CONSEIL DE L'EUROPE————
————COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 638/2020
(Arman ZRVANDYAN 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:

Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Arman Zrvandyan, lodged his appeal on 4 March 2020. On 13 March 2020, the appeal was registered under No. 638/2020.

2. On 10 April 2020, the Secretary General submitted her observations on the appellant's appeal, which were communicated to the latter on 27 April 2020. The appellant filed his submissions in reply on 4 June 2020.

3. As the parties had agreed to waive oral proceedings, the Tribunal decided on 15 June 2020 that there was no need to hold a hearing. The appellant conducted his own defence. The Secretary General was represented by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law (Jurisconsult).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The appellant is a former staff member who worked at the Registry of the European Court of Human Rights as an assistant lawyer under a fixed-term contract, which ended on 31 August 2019.

5. Following vacancy notice No. o44/2019 on 12 July 2019, the appellant applied to take part in the selection procedure organised in accordance with Rule No. 1234 of 15 December 2005 laying down the conditions of recruitment and employment of locally recruited temporary staff members working in Council of Europe Duty Stations located outside of France, for a Project Manager to be employed on a local temporary contract (grade A1/A2) in the Council of Europe Office in Yerevan (hereinafter "the Yerevan Office"), Armenia.

6. On 28 August 2019, the Directorate of Human Resources (hereinafter "DHR") notified the appellant that he had been shortlisted under this vacancy notice. It invited him to undergo a competitive test on 4 September 2019 and to attend an interview on 5 September 2019.

7. On 4 September 2019, the appellant sat a written test in the Yerevan Office, along with other persons applying for the same post. On 5 September 2019, he was interviewed there by a panel consisting of Mr S.T., Ms L.D.-B. and Mr T.K.

8. During the procedure before the Tribunal, the Secretary General indicated that, on 11 September 2019, the Committee of Ministers examined the External Auditor's report of 31 May 2019 which stated, *inter alia*:

> "'One-year break' file
>
> 144. As we were informed, DHR advised the CoE entities not to rehire former permanent staff members on other types of contracts earlier than after a year. The purpose was to 'avoid the legal risk of employees claiming that here was a contractual continuity and that therefore they should be considered as permanent staff members over the whole period'. As we were also explained, this practice concerns more specifically the staff with *fixed term contracts*. We support such a cautious approach also in the case of *permanent contract* staff and we additionally turn the Organisation's attention to other risk, like: the lack of clarity, or even a *conflict of interests*, if the newly contracted work could have been performed by the same employees when they were still permanent staff members.
>
> Recommendation 15. It would be advisable to support and disseminate the practice of re-employing former permanent staff of the Council not earlier than a year after their previous employment expired. Respective provisions should also be introduced in the recruitment rules."

9. On 12 November 2019, the appellant was notified that:

> "... after careful deliberation and comparison of the qualifications, experience and performance of the various candidates, it has been decided to establish a reserve list of eligible candidates upon which your name has been placed."

10. On 27 November 2019, the appellant was informed that another person had been appointed to the position he had applied for. According to the appellant, the implication of this notification was that his application under vacancy notice no. o44/2019 had been rejected.

11. On the same day, the appellant requested that the Director of DHR and/or the members of the interview panel provide reasons for the contested decision and information about the recruitment process to enable him to file an effective and meaningful complaint against the contested decision.

12. On 6 December 2019, the Director of DHR replied as follows:

> "The staff members who interviewed you did recommend to DHR that you should be offered a temporary contract as Project Manager of the project, 'Support to the implementation of judicial reform in Armenia'. However, this recommendation was made in error – an error which was noticed by DHR – as the colleagues in question should have borne in mind the Council's long-standing policy and corresponding practice of requiring an interruption of at least one year's duration between the end of employment under a fixed-term contract and a temporary contract. This policy applies equally to temporary contracts in Strasbourg and the external offices. DHR was consequently unable to offer you a temporary contract, as requested by the recruiting entity, since it would have been in breach of the aforementioned policy aimed at avoiding legal risks stemming from continuous employment. Please be advised that the one-year interruption was recommended by the Council of Europe external auditors.
>
> However, since your competences and experience closely matched those required for the position under recruitment, it was decided to place your name on a reserve list for future Project Manager positions. In this way, should a similar vacancy notice arise once the required 12-month period has elapsed from the end date of your fixed-term contract, you may be offered a temporary contract in the Yerevan Office. This information was notified to you by way of the email you received dated 12 November 2019.
>
> I hope that the above provides you with sufficient clarification. As a final point, I note that you seem to imply, in your letter, that other factors might have influenced the recruitment procedure to your detriment. In this regard, I would like to assure you that this was not the case."

13. On 12 December 2019, the appellant submitted an administrative complaint to the Secretary General against the administrative policy entailing a one-year break between the end of employment under a fixed-term contract and a temporary contract, as applied in his case. On 13 January 2020, the Secretary General rejected the appellant's complaint.

14. On 4 March 2020, the appellant lodged the present appeal.

II. RELEVANT LAW

15. The conditions of recruitment and employment of locally recruited temporary staff members working in Council of Europe Duty Stations located outside of France are governed by Rule No. 1234 of 15 December 2005. The relevant provisions read as follows:

> "...
>
> 2. A 'locally recruited temporary staff member' is a person already present in the host country at the time of recruitment ..., who is engaged for a limited period of time to work for the Organisation, under the authority of the Secretary General, on the basis of a contract drawn up in accordance with this Rule.
>
> ...
>
> 11. A contract of a locally recruited temporary staff member may be offered by the Director of Human Resources, with the agreement of the Head of the Major Administrative Entity concerned, to persons within the definition laid down in Article 2 who are selected on the basis of the qualifications and experience required for the job for which they are being considered.
>
> 12. A candidate may be engaged on such a contract only if he or she is a national of a member state of the Organisation or of the host country.
>
> 13. The aim of recruitment shall be to employ staff of the highest ability, efficiency and integrity."

16. The conditions of recruitment and employment of temporary staff members in France from 1 January 2006 are governed by Rule No. 1232 of 15 December 2005. This Rule states, *inter alia*:

" ...

Part V: Council of Europe Duty Stations located outside of France

41. The conditions of recruitment and employment of locally recruited staff members working in Council of Europe Duty Stations located outside of France are governed by a special Rule.

Part VI: Notice figuring in all contracts

42. The following notice shall be inserted into every contract:

IMPORTANT NOTICE

...

any renewal of the contract will not confer entitlement to further renewal or to conversion into another type of contract. ..."

17. A Memorandum issued by the Direction General of Administration (DGA, DRH(2013)594 of 15 December 2013) reads, *inter alia*, as follows:

[original version]

"Objet: Lignes directrices sur l'utilisation des contrats temporaires mensuels régis par l'Arrêté 1232

(...)

2.

(...)

√ Une période de carence d'un an doit être respectée entre la fin d'un contrat CDD et le début d'un contrat temporaire (point 3).

3. La DRH rappelle que les interruptions de contrats temporaires, suivies d'un renouvellement, ou l'offre contrat temporaire à un ex-agent CDD, ont des conséquences sur la couverture sociale (...) et médicale des agents. L'accord signé entre le Conseil de l'Europe et la Sécurité Sociale Française établit des règles très strictes quant aux droits des agents employés par le Conseil. De plus, les ouvertures et fermetures de droits sont des processus requérant un laps de temps conséquent qui ne correspond pas toujours aux périodes de contrats. En termes de pensions, ces situations contractuelles sont difficiles à gérer par l'agent/e concerné/e.

(...) »

THE LAW

18. In the present appeal, the appellant requests the Tribunal to order the Secretary General to appoint him to the position applied for under vacancy notice no. o44/2019 or, in the alternative, if the foregoing is refused, to appoint him to another project manager's position in the Council of Europe's Yerevan Office, comparable to the position advertised in the aforesaid vacancy notice.

In the absence of a decision to take any such measures, the appellant requests 28,000 euros as compensation for the loss of 12 months' salary as Project Manager. He is also claiming 20,000 euros as compensation for non-pecuniary damage.

Lastly, the appellant requests that, "irrespective of the results of the Appeal, the Tribunal formally instruct DHR to refrain from any subjectivity, bias or 'reprisal' in respect of the Appellant and his future employment opportunities in the Council of Europe."

19. The Secretary General invites the Tribunal to find that the present appeal is unfounded and must be dismissed in its entirety.

I. THE PARTIES' SUBMISSIONS

A. The appellant

20. The appellant contests the existence of a valid, accessible and foreseeable policy of one-year breaks at the Council of Europe adopted in accordance with a valid procedure. According to him, the impugned decision is unlawful.

21. Where the decision-maker relies on a rule when making a decision that interferes with individual rights, that rule must be accessible, i.e. it should be known and available for perusal by any interested person. The use of secret policies is totally unacceptable in an organisation such as the Council of Europe. In cases where neither the persons covered by the rule, nor the officials who are supposed to apply it nor the general public are aware of the rule, then that rule does not exist or exists secretly and no person/official may rely on it to make a decision that interferes with individual rights and/or interests. Accessibility of rules is one of the key principles of lawfulness under the case-law of the European Court of Human Rights.

22. No rule to the effect that, on completing a fixed-term contract, a former staff member cannot be offered a temporary contract before a one-year period has elapsed, has been either formally adopted or published by the respondent. In its reply dated 6 December 2019, DHR submitted that the one-year break was recommended by the auditors. Neither the appellant, nor any members of the interview panel nor the public in general are required to be aware of all the recommendations that the Council's auditors make to the Organisation, however.

23. The appellant assures the Tribunal that none of the assistant lawyers were aware, at the time of their recruitment or afterwards, that on completion of their fixed-term contracts in Strasbourg, DHR would prevent them from being employed in field offices through external recruitment for a period of one year. The appellant asserts that no such information was officially communicated to any assistant lawyer of the Court at any time.

24. As regards the awareness of the members of the interview panel of the one-year break policy, DHR asserted that *"... the guidelines governing temporary contracts, including the rule not to rehire former permanent staff on temporary contracts earlier than after a year, are regularly circulated amongst all Major Administrative Entities of the Organization"*. Again, this factual assertion is not substantiated by any evidence. Consequently, in the absence of any evidence to the contrary, the Tribunal is requested to make a factual conclusion that the members of the interview panel did not have any knowledge of the one-year break policy.

25. As to foreseeability, the appellant argues that even assuming that the one-year break policy existed and was somehow accessible, it is clear that it fails to satisfy the principle of legal certainty. In particular, it is not clear what the scope and limits of the policy are. As a result, it is not clear in which circumstances DHR will apply it, and when it does not apply. Due to the lack of certainty surrounding the scope of application of the policy, anyone covered by it, such as the appellant, would be justified in supposing that it might be applied arbitrarily because the instances when it does and does not apply are not predictable. In the

absence of predictability, DHR may use this policy as a "legitimate" guise for other, ulterior motives, when refusing job applications.

26. Even in the absence of a formal and publicly accessible policy, DHR could have inserted a statement in each vacancy notice for fixed-term contracts, informing all candidates that, on completion of the contract, they would be ineligible for (local) temporary contracts for a period of one year. Vacancy notice no. e94/2014 under which he was recruited as an assistant lawyer at the Court in 2015 mentioned various limitations connected with the proposed contract, i.e. maximum period of employment, restriction on transfer and participation in internal competitions etc. It did, not, however, make any reference to the one-year break policy.

27. DHR could also have included information about its policy in vacancy notice o44/2019 yet it did not. The lack of any information about such a policy, its scope and conditions of application, together with the failure to mention it in either vacancy notice, made it impossible to foresee that such a policy would ever apply to the appellant. This is sufficient to conclude that the contested decision is unlawful and must be set aside.

28. Even assuming that there was a general policy in place, requiring individuals to take a one-year break between completing a fixed-term contract and starting a temporary one, the appellant submits that it was not intended to cover, and was never applied to, cases such as his own. Therefore, invoking and relying on that policy in his particular case was unlawful and arbitrary, even if that policy had previously been applied in other situations.

29. Disputing the reasoning behind DHR's reply dated 6 December 2019 and the decision of 13 January 2020 (see paragraphs 11-12 above), the appellant maintains that the post in the Yerevan Office under vacancy notice o44/2019 offered more favourable employment conditions than the post at the Court in Strasbourg. He also contends that there was a distinction to be made between a temporary contract in Strasbourg and a local temporary contract in a field office. The temporary contract in Strasbourg comes with a significant limitation: it may not exceed nine months in any calendar year. This is a manifestly unfavourable condition of employment. No such limitation, however, applies to local temporary contracts in field offices, which cover the whole year and may be extended (renewed) without restriction. This difference is of crucial significance. The rationale that was invoked in respect of temporary contracts in Strasbourg was thus arbitrarily and automatically applied to the local temporary contract outside of France, in the Council of Europe's Yerevan Office.

B. The Secretary General

30. The Secretary General notes firstly that it has been consistently recognised by the case-law of the Tribunal that the Secretary General, who holds the authority to make appointments (Article 36c of the Council of Europe Statute and Article 11 of the Staff Regulations) has wide-ranging discretionary power in staff management matters. Appointments by international organisations are a matter of judgment and discretion. Therefore, a higher degree of deference is required.

31. Similarly, Rule No. 1234 of 15 December 2005 laying down the conditions of recruitment and employment of locally recruited temporary staff members working in Council of Europe Duty Stations located outside of France gives the Director of Human

Resources discretion to decide whether a temporary contract should be offered to a person selected on the basis of the qualifications and experience required for the job for which he/she is being considered. Part III. 1 of the Rule, on conditions of recruitment, only provides for the possibility of the Director of Human Resources offering someone a temporary contract, as evidenced by the use of the term "may". Consequently, the Director of Human Resources may decide on a discretionary basis. There is hence no right for the appellant to be awarded the temporary contract in question. Considering the discretion afforded to international organisations in this area, such decisions are only subject to limited scrutiny and can only be annulled if they have been taken *ultra vires*, show a formal or procedural flaw or a mistake of fact or law, if some material fact was overlooked, if there was a misuse of authority or an obviously wrong inference was drawn from the evidence.

32. Insofar as the appellant contests the lawfulness of the policy and practice in question, the Secretary General notes that international administrative case-law clearly recognises that a consistent practice can bind both the Organisation and its staff, and therefore provide a legal basis for a decision such as the one taken in the present case. The Secretary General refers, *inter alia*, to ILOAT judgment No. 1125, in which consideration 8 reads as follows:

> "... A construction which an international organisation wilfully and consistently puts on a rule for years may become a binding element of personnel policy to be applied to everyone who is in the same position in law and fact."

33. The Secretary General notes in this respect that the "one-year break" practice does not modify or otherwise affect the content of the Organisation's existing legal framework. The appellant has provided no basis on which to conclude otherwise in this regard. Consequently, this practice can be considered as legally binding.

34. According to the Secretary General, the policy in question is long-standing and a corresponding practice has been in place for several years and has been consistently applied throughout that period. The policy first applied to the use of temporary contracts governed by Rule No. 1232, as set out in the guidelines governing temporary contracts in a memorandum dated 15 November 2013. These guidelines reiterate the rule not to rehire, on a temporary contract, former staff members who were employed on fixed-term contracts earlier than after a year. It subsequently became apparent that the same rule needed to apply to field offices, so it was extended to include the use of temporary contracts governed by Rule No. 1234. According to the Secretary General, these guidelines are widely known to all the Major Administrative Entities of the Organisation. Evidence of the existence of the policy and corresponding practice can be found in a recent report by the Council of Europe's auditors, moreover.

35. The Secretary General refers to an e-mail exchange between a staff member in Human Resources dealing with ODGP and a member of a recruiting entity in December 2016 concerning recruitment in Strasbourg under a temporary contract. In this exchange, the member of the recruiting entity at the time – who also interviewed the appellant in the present case – was informed that, because of the one-year break rule, the candidate put forward by the interview panel could not be recruited. According to the Secretary General, this exchange shows that the practice is long-standing, and that the member of the recruiting entity was or should have been aware of the policy concerned. The exchange included the following:

> - "[We] interviewed 3 persons for this vacancy and our clear preference is for Ms ...
>
> I'd be grateful if you could request Human Resources to recruit [her] ..."
>
> - "Ms ... is not eligible for a temporary contract as her fixed-term CDD contract just ended in October and a 12-month interruption in employment must be respected before a temporary contract can be requested."
>
> - "Is she aware of this rule? Probably not, as she has been actively seeking re-employment within this timeframe ...
>
> *C'est très fâcheux* – as one would say. She was by far the most competent, having a combination of skills that one doesn't often see – so another case of the CoE tying itself up in knots and losing out on real talent."
>
> - "This practice was put in place by DHR a few years ago. If Ms ... has questions she can contact the DHR directly.
> DHR do not provide CVs of persons who are not eligible for temporary contracts, which may be why you received the CV from other sources."

36. The Secretary General also refers to another example to show that the practice concerned was extended and applied to contracts under Rule No. 1234. It concerned a former assistant lawyer of the ECtHR who – in line with the one-year break policy – could not be offered a temporary contract in Skopje earlier than one year after the fixed-term contract in Strasbourg had ended. In this respect, the Secretary General submitted a copy of an internal document entitled [original version] "... 3100 Contrat temporaire ou mise à disposition" in which it was noted "Please do not contact candidate – waiting for DHR approval, Recently had a CDD contract, Start date to be confirmed, ..." and also [original version] "Accord du conseiller RH - Non". Moreover, from the history of the recruitment request it appears that on 26 July 2017 the DHR noted [original version] "Le délai de carence d'un an doit être respecté", and also "This is a recruitment under Rule 1234 for Skopje, not headquarters", and finally [original version] "[T.] merci d'annuler la demande".

37. The Secretary General further mentions the case of Jannick Devaux (II) v. Secretary General (ATCE, appeals Nos. 587-588/2018, paragraph 8), to support his contention that DHR does in fact have a one-year break practice. According to the Secretary General, this case was special, from the point of view of the policy in question, as there were exceptional circumstances that justified dispensing with the one-year break rule.

38. The Secretary General accordingly considers that it is clear from the concrete facts adduced above that DHR has a long-standing policy and corresponding practice concerning the one-year break rule which has been consistently applied throughout the years.

39. Regarding the rationale for the administrative practice in question, the Secretary General notes that its aim is to avoid legal risks for the Organisation stemming from continuous employment of staff members. Other than the fact that measures taken at the end of fixed-term contracts are rendered completely ineffective insofar as the employment is continued, these legal risks stem from the less favourable employment conditions of temporary staff members formerly employed on fixed-term contracts.

40. As to the scope of the contested policy and its application in the appellant's case, the Secretary General first notes that the practice is of general application. In reply to the appellant's claims that the policy would not be applicable in his case since he would benefit from more favourable employment conditions under the temporary contract in the Yerevan Office than he did under his former fixed-term contract in Strasbourg, the Secretary General

states that the personal opinion of an individual candidate regarding the relative benefits of different employment conditions in his or her own case cannot be allowed to undermine the rationale of a policy adopted by the Organisation. Even if the appellant considers that he would benefit from certain more favourable employment conditions in the Yerevan Office, that would not exclude other risks.

41. The Secretary General further disputes the appellant's claim that the one-year break policy was not intended to apply to externally advertised temporary contracts in a field office, referring to her above-mentioned arguments (see paragraphs 33 and 35 above). Accordingly, the Organisation was right to apply the one-year waiting period before offering the appellant a temporary contract, since he had just ended a period on a fixed-term contract at the Council, and there were no exceptional circumstances that would have applied in his case.

42. Moreover, *in casu*, the Secretary General considered in good faith and with justification that it was in the Organisation's best interests that the one-year break practice be applied in the appellant's case. There was no reason for the Administration to deviate from its consistent practice. The Secretary General further points out that the appellant's name has been placed on a list, giving him the possibility of being offered a temporary contract in the Yerevan Office once the required 12-month period has elapsed. He could also participate in an external competition to recruit staff under fixed-term contracts and possibly be recruited as the policy concerned would not apply owing to the absence of the above-mentioned risks.

43. The Secretary General also notes that the Administration has been very open with the appellant about the outcome of the recruitment procedure, including the fact that the interview panel recommended that DHR offer him a temporary contract as Project Manager of the project *"Support to the implementation of the judicial reform in Armenia"*. However, the panel also identified other candidates fit for the position and placed their names on a list for possible future temporary recruitment.

44. For the above-mentioned reasons, the decision to apply a one-year waiting period in the appellant's case and not to grant him a temporary contract is in conformity with the long-standing one-year break policy and corresponding practice of the Organisation, the applicable regulations and general principles of law. There is nothing in the present appeal to indicate that the Secretary General has exceeded or otherwise abused her discretionary power, or that she has taken into account irrelevant considerations or committed a manifest error.

45. The Secretary General concludes that the grounds of the present appeal are unfounded and that the appeal should be dismissed.

II. THE TRIBUNAL'S ASSESSMENT

A. As to the merits

46. The appellant contends that the refusal to appoint him under a temporary contract in the Yerevan Office because of the policy requiring a 12-month break between his previous fixed-term contract and the temporary contract was unlawful, arbitrary, incorrect and unfair and ran counter to the best interests/values of the Council of Europe.

47. The Secretary General maintains that the long-standing one-year break policy and corresponding practice were lawfully and rightly applied in the appellant's case.

48. The Tribunal confirms that the Secretary General, who holds the authority to make appointments (Article 36c of the Council of Europe Statute and Article 11 of the Staff Regulations), has wide-ranging discretionary power in staff management matters (see paragraph 30 above). It further recognises the arguments put forward by the Secretary General justifying the rationale behind the one-year break policy between the end of a fixed-term employment contract and a new temporary contract, as well as the interests of the Organisation in this respect (see paragraph 39 above).

49. The Tribunal recalls that any measure imposed on a staff member or decision taken in his or her respect must have a legal basis. In this connection it points out that it is well established in the Tribunal's own case-law as well as in the international administrative case law, that a practice cannot become legally binding if it contravenes a written rule that is already in force (see ATCE, Barbara Ubowska, appeal No. 617/2019, judgment of 17 December 2019, paragraph 29; A. v. World Health Organisation (WHO), ILOAT judgment No. 4029 of 15 May 2018, consideration 19;). Indeed, a practice can be created by an announcement, by an administrative circular or otherwise (see, V.K. v. Organisation for the Prohibition of Chemical Weapons (OPCW), ILOAT judgment No. 3680 of 6 July 2016, consideration 12).

50. In the present case, the Tribunal observes that the recruitment procedure regarding temporary staff in France is governed by Rule No. 1232. That Rule clearly specifies that "[T]he conditions of recruitment and employment of locally recruited staff members working in Council of Europe Duty Stations located outside of France are governed by a special Rule" (see paragraph 16 above). That special rule was Rule No. 1234 (see paragraph 15 above), referred to in vacancy notice No. o44/2019. Based on these facts, the Tribunal considers that the Organisation made a straightforward distinction between the two recruitment procedures and decided to govern them by two different rules.

51. The Tribunal further observes that DHR adopted the Memorandum of 15 November 2013 the subject of which was (original version) *"Lignes directrices sur l'utilisation des contrats temporaires mensuels régis par l'Arrêté 1232"* which laid down the conditions of recruitment of temporary staff members in France from 1 January 2006. It considers that the title of the Memorandum indicates that it was intended to govern the recruitment procedure of temporary staff members in France (see paragraph 17 above).

52. In this respect, the Tribunal notes that the Memorandum, while clarifying the application of Rule 1232, did not make any reference to its applicability either directly or *mutatis mutandis/per analogiam* to the recruitment procedure under Rule No. 1234 for local temporary staff members, such as the appellant. This is implicitly confirmed by the Secretary General in the following statement: "The policy first applied to the use of temporary contracts governed by Rule No. 1232 ... It subsequently became apparent that it was necessary to apply [the one-year break policy] also to field offices, it was therefore extended to the use of temporary contracts governed by Rule No. 1234" (see paragraph 34 above).

53. The Tribunal notes that in order to prove the extension of the above policy to Rule 1234, the Secretary General cites three examples which, in her view, show that the requirement to take a one-year break was a long-standing practice and of general application

(see paragraphs 35-37 above). The Tribunal observes that of these three examples, only one concerns a former staff member who applied for a post outside of France (see paragraph 36 above), as was the case here with the appellant. Further to this finding, the Tribunal notes, however, that it appears from the internal document submitted by the Secretary General that the person concerned in that example was not invited to participate in the recruitment procedure lacking approval of DRH related to the one-year break policy. Thus, unlike the appellant, the person in the only example relating to a post outside of France referred to by the Secretary General was not shortlisted and did not therefore participate in the recruitment procedure (see paragraph 36 above). Furthermore, this document, which is an exchange of messages with DRH during the recruitment procedure, is not accessible, as it is not a public document. Such facts call into question the arguments advanced by the Secretary General regarding the existence of a long-standing policy and corresponding practice concerning the one-year break rule in respect of candidates in the recruitment procedure under Rule No. 1234.

54. While, too, as the Secretary General underlines, the External Auditors, in their report issued on 31 May 2019, said it would be advisable "to support and disseminate the practice of re-employing former permanent staff of the Council not earlier than a year after their previous employment expired", the Tribunal notes that the Administration has not acted on their further recommendation that "[r]espective provisions should also be introduced in the recruitment rules" (see paragraph 8 above). Indeed, no reference to the one-year break rule was made in vacancy notice n^{o} o44/2019 under which the appellant applied for the post in Yerevan. At no stage of the recruitment procedure was the appellant informed that the one-year break rule would or could apply in his case.

55. Lastly, the Tribunal acknowledges the Secretary General's submission that the Administration has been very open with the appellant about the outcome of the recruitment procedure (see paragraph 41 above). It notes, however, that DHR first informed the appellant that "... after careful deliberation and comparison of the qualifications, experience and performance of the various candidates, it has been decided to establish a reserve list of eligible candidates upon which your name has been placed" (see paragraph 9 above). It was only when the appellant requested further information (see paragraph 11 above) that DHR confessed that the appellant had actually been recommended by the panel which interviewed him but that, due to the one-year break policy, he could not be offered the post in the Yerevan Office (see paragraph 12 above). Indeed, in the administrative proceedings following their refusal to hire the appellant, DHR, without relying on its discretionary power in matters of employment, repeatedly invoked and referred to the one-year break rule as the sole reason for not hiring the appellant, arguing that this rule applies no less consistently to temporary contracts under Rule No. 1234.

56. In the light of all these circumstances, the Tribunal finds that the contested decision is adopted on the basis of an error of law by reason of the absence of a consistent practice on the part of the defendant, grounded on an accessible and foreseeable legal basis for applying the one-year break rule in respect of candidates in recruitment procedures under Rule No. 1234, such as the appellant in the present case. Moreover, DRH was aware that the External Auditors had advised the Organisation on the need to support and disseminate the respective practice, as well as to introduce corresponding provisions in the recruitment rules, as indicated in Recommendation 15 (see paragraph 8 above).

57. In conclusion, the Tribunal considers that the contested decision is vitiated by illegality and, therefore, the present appeal is well founded, and the decision complained of should be set aside.

B. Damages

58. The appellant requests the Tribunal to order the Secretary General to appoint him to the position applied for under vacancy notice no. o44/2019 or, in the alternative, if the foregoing is refused, to appoint him to another project manager's position in the Council of Europe's Yerevan Office, comparable to the position advertised in the aforesaid vacancy notice.

In the absence of a decision to take any such measures, the appellant requests 28,000 euros as compensation for the loss of 12 months' salary as Project Manager. He is also claiming 20,000 euros as compensation for non-pecuniary damage.

Finally, the appellant requests that, irrespective of the outcome of the appeal, the Tribunal formally instruct DHR to refrain from any subjectivity, bias or 'reprisal' in respect of the appellant and his future employment opportunities at the Council of Europe.

59. The Secretary General first maintains that the Tribunal is not competent to order the appellant's appointment. She further considers that the present appeal is not founded and that, therefore, the appellant's pecuniary claims should be dismissed.

60. As to the claim for compensation of pecuniary damage, the Secretary General notes that the appellant is seeking a sum corresponding to the salary of a local Project Manager in Armenia for 12 months. i.e. for each "excluded month" or, in other words, from September 2019 until the end of August 2020. The Secretary General, however, argues that the appellant has indicated that "[h]e is currently completing another judiciary-related assignment for the Council as an international expert (Strengthening the profession of lawyer in line with European standards)''. It would seem that the contract in question is more in the nature of a consultant's contract than an expert appointment as the wording used by the appellant suggests. Given the incompatibility of holding a consultant's contract and an employment contract within the Organisation simultaneously, the Secretary General is of the opinion that it would be unjust to grant the appellant compensation for pecuniary damage for the said loss of earnings for the period during which he has been working as a consultant for the Organisation. Secondly, in the extraordinary event that the Tribunal should consider awarding the appellant compensation for pecuniary damage, the Secretary General considers that the amount awarded should also reflect the fact that the results of the recruitment procedure were only finalised on 12 November 2019 and that recruitment to this role took place on 7 January 2020. Hence, the amount of any award that might be made cannot cover 12 months of salary.

61. As to the appellant's request for payment of compensation for non-pecuniary damage, the Secretary General considers that this claim, the amount of which is manifestly excessive, should also be dismissed. Moreover, as to the appellant's final request, the Secretary General stresses her own and DHR's commitment to organising fair recruitment procedures in full compliance with the Organisation's regulations and policies, thereby safeguarding both the Organisation's and the candidates' interests. According to the Secretary General, there has

been no wavering from this commitment with respect to the appellant in the present case and there will be no wavering from it in dealings with him in the future.

62. The Tribunal first considers that it does not have jurisdiction to order the appellant's appointment (see ATCE, appeal No. 604/2019, Isabela Mihalache v. Secretary General, 30 October 2019 decision, paragraph 104). It therefore dismisses the appellant's claim in this respect.

63. In respect of the appellant's claim for pecuniary damage, the Tribunal recalls that under Article 60, paragraph 2, of the Staff Regulations, it may order the Organisation to pay compensation to the appellant for the damage resulting from the contested act. However, although the appellant was recommended for the post by the interview panel (see paragraph 12 above) the status of which was not further explained by the Secretary General, the Tribunal notes that it belongs to the Secretary General, using her discretionary powers, to make a final appointment (see paragraph 49 above). Therefore, the Tribunal cannot speculate on whether the appellant would eventually have been hired or not. Accordingly, it dismisses the appellant's request for pecuniary damage.

64. Regarding the appellant's claims for non-pecuniary damage, the Tribunal recalls that it has come to the conclusion that the contested decision had been adopted on the basis of an error of law (see paragraphs 56-57 above). In this respect the Tribunal considers that the fact of having lost the opportunity of being recruited to the post advertised, certainly caused distress to the appellant. Therefore, deciding on an equitable basis, the Tribunal awards the appellant the amount of EUR 4,000 under that head.

65. Finally, as to the applicant's last request that, irrespective of the outcome of the appeal, the Tribunal formally instruct DHR to refrain from any subjectivity, bias or 'reprisal' in respect of the appellant and his future employment opportunities at the Council of Europe, the Tribunal recalls that under Article 62, paragraph 2, of the Staff Regulations, the Tribunal has unlimited jurisdiction in respect of disputes of pecuniary nature. Outside the disputes of pecuniary nature, the Tribunal cannot decide otherwise than to annul the act complained of (see ATCE, appeal No. 604/2019, Mihalache v. Secretary General, judgment of 30 October 2019, paragraph 101, with further references). Accordingly, it dismisses the appellant's last request.

IV. CONCLUSION

66. The present appeal is well founded, and the decision complained of must be set aside. In respect of non-pecuniary damage, the appellant is entitled to be paid the amount of EUR 4,000.

For these reasons, the Administrative Tribunal:

Declares the present appeal well founded and sets aside the decision complained of;

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

Adopted by the Tribunal by videoconference on 27 October 2020 and delivered in writing on 30 November 2020 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the English text being authentic.

The Deputy Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
E. HUBALKOVA	N. VAJIĆ