

**O. T. (No. 2)**

**v.**

**EPO**

**130th Session**

**Judgment No. 4321**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs A. M. O. T. against the European Patent Organisation (EPO) on 21 January 2015, the EPO's reply of 11 May, the complainant's rejoinder of 27 June and the EPO's surrejoinder of 21 September 2015;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the non-renewal of her fixed-term contract.

The complainant was recruited to work at the European Patent Office (the EPO's secretariat) in 2008 under a ten-month fixed-term contract. The letter containing the job offer indicated that the contract was of fixed duration "owing to a temporary staff shortage". This contract was subsequently extended five times. On each occasion, the letter of extension reminded her that her contract had been concluded in response to a temporary staff shortage and further indicated that, in accordance with the plans of her Directorate, "the overall level of staff resources [would] be reduced henceforth as a result of the increased efficiency in the business procedures".

In June 2012 a vacancy notice was published for a permanent post in the Directorate in which the complainant was working, with duties similar to hers. A few days later, on 28 June 2012, she was notified that her contract would not be renewed beyond 31 December 2012, when it was due to expire. The EPO explained that the justification for her fixed-term contract, namely the temporary nature of her duties, no longer existed; that various projects aimed at improving the efficiency of the Office were expected to show results in the foreseeable future; and that the overall level of staff resources would be reduced as a result of the increased efficiency in the business procedures. The complainant applied for the advertised permanent post in her Directorate, but her application was rejected on the grounds that, as the holder of a fixed-term contract, she was not eligible to apply. That decision is the subject of her first complaint to the Tribunal (see Judgment 4320).

By a letter of 25 September 2012 addressed to the President of the Office, the complainant challenged the decision not to extend her contract, arguing that the reasons on which it was based were obviously not valid, especially in light of the recent advertising of a vacancy corresponding to her duties. She requested that the selection procedure for the advertised post be cancelled and that her contract be converted into a permanent appointment in accordance with Article 15a of the Conditions of Employment for Contract Staff. In the event that these requests were not granted, her letter was to be treated as an internal appeal and she would also claim moral damages and costs, including compensation for loss of salary and pension rights.

Following an initial rejection of her requests, the matter was referred to the Internal Appeals Committee (IAC) for an opinion. The complainant separated from service on 31 December 2012.

The IAC held a hearing on 27 March 2014 and issued its opinion on 27 August 2014. It unanimously concluded that the complainant's claim for cancellation of the selection procedure was inadmissible because it was the subject of another appeal she had filed, and that she was not entitled to the conversion of her contract into a permanent appointment, because such a decision was always at the discretion of the Office even if all conditions were met. However, the members of the IAC were divided as to the lawfulness of the decision not to extend the complainant's contract. The majority considered that the decision was based on adequate and valid reasons, though they conceded that

the reference to the temporary nature of the complainant's duties was inaccurate and misleading. They recommended that the appeal should therefore be dismissed. The minority, however, considered that the reasons were inadequate, as the advertising of the vacancy showed that the complainant's tasks had become permanent. They considered that the complainant ought to have been given the opportunity to compete for "her own job", but as this was not possible they recommended that the decision not to extend her contract be withdrawn and that she be awarded moral damages and costs.

By a letter of 20 October 2014, the Vice-President of Directorate-General 4 (DG4), acting on behalf of the President of the Office, informed the complainant that he had decided to dismiss her appeal as irreceivable in part and unfounded in its entirety, in accordance with the unanimous and majority recommendations of the IAC. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision to terminate her contract, and to order the EPO to convert her contract into permanent employment as of 1 January 2013. She seeks the payment of her salary as of 1 January 2013 until the time of re-entering the EPO, less any earnings from other sources during that period, and payment of the employer's contributions to the pension scheme as of 1 January 2013. She also claims moral damages of at least 10,000 euros and costs.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

## CONSIDERATIONS

1. The complainant was recruited by the EPO in September 2008 on a ten-month fixed-term contract that was extended five times. On 28 June 2012, the complainant was informed that the contract concluded between her and the EPO would end on 31 December 2012 in accordance with Article 15(1) of the Conditions of Employment for Contract Staff (CECS). The complainant lodged an internal appeal against the decision not to extend her contract beyond its date of expiry. The IAC unanimously recommended the rejection of the complainant's claim for a conversion of her fixed-term contract to a permanent appointment. A majority of the IAC members concluded that the challenged decision was based on adequate and valid reasons and recommended the dismissal of the appeal. In his decision of 20 October

2014, the Vice-President of DG4, acting on behalf of the President of the Office, accepted the IAC majority opinion and dismissed the complainant's appeal. This is the impugned decision.

2. The complainant's first submission concerns the EPO's alleged violation of Article 2(3) of the CECS. In advancing her position, the complainant acknowledges that the challenged decision is discretionary in nature and, accordingly, it will only be set aside, as stated in Judgment 3005, consideration 10, "if it is taken without authority or in breach of a rule of form or of procedure, or if it is based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was an abuse of authority". The complainant submits that in her case the IAC and, subsequently, the Vice-President of DG4 overlooked an essential fact, namely, that the extensions of her contract amounting to 42 months of the total duration of her contract violated Article 2(3) of the CECS. As an aside, it is observed that the complainant inadvertently cited Article 2(3) of the 2009 CECS rather than Article 2 of the previous version in force at the material time. This is of no moment, as Article 2(3) contains the same limitation concerning extensions as the former Article 2, which reads: "Contracts shall be concluded for a maximum term of five years. They may in exceptional cases be extended by a maximum of two years."

3. In support of this position, the complainant points out that the original contract she signed was for a period of ten months. This contract was then extended five times for a total duration of 52 months of which 42 months were extensions. The complainant submits that the text of Article 2 clearly provides that a contract cannot be extended beyond the established maximum of two years and, therefore, the 42 months of extensions of her contract were clearly beyond the statutory limit of 24 months.

4. The principles of statutory interpretation are well settled in the case law. As the Tribunal reiterated in Judgment 4178, consideration 10:

"The primary rule is that words are to be given their obvious and ordinary meaning (see, for example, Judgments 3310, consideration 7, and 2276, consideration 4). Additionally, as the Tribunal stated in Judgment 3734, consideration 4, '[i]t is the obvious and ordinary meaning of the words in the provision that must be discerned and not just a phrase taken in isolation'."

5. As stated in the heading of Article 2, it concerns the “Term of Contract”. The obvious and ordinary meaning of the first sentence in Article 2 is that it establishes a maximum term of five years for fixed-term contracts. Read in this context, it is obvious that the pronoun “[t]hey” at the start of the second sentence replaces its antecedent “contracts” in the first sentence. Replacing the pronoun with its antecedent, the second sentence would read: “Contracts may in exceptional cases be extended by a maximum of two years.” This statement is clear and unambiguous. It provides that the maximum term of five years for fixed-term contracts established in the first sentence can be extended for up to a maximum of two years in exceptional cases. Contrary to the complainant’s interpretation, Article 2 does not limit the extensions to a fixed-term contract to a maximum duration of two years. Additionally, the complainant’s interpretation is at odds with the maximum term of five years stated in the provision. It follows that the complainant’s fixed-term contract was not extended beyond the statutory limit and Article 2 was not violated. Thus, it cannot be said that in arriving at the impugned decision an essential fact was overlooked.

6. Second, the complainant submits that she had legitimate expectations that her employment would become permanent. The complainant points to the fact that at the time she was recruited there was no temporary shortage of staff in the department to which she was assigned; the tasks she performed were previously performed by permanent employees; and the repeated extensions of her contract for almost five years gave her the clear impression that her work was needed at the EPO on a permanent basis and at the appropriate time the EPO would convert her contract to permanent employment, particularly in light of the fact that she met all the conditions in Article 15a(2) of the CECS. This submission is unfounded.

7. It is observed that by signing her contract, the complainant also accepted the conditions set out in the EPO’s offer of employment that “[t]he Office retain[ed] the absolute right not to renew the contract” and that the contract was governed by the CECS. Relevantly, Article 15(1) of the CECS provides that “[t]he contract shall be terminated at the contractually appointed time”. Additionally, Article 15a(1) of the CECS provides that “[w]ith the exception of paragraph 3, a fixed-term contract shall not confer any right either to an extension or to conversion into another type of employment”.

In view of these two provisions, the complainant did not have any contractual right or legitimate expectation of permanent employment or an extension of her contract beyond 31 December 2012.

8. Lastly, the complainant's assertion the EPO breached its duty of care owed to her is unsubstantiated. The complainant was given six months' notice of the termination of her contract; the termination of the contract occurred at the contractually agreed time, as stated in her last extension; and the complainant received valid reasons for the decision.

9. Accordingly, the complaint will be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 6 July 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ