
Mr Christos VASSILOPOULOS, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Isabela Mihalache, lodged her appeal on 19 February 2019. On 22 February 2019, the appeal was registered under No. 604/2019.

2. On 1 April 2019, the then Secretary General forwarded his observations on the appeal.

3. On 24 April 2019, the appellant submitted observations in reply.

4. The public hearing on the appeal took place in the Administrative Tribunal's hearing room in Strasbourg on 14 June 2019. The appellant was represented by Ms Nathalie Verneau, Council of Europe staff member, assisted by Ms Cecile Anglade, lawyer, while the Secretary General was represented by Ms Sania Ivedi, administrative officer in the Department of Legal Advice and Public International Law (Jurisconsult), assisted by Ms Léa Boucard, assistant lawyer in the same department.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The appellant was a temporary Council of Europe staff member. She is of Roma origin.

6. She was employed by the Organisation, from 8 April 2014, on temporary contracts governed by Rule No. 1232 laying down the conditions of recruitment and employment of temporary staff members in France, the maximum period of employment in any given calendar year being nine months. Her last appointment ended on 30 September 2018. She was assigned to the Roma and Travellers Team, as project manager. This is a joint Council of Europe/European Union programme called JUSTROM. To date, there have been two phases (JUSTROM1 and JUSTROM2) and there are plans for a third one (JUSTROM3) which was to start in March 2019.

7. At the end of 2016, the Organisation published vacancy notice no. e178/2016 for the following post:

> "Senior Programme Officer (grade B5)
> Directorate General of Democracy
>
> Support Team of the Special Representative of the Secretary General for Roma Issues"

8. According to the said vacancy notice, the procedure would take place in accordance with Article 15 B (Recruitment for fixed-term contracts) of the Regulations on appointments (Appendix II to the Staff Regulations).

9. As regards the "job mission" (first section of the vacancy notice), it was stated as follows:

> "Under the authority of the Special Representative of the Secretary General for Roma Issues and the Head of the Support Team, the incumbent ensures proper implementation of the Strasbourg Declarations on Roma as well as the Thematic Action Plan for the Inclusion of Roma and Travellers in Europe (2016-2019), provides secretariat services in the planning, implementation and assessment of programmes, projects and related activities, and will coordinate activities developed by the Team in collaboration with other members of staff concerned, in accordance with guidelines, priorities and deadlines with a concern of quality, efficiency and accuracy."

10. In the last section ("additional information") of the vacancy notice, it was specified, *inter alia*, that:

> "Following this competition, a reserve list of successful candidates, in order of merit, may be established. …"

11. On 16 October 2017, the Directorate of Human Resources sent the appellant the following memorandum:

> "…I should like to inform you that the Secretary General has decided to approve the recommendation of the Appointments Board to establish a reserve list of 5 eligible candidates upon which your name has been placed.
>
> Accordingly, you may be offered employment at the Council of Europe should a fixed-term position corresponding to your qualifications become vacant within the period of validity of the reserve list (two years with the possibility of extending it to a maximum of four years by decision of the Secretary General).
>
> It should be noted however, that being placed on a reserve list does not constitute an entitlement to an offer of employment within the Council of Europe."

The Tribunal has not been informed as to where on the reserve list the appellant has been placed.

12. On 1 June 2018, the appellant was informed that a B5 position for a senior project officer to manage and implement the JUSTROM2 project (tasks which the appellant had been performing as a temporary staff member) had been created. At the same time, she was told that first efforts would be made to fill the new position internally, before consideration could be given to appointing a suitable candidate from a valid reserve list.

13. An internal appointment procedure was launched in June and an internal vacancy notice to fill the post was drawn up in July 2018 although it was never published.

14. In August 2018, the appellant was informed that the Directorate of Human Resources was obliged to give priority to redeploying unassigned staff members on indefinite-term contracts in vacant posts or positions within the Organisation that matched their grades and qualifications.

15. On 4 September 2018, the appellant was informed that a suitably qualified staff member on a B5 indefinite-term contract, who had not been assigned after returning from unpaid leave for personal reasons, was to be appointed to the position of senior project officer for JUSTROM2 and that this person would take over from her on 1 October 2018, the appellant's temporary contract being due to end on 30 September 2018 when she would have been employed for the maximum of 9 months. The staff member in question had no Roma connection although she had worked before in the field of non-discrimination.

16. On 28 September 2018, the appellant submitted an administrative complaint to the Secretary General under Article 59, paragraph 1, of the Staff Regulations.

17. She asked him to find a way to enable her to continue working under the JUSTROM programme. She also asked that the recruitment procedure further to vacancy notice no. e178/2016 be completed. Lastly, she indicated her willingness to work at the Council of Europe in any other suitable post.

18. On 31 October 2018, the Director of Human Resources replied to the administrative request, on behalf of the Secretary General.

She reminded the appellant that she was aware of the conditions governing temporary employment and that such contracts did not confer entitlement to a further renewal or to conversion into another type of contract.

As to her assertion that the Directorate of Human Resources had blocked the internal mobility procedure, the said Directorate noted that DHR had an obligation to give priority to redeploying suitably qualified staff members on indefinite-term contracts over the recruitment of successful candidates from reserve lists.

She pointed out that, pursuant to the Staff Regulations, the Secretary General had discretion as to the choice of procedure for filling a vacant post or position. She further pointed out that being placed on a reserve list did not give candidates the right to an appointment within the Council of Europe.

The appellant was further informed that the reserve list having been drawn up, the competitive examination under vacancy notice no. e178/2016 had achieved its objective and had in fact, therefore, been completed since the competition had been held precisely for the purpose of compiling a reserve list to meet possible future recruitment needs.

Lastly, regarding the appellant's willingness to work at the Council of Europe in any other post suitable for her professional background and experience, the Director of Human Resources assured the appellant that she would remain on the reserve list until the date of its expiry.

19. On 29 November 2018, the appellant submitted an administrative complaint to the Secretary General under Article 59, paragraph 2, of the Staff Regulations in which she contested the reply to her administrative request.

20. She claimed "to have been unfairly and wrongfully replaced in the role in which she had been employed under the JUSTROM project" and asked that "DHR acknowledge that she is entitled to be offered an arrangement that would allow her to continue working at the Council of Europe on the JUSTROM project and that it complete the recruitment set in motion by the competition in 2016".

21. In conclusion, the appellant asked the Secretary General to revoke the Administration's decision to depart from the original recruitment procedure and redeploy a Council of Europe staff member, and to appoint that staff member to the position she had held.

22. On 21 December 2018, the Secretary General rejected the administrative complaint on the ground that it was inadmissible and/or unfounded.

23. On 19 March 2018, the appellant lodged the present appeal.

24. From the information provided at the hearing it appears that the Organisation has not suspended or closed the recruitment procedure set in motion by the vacancy notice in question: it would seem that it is still officially open and that the reserve list is still valid.

25. The Tribunal also understands that the appellant is working in Brussels on similar projects although it has no information as to the type of contract under which she is employed.

II. RELEVANT LAW

26. Article 59, paragraph 2, of the Staff Regulations concerns the lodging of administrative complaints and reads as follows:

> "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 or any official acting by delegation from the Secretary General."

27. Matters relating to recruitment are governed by Part II of the Staff Regulations and by Appendix II (Regulations on appointments) to the said Regulations.

28. Article 45, paragraph 3, of the Staff Regulations concerns unpaid leave; the conditions under which a staff member may be granted unpaid leave are set out in Appendix VII (Regulations on unpaid leave) to the said Regulations. Article 8, paragraph 1, concerns returning from leave and reads as follows:

> Annexe III "When staff members assigned to posts (Appendix III to the Staff Regulations) take unpaid leave, they are entitled to be reinstated in their post on their return. The post will thus be kept vacant."

29. Temporary contracts are governed by Rule No. 1232 of 15 December 2005 laying down the conditions of recruitment and employment of temporary staff members in France from 1 January 2006.

Pursuant to Article 2.1, the provisions of Article 3 of the Staff Regulations on non-discrimination apply to temporary staff.

According to Article 3.3 of this Rule, temporary contracts may be renewed in accordance with the conditions laid down in the said Rule, but renewal does not confer entitlement to further renewal or to conversion into another type of contract.

THE LAW

30. The appellant seeks the annulment of the decision not to give her any more contracts and the decision to appoint another Council of Europe staff member to run the JUSTROM programme. She also asks to be allowed to return to this team, or to a sector

of the Organisation where her specific experience and qualifications could be put to good use.

31. The appellant goes on to claim compensation for the non-pecuniary damage which she allegedly suffered because of the way in which the Directorate of Human Resources behaved towards her.

32. The Secretary General invites the Tribunal to declare the appeal inadmissible and, in the alternative, ill-founded and to dismiss it.

I. THE ADMISSIBILITY OF THE COMPLAINT

A. The Secretary General

33. After citing Article 59, paragraph 2, of the Staff Regulations, the Secretary General submits that the appeal is inadmissible as the appellant has no interest in taking action, for two reasons.

34. Firstly, the appeal is directed against the decision to redeploy a staff member on an indefinite-term contract in a vacant post or position. In the Secretary General's view, therefore, it is not directed against an administrative act that is directly and currently affecting the appellant within the meaning of the said Article 59, paragraph 2, of the Staff Regulations.

35. According to the Secretary General, the decision to redeploy an unassigned staff member on an indefinite-term contract in a vacant post or position which matches their grade and qualifications rather than to recruit is a decision relating to the general organisation of the Council of Europe, one aimed at complying with the requirement to give priority to redeploying staff on indefinite-term contracts, especially given the current funding crisis and the need for action to deal with a significant reduction in the Organisation's budget.

36. Since this redeployment decision does not directly concern the appellant's individual situation, her interest is indirect and ancillary to the purpose and objective of the redeployment in question and she does not have a direct and existing interest within the meaning of Article 59, paragraph 2, of the Staff Regulations in complaining of that decision.

37. Secondly, the appellant does not have a direct and existing interest in challenging the decision not to recruit her straightaway from the reserve list drawn up after the competition under vacancy notice no. e178/2016. As a candidate placed on a reserve list, she has no right to an appointment within the Council of Europe, something that was pointed out to her on several occasions, including in vacancy notice no. e178/2016 and in the decision communicated to her after the competition, informing her that she had been placed on the reserve list.

The decision in question, therefore, is not an administrative act capable of adversely affecting the appellant as she does not have a subjective right to be recruited to the Council of Europe solely because she is on a reserve list.

38. For these reasons, therefore, the present appeal is inadmissible.

B. The appellant

39. After citing the Tribunal's case-law (ATCE, Appeal No. 267/2001- Peukert v. Secretary General, decision of 31 January 2002, paragraph 24; Appeals Nos. 587 and 588/2018 - Devaux (II) and (III) v. Secretary General, decision of 25 September 2018, paragraph 45, and Appeals Nos. 258 and 261/2000 – Ballester v. Secretary General, decision of 31 January 2002, paragraph 45), the appellant points out that the act complained of need not necessarily be directed at her. Also, it is enough that there should be a reasonable chance of being appointed in order for her to have a direct and existing interest. In the case in point, the decision which she is challenging was taken at a time when there was talk of making the post which she had held for four years permanent. Also, she had passed the competitive examination for this post. She therefore believes that she had a reasonable chance of being appointed to the post in question.

40. In the appellant's view, it follows that, had the recruitment procedure not been disrupted by the decision to redeploy a staff member on an indefinite-term contract, the post would very likely have been filled. She is still feeling the impact of this decision as she remains excluded from the project and the Organisation.

41. Lastly, the appellant submits that the obligation to redeploy the other staff member had no legal basis at the time of the facts at issue.

42. The appellant is therefore of the opinion that her appeal should not be declared inadmissible.

C. The Tribunal's assessment

43. The Tribunal notes that, through her appeal, the appellant is challenging first and foremost the failure to afford her the possibility of being recruited after competition no. e178/2016 and not the decision to assign the other staff member to the post in question.

44. In essence, the appellant submits that, although she passed the relevant competitive examination and is on the reserve list and although this list has never been invalidated for any reason, the Secretary General chose to ignore the results of the competition and to fill the vacancy by appointing another person who was not on that list.

45. The Tribunal acknowledges that the Secretary General has the right to disregard the order of merit in which candidates are selected through a competitive examination for reasons which it shall be for him to assess and explain to the required legal standard. The decision to disregard the results of a valid competition and appoint another staff member without launching a new competition does nevertheless directly affect the legitimate interests of the persons on the reserve list for that competition. The fact that a candidate has taken part in a competition, following which they were placed on the reserve list, proves, in fact, that they have an interest in how the Administration follows up that competition. Such is the case here where another person was appointed to the post to be filled, regardless of the outcome of the competition.

46. In these circumstances, the impugned decision adversely affects the appellant, as there is no question that she has a direct and existing interest in relying on the guarantees provided for in Articles 59 and 60 of the Staff Regulations.

47. Accordingly, the Tribunal rejects the objections to admissibility raised by the Secretary General and declares the present appeal admissible.

II. ON THE MERITS

A. The appellant

48. The appellant considers that she was unfairly and wrongfully replaced in the role in which she had been employed under the JUSTROM project. She asks that the Directorate of Human Resources acknowledge that she is entitled to be offered an arrangement that would allow her to resume working at the Council of Europe on the JUSTROM project, and that it complete the recruitment procedure set in motion by the competition in 2016.

49. With regard to her contractual situation, the appellant contends that the way in which the Directorate of Human Resources and her line managers behaved towards her was deeply unfair and extremely inconsistent. She acknowledges being aware that, according to Rule No. 1232, there was no guarantee that her contract would be renewed and she was waiting to be able to "regularise" her situation by passing a formal competitive examination. Yet even though she was placed on the reserve list and had a legitimate expectation of being offered a fixed-term contract, she was not informed until the summer of 2018, when her contract was due to end on September 30, that her contract would not be renewed and that a permanent staff member was to be appointed to the post in which she was currently employed.

50. The appellant also complains of the manner in which she was excluded from the recruitment process. Although aware of the provisions applicable to staff on temporary contracts, she feels that her case could have been given more respectful consideration in order to better protect her interests. She further submits that, by sitting and passing competitive examination e178/2016, she complied with the conditions imposed by the Administration and the way in which she was removed from the project was not only unfair and disrespectful but also reckless in terms of the future of JUSTROM. In addition, she

considers that the fact that the competitive recruitment procedure sought and implemented by the Directorate of Human Resources and her line managers is not being followed through to completion has harmed her professional and personal interests and, above all, impaired her legitimate expectation of securing a more stable contract in order to continue managing this important project, after more than four years spent on very precarious contracts, in difficult working conditions.

51. She considers that DHR's general behaviour towards her was not in keeping with the principle of good faith and the duty of care which should form the basis of any employment relationship between an international organisation and its staff, whatever their contractual status.

52. As to the Secretary General's argument that he had an obligation to first redeploy staff members on indefinite-term contracts before appointing a candidate from a reserve list, this argument seems to her to be wrong, not least under Article 6 (choice of appointment procedure) of Appendix II (Regulations on appointments) to the Staff Regulations which provides that:

> "In the case of a vacant post or position the Secretary General may also decide to appoint a suitable candidate named in a valid reserve list established under Article 15, paragraph 2, of these Regulations without having recourse to the recruitment procedure or an internal competition."

53. The appellant concludes that it would have been entirely feasible to recruit a candidate from the reserve list drawn up after the competition in October 2016 without going through an internal appointment procedure, especially since the method initially chosen to fill the post was the external competition method.

54. Accordingly, the appellant considers that DHR's appointment decision was made without taking into consideration either her profile and application or the actual needs of the JUSTROM project.

55. In addition, while she understands that DHR has the authority to redeploy staff on indefinite-term contracts, she is disappointed that her successor was not recruited according to a more transparent process, in keeping with the interests of the project.

56. She maintains that it is counterproductive, especially in the current difficult budgetary climate, to go to the trouble and expense of holding a competition for the purpose of appointing a candidate to a specific post, only to then not follow through. The fact that it was decided to appoint a staff member who did not undergo a selective, transparent recruitment procedure and who satisfies neither the criteria laid down by the European Commission nor those listed in the vacancy notice for the competition for the post in question is, in her view, particularly irrational.

57. The appellant points out in this connection that, following the Council of Europe's decision to replace her with another staff member, the European Commission expressed its disappointment at the fact that the Council of Europe had not found a way to keep her and stressed the importance it attached to having a Roma woman in charge of JUSTROM. The appellant adds that the European Commission has requested that,

in the event that there should be a JUSTROM3, the Council of Europe submit the main candidates' CVs in good time, to ensure that the Roma community is represented in the project.

B. The Secretary General

58. According to the Secretary General, the subject of this appeal is the decision to appoint to a vacant position a staff member on an indefinite-term contract, who remained unassigned after returning to the Organisation from unpaid leave, to the role of senior project officer for JUSTROM2 as of 1 October 2018.

59. Until 30 September 2018, this role had been performed by the appellant under a temporary contract.

60. The Secretary General begins with a reminder of the Tribunal's case-law, according to which he holds the authority to make appointments (Article 36 c of the Statute of the Council of Europe and Article 11 of the Staff Regulations) and has discretionary powers in matters of staff management and is qualified to know and assess the Organisation's operational needs and the professional abilities of candidates for a vacant post or position. It is also for the Secretary General to choose the appointment procedure (Article 5, paragraph 1, of the Regulations on appointments).

61. In the Secretary General's view, none of the arguments put forward by the appellant is capable of casting doubt on the fact that he exercised his power lawfully, in accordance with the applicable regulatory provisions.

62. With regard more specifically to the appellant's allegations that replacing her jeopardised the smooth running of the JUSTROM2 project, the Secretary General points out that, since the appellant's departure, there have been no objective occurrences regarding the implementation of this project that would support her allegations.

63. In addition, when the European Commission was informed of the appointment of a new senior project officer for JUSTROM2, no objections were raised by the relevant persons and there have been no subsequent reports of any problems.

64. The Secretary General adds that it is also not for the appellant to assess the qualifications and professional skills of the staff member who has been appointed to replace her in running the JUSTROM2 project.

65. He further contends that there has been no violation of the appellant's rights. The appellant was informed, from the outset of her appointment at the Council of Europe, that fixed-term contracts are by definition limited in time, that they are not necessarily or automatically renewed and that they end on expiry. The Tribunal's case-law supports this view, moreover (ATCE, Appeals Nos. 469/2010 and 473/2011, Seda Pumpyanskaya (II) and (III) v. Secretary General, decision of 20 April 2012, paragraph 57, Appeals Nos. 587 and 588/2018, Devaux (II) and (III) v. Secretary General, decision of 9 October 2018, paragraph 109).

66. The Secretary General maintains that the Tribunal has taken a clear and consistent position in such matters: there is no entitlement to renewal of a contract which has been concluded for a limited period, whether it be a temporary contract or a fixed-term contract. Nor is there any entitlement to a different type of appointment.

67. Lastly, again according to the Secretary General, the appellant was duly informed, in good time, that priority would be given to filling the vacant position of senior project officer for JUSTROM2 internally, in view of the need to redeploy unassigned staff members on indefinite-term contracts. The Council of Europe made no promises to the appellant and nor did she receive any assurances which would have led her to entertain legitimate hopes of securing an appointment to this position under a fixed-term contract.

68. In view of the Organisation's obligation to give priority to reassigning staff on indefinite-term contracts in posts or positions that matched their qualifications, it was not possible, in the circumstances, to recruit from the reserve list drawn up after the competition under vacancy notice no. e178/2016 in order to fill the vacancy in question.

69. In the instant case, the Organisation ensured that all the interests involved, in particular those of the appellant, were respected in accordance with its duty of care.

70. The Secretary General contends that all of the foregoing shows that the decision to redeploy a suitably qualified staff member on an indefinite-term contract in the vacant position was justified and not in any way irregular, and that the appellant cannot claim to have suffered any violation of her rights or legitimate interests.

71. In the light of the foregoing, the Secretary General considers that the present appeal is ill-founded.

C. The Tribunal's assessment

72. Before examining the merits of the appeal, the Tribunal must make two clarifications.

73. The first relates to the purpose of vacancy notice no. e178/2016. In effect, the Secretary General stated and maintained, in response to a question from the Tribunal, that the aim of this recruitment procedure was to draw up a reserve list. It is clear, however, from the title of the vacancy notice and its wording, in particular the job mission, that the purpose of the procedure was to recruit someone for a specific post and not to compile a reserve list. The assertions to the contrary made by the Directorate of Human Resources when addressing the appellant and by the Secretary General in the course of these proceedings are not such as to alter this finding. Also, the reference in the vacancy notice to the compilation of a reserve list appears in a marginal section of the document entitled "Additional information" and was worded as follows:

> "Following this competition, a reserve list of successful candidates, in order of merits, may be established…" (the underlining is the Tribunal's).

74. Admittedly, according to the information provided by the Directorate of Human Resources to the appellant on 16 October 2017 (see paragraph 11 above), the Recruitment Panel made a recommendation to the Secretary General, advising him to draw up a reserve list. Nothing has been said, however, to either the appellant or the Tribunal as to whether the Panel also commented on the issue of the immediate recruitment referred to in the vacancy notice and, in particular, whether it ruled out the possibility of all the candidates who were unable to fill the post in question being placed on a reserve list for the purpose of filling other posts. Nor has anything been said about the manner in which the Recruitment Panel proceeded (ATCE, formerly the Appeals Board, Appeals Nos. 115-117/1985 - Peukert, Muller-Rappard and Bartsch v. Secretary General, decision of 14 February 1986, paragraph 102).

75. In any event, the Tribunal does not see how it can be claimed that the purpose of the procedure set in motion by vacancy notice no. e178/2016 was to draw up a reserve list. The Tribunal must therefore examine the Appellant's grievances in the light of this finding.

76. The second clarification concerns the subject matter of this appeal. The Secretary General focuses – wrongly - on the issue of the renewal of the appellant's temporary contract and the rights to which, he alleges, she has laid claim. The fact is, however, that the appellant has not, at any time, claimed any rights in this respect. Instead, she merely talks about "legitimate expectation", which is not the same thing. Secondly, contrary to what the Secretary General contends, the appeal does not concern the issue of whether the staff member who was appointed to the position was qualified for it, or whether she was given priority over the appellant. In effect, the appeal concerns the decision not to award the appellant any more contracts, and the decision to appoint another Council of Europe staff member to run the JUSTROM programme (see paragraph 30 above).

77. On this last point, the Tribunal notes that, in the proceedings before it, the appellant questioned the legal basis of that decision. The Secretary General, however, has not indicated what that basis was, either at the administrative complaint stage or in the proceedings before the Tribunal, even though, as a general rule, the Directorate of Human Resources should always indicate the legal basis for its decisions. In this instance, the Secretary General merely referred to an obligation to give priority to certain persons, without providing either this information or any other details regarding the leave in question and the return of the staff member concerned.

78. The Tribunal notes, however, that Appendix VII (Regulations on unpaid leave) to the Staff Regulations establishes no such priority. Far from it, under the terms of Article 8, paragraph 1, of this text "When staff members assigned to posts (Appendix III to the Staff Regulations) take unpaid leave, they are entitled to be reinstated in their post on their return. The post will thus be kept vacant." The Tribunal does not understand, therefore, why it was necessary to assign the staff member concerned to a position other than the post (or position) she had held prior to taking unpaid leave and why reassigning her in this way should have been a matter of priority.

79. On the basis of these clarifications, the only issue, in the opinion of the Tribunal, is whether the appellant can claim to have a right or legitimate interest after passing the competitive examination which she sat and whether she can rely on the protection of that right or interest in proceedings before the Tribunal.

80. In this context, the Tribunal notes that the vacancy notice does not indicate whether the purpose of the latter was to recruit for a post or a position.

81. In any event, it is clear that the duties attached to the position filled by the staff member returning from unpaid leave were identical to those covered by the vacancy notice. In the Tribunal's view, this is evident from the very terms in which the Directorate of Human Resources addressed the appellant, referring to priority. Had this not been the case, the said Directorate would have expressed itself differently.

82. It is also clear that the Organisation has never taken any decision as to the administrative outcome of the recruitment procedure in order to terminate it.

83. According to the Tribunal's case-law,

> "In matters of staff management and, in particular, when a vacant post is to be filled, a procedure respecting the letter and spirit of the statutory provisions and regulations has the advantage of preventing any misuse of powers and is, moreover, of a nature to ensure the transparency which is necessary in such matters. The conditions and procedures laid down by the Staff Regulations are in fact designed to ensure the respect of the principle of certainty of the law which is inherent in the system of the Council of Europe and is therefore in the interests of the Organisation as well as in the interests of members of its staff." (ATCE, formerly the Appeals Board, Appeals Nos. 115-117/1985 – Peukert, Muller-Rappard and Bartsch v. Secretary General, decision of 14 February 1986, cited above, paragraph 117)."

84. Cited in a dispute concerning an internal promotion, these principles also apply in matters of external recruitment which, from this point of view, is on a par with "internal" procedures such as transfers and promotions (ibid., paragraph 110).

85. It is clear, therefore, that the appellant was entitled to expect the position to be filled on the basis of the recruitment procedure launched for this purpose, for which there was a valid reserve list and which had never been closed.

86. In the message dated 16 October 2017 (paragraph 11 above), furthermore, the Directorate of Human Resources had been very clear:

> "Accordingly, you may be offered employment at the Council of Europe should a fixed-term position corresponding to your qualifications become vacant within the period of validity of the reserve list (two years with the possibility of extending it to a maximum of four years by decision of the Secretary General)."

87. It follows that, despite the discretionary power which he enjoys in such matters, the Secretary General did not have the right to place a staff member who had not taken part in the recruitment procedure in the position, without first terminating that

competition and declaring the list null and void, or, at the very least, without explaining why he was excluding the persons on the list. In short, the Secretary General was required to comply with the rules that apply in matters relating to recruitment. Indicating that he was going to apply a rule requiring him to give priority to certain persons - a rule of whose existence in the Organisation's internal legal system he has provided no evidence, in the face of the appellant's assertions that there is no such rule – cannot be deemed to constitute compliance with the aforementioned rules.

88. The same applies even if no one on the reserve list has an individual right to be recruited. Each of these individuals is nevertheless entitled to expect the Organisation, when filling the roles opened to competition, to choose from among the people on the said list as long as it remains valid, except where duly substantiated legal reasons make it impossible to do so.

89. Contrary to what the Secretary General claims, moreover, the relevant information, namely that there was to be no recruitment under the recruitment procedure that had taken place, was not given to the appellant in "good time" but rather after the Appointments Board had submitted its opinion to the Secretary General (paragraph 11 above).

90. The Secretary General having taken a route other than the legal approach which should have been followed, the appellant's rights were infringed. The administrative act which she is contesting is vitiated on the ground that there has been a violation of rights, therefore, and must be set aside.

D. The appellant's claims for compensation

91. The appellant has submitted two sets of claims for compensation to the Tribunal (paragraphs 30-31 above):

- Annulment of the decision not to give her any more contracts, and the decision to appoint another Council of Europe staff member to run the JUSTROM programme. She also asks to be allowed to return to this team, or to a sector of the Organisation where her specific experience and qualifications could be put to good use.

- The appellant is also seeking compensation for the non-pecuniary damage which she allegedly suffered because of the way in which the Directorate of Human Resources behaved towards her.

92. The Secretary General comments only on the claim for compensation for non-pecuniary damage.

93. In his view, there is no justification for awarding the appellant compensation on this ground and no such sums should be awarded.

94. He further submits that the appellant has suffered no prejudice as a result of wrongdoing on the part of the Organisation. The condition concerning the existence of an unlawful act on the part of the Organisation has not been met therefore. In this connection, the Secretary General refers to the judgment of the Court of First Instance of the European Communities (judgment of 12 March 2008, Massimo Giannini v. Commission of the European Communities, paragraph 327).

95. In the event, however, that the Tribunal should conclude that the Council of Europe is responsible, the Secretary General makes the following observations in the alternative.

96. The appellant has not adduced any evidence to substantiate or support her claim for compensation for non-pecuniary damage, nor does she specify the amount of such compensation.

97. In the Secretary General's view, the Organisation complied with its duty of good faith and care towards the appellant and acted in compliance with the applicable regulatory provisions.

98. The appellant, moreover, accepted the conclusion and renewal of her various temporary contracts, being fully aware that the nature of her employment was, in each case, short term. Similarly, she was fully informed that being placed on a reserve list did not entitle her to employment at the Council of Europe.

99. The appellant cannot claim, therefore, to have suffered non-pecuniary damage attributable to the Organisation and nor has she provided any evidence of the existence of such damage.

100. In conclusion, the Secretary General asks the Tribunal to dismiss the appellant's claim for compensation for the alleged non-pecuniary damage.

101. With regard to the first set of claims, the Tribunal notes that, under Article 60, paragraph 2, of the Staff Regulations, in disputes of a pecuniary nature, it has unlimited jurisdiction and in other disputes, it may set aside the act complained of. It follows, firstly, that the Tribunal cannot take decisions concerning non-contested acts and, secondly, as regards contested acts, except in disputes of a pecuniary nature, it cannot take decisions other than decisions to set aside (ATCE, formerly the Appeals Board, Appeal No. 179/1994 – Fuchs v. Secretary General, decision of 12 December 1994, paragraph 22, ATCE, Appeals Nos. 530/2012 and 531/2012 - Françoise PRINZ (II) and Alfonso ZARDI (II) v. Secretary General, decision of 6 December 2012, paragraph 87).

102. On the subject of the impugned act, the Tribunal points out that the legal framework for the appeal is determined by the administrative request made under Article 59, paragraph 1, of the Staff Regulations (paragraphs 16-18 above) and, above all, by the ensuing administrative complaint, in accordance with paragraph 2 of this same Article 59 (paragraphs 19-21).

103. It is clear from examining these documents, however, that the appellant has not asked for the decision to appoint another staff member to be set aside, despite making negative comments on this subject.

104. As for the point concerning the decision not to give her any more contracts, if this last term refers to temporary contracts, then it would also fall outside the above-mentioned legal framework. To the extent that it refers to the fixed-term contract to be offered at the end of the recruitment procedure set in motion by vacancy notice no. e178/2016, the Tribunal cannot order the Secretary General to give a contract to the appellant because the Court does not have the power to impose a positive (facere) obligation on the Secretary General. Also, in the proceedings before the Tribunal, as stated in paragraph 11 above, no indication has been given as to where on the reserve list the appellant has been placed. This last remark also applies to the appellant's request to be allowed to return to the JUSTROM team, or to a sector of the Organisation where her specific experience and qualifications could be put to good use.

105. The Tribunal must reject this first set of claims, therefore. The Tribunal, moreover, has had occasion to make such a ruling before, in the above-mentioned decision in the Peukert, Muller-Rappard and Bartsch appeals (ibid., paragraph 122) when it was asked to reopen the procedure in question.

106. Consequently, it is for the Secretary General, in executing the decision which is governed by paragraphs 6 and 7 of Article 60 of the Staff Regulations, to draw the appropriate conclusions from the annulment decision adopted and to take the necessary measures to enforce it.

107. With regard to the second set of claims, the Tribunal notes that under the terms of Article 60, paragraph 2, of the Staff Regulations, it may also order the Council to pay to the appellant compensation for damage resulting from the act complained of.

108. In reply to this request, the Secretary General maintains that the appellant has suffered no non-pecuniary damage and, in the alternative, provided no evidence of the existence of such damage.

109. While it is true that the Tribunal has not found any breach by the Organisation of the principles of good faith or care towards the appellant, it has nevertheless come to the conclusion that there has been a failure to comply with the applicable regulatory provisions in the instant case.

110. This failure undoubtedly caused non-pecuniary harm to the appellant. This harm, however, is a consequence not of the fact that she was not recruited but rather of the fact that she was denied the possibility of being selected for the post thrown open to competition. In effect, even though the appellant had been performing the same duties under temporary contracts and might, therefore, have been chosen from among the five persons on the reserve list, the Tribunal cannot speculate as to what the outcome might have been and state positively that the appellant is the one who would have been chosen.

111. Consequently, since the appellant has left the Organisation and is not seeking compensation for pecuniary damage, the Court considers it fair to award her the sum of EUR 4 000 in respect of non-pecuniary damage.

III. CONCLUSION

112. The appeal is admissible and well-founded and the impugned act (decision of 31 October 2018 to dismiss the administrative request dated 28 September 2018) must be set aside.

113. The appellant is entitled to a sum of EUR 4 000 in compensation for non-pecuniary damage.

For these reasons,

The Administrative Tribunal:

Rejects the objections to admissibility raised by the Secretary General and declares the present appeal admissible;

Declares the appeal well-founded and annuls the act complained of;

Orders the Secretary General to pay the appellant the sum of EUR 4 000 for non-pecuniary damage.

Adopted by the Tribunal in Strasbourg on 23 October 2019 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 30 October 2019, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	N. VAJIĆ