

EIGHTY-SECOND SESSION

In re Leicht, Linsbauer, Raade, Samuelsson, Sherwood and Watkinson

Judgment 1596

The Administrative Tribunal,

Considering the complaints filed by Miss Elsbeth Leicht, Mr. Günter Linsbauer, Mrs. Erna Maarit Raade, Mrs. Berit Marianne Samuelsson, Mrs. Lesley Ann Sherwood and Mrs. Nita Katherine Sylvia Watkinson against the European Free Trade Association (EFTA) on 7 February 1996, EFTA's reply of 20 May, the complainants' single rejoinder of 13 July, the Association's surrejoinder of 18 October, the complainants further submissions of 30 October and the Association's comments thereon of 11 November 1996;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. EFTA employed the complainants, who are Swiss, for periods ranging from five years and ten days to nine years and five months. It abolished Mrs. Watkinson's post on 30 April and those of the other complainants on 30 June 1995. It extended their appointments by various periods ranging from one to seven months under "fixed-term" contracts that expired at the dates of abolition. The letters of appointment said that the rules "do not provide for a termination indemnity if a fixed-term appointment expires without being renewed".

The Association informed Mrs. Watkinson by a letter of 28 September 1994 and the other complainants by letters of 14 December 1994 of decisions not to renew their appointments further.

In letters of June 1995 to the secretary of the Advisory Board the complainants claimed payment of the termination indemnity. By letters of 14 November 1995 the Secretary-General told them that on 20 July 1995 the "Supervisory Body of the Seven current and former EFTA States" had decided to pay the indemnity to anyone with over ten years' service but had failed to agree whether to pay it to anyone else. Those are the challenged decisions.

B. The complainants submit that EFTA owes them the indemnity. In their view it had no "objective" basis for the ten-year requirement and acted in breach of the principle of equal treatment. It granted the indemnity to staff with less than ten years' seniority when the dates of abolition and expiry did not coincide. By offering the complainants "fixed-term" contracts of only a few months instead of the two to five years prescribed in Staff Regulation 10(a)(i) it sought to bring into play Regulation 12.5(b), which relieved it of paying compensation to anyone "whose fixed-term contract expires without being renewed". The Tribunal has already outlawed such practice.

They each claim the indemnity: 5 months' pay for Miss Leicht, 8 for Mr. Linsbauer, 7 for Mrs. Raade, 6 for Mrs. Sherwood and Mrs. Watkinson and 4 for Mrs. Samuelsson. They seek costs.

C. In its reply EFTA argues that the complaints are irreceivable. The decisions they are purportedly impugning are not challengeable. What each is objecting to is either the letter of appointment or the letter sent in September or December 1994 confirming non-renewal: whichever it be, they have all acted out of time.

Their complaints are in any event devoid of merit. There was nothing wrong with offering them shorter contracts and, having accepted, they are estopped from challenging an express provision in their letters of appointment. There was no breach of equal treatment: others whose posts were abolished before the expiry of appointment or who got payments *ex gratia* for over ten years' service were not in like case.

D. In their rejoinder the complainants adduce further factual evidence and answer the Association's arguments.

E. In its surrejoinder EFTA presses its case and raises procedural objections to documents produced in the

rejoinder.

F. In further submissions which the Tribunal gave the complainants leave to enter they challenge the contention in the surrejoinder that their counsel failed to answer a letter that the Association had sent on 18 September 1996: the answer was in a letter of 8 October.

G. Invited to comment, the Association says it can find no trace of that letter.

CONSIDERATIONS

1. Each of the six complainants, who used to be on the staff of EFTA, is claiming payment of a termination indemnity under the Staff Rules and Regulations.

2. In 1989 the seven member countries of EFTA began the complex negotiations with the European Union which, though their outcome was uncertain, eventually led to adoption of the European Economic Area Agreement. At a meeting on 22 June 1994 in Helsinki the ministers of the member countries noted that Austria, Finland, Norway and Sweden would on 24 June be signing the Treaty of Accession to the Union and would be leaving the Association at the end of the year to join it. The ministers' meeting confirmed the decision to keep the secretariat in full operation until the end of the year but agreed that the secretariat would have to survive for up to six months after that date, though adjusted to the needs of the remaining Members.

3. At a meeting on 12 December 1994 the Council of EFTA, still comprising the seven member States, set up a body to supervise the winding up of the Association and any operations to be carried out under its final budget in the period from January to June 1995. One decision that the Supervisory Body took was to authorise the *ex gratia* payment of termination indemnities to staff members who had completed at least ten years' service.

4. From March 1993 the Association extended the contracts of its staff by only one year at a time. In March 1994 its Council agreed that contracts might be renewed to 30 June 1995, and in June 1994 that renewal would not be automatic but subject to continuing assessment of needs. Before the Council approved the policy of having as many fixed-term contracts as possible end at 30 June 1995 some staff members had received normal renewals of contract and so that for them the date of termination was after 30 June 1995. They were paid the termination indemnity even though some had completed fewer years' service than the complainants.

5. The complainants were in the following position.

(i) The last notice of renewal that Miss Leicht got was dated 30 June 1994 and told her that her contract was extended by six months from 1 January to 30 June 1995. By the end of June 1995 she had served a total of six years and six months and was at step 8 in grade G.7.

(ii) Mr. Linsbauer got his last notice of renewal in a text dated 28 September 1994: the extension was for the three months up to 30 June 1995. By then he was at G.4, step 11, and had served for nine years and five months.

(iii) In her last notice of renewal, dated 2 June 1994, Mrs. Raade was granted a seven-month extension up to 30 June 1995. She left at grade G.6, step 8, and had served for eight years and seven months.

(iv) The last notice of renewal that went to Mrs. Samuelsson was dated 30 June 1994. She got an extension of contract for six months expiring on 30 June 1995. She was at grade G.5, step 7, and her period of service came to five years and twenty-one days.

(v) For Mrs. Sherwood the last notice of renewal was given on 25 November 1994: she got one month's extension expiring on 30 June 1995. She left at grade P.3, step 6, and had served a total of seven years and one month.

(vi) Lastly, Mrs. Watkinson had her last notice of renewal on 21 July 1994, the contract being for three months up to 30 April 1995. When she left she was at grade G.5, step 11, and her seniority came to seven years, three months and fourteen days.

Mrs. Watkinson got notice of non-renewal by a letter of 27 September 1994; all the others got it by letters dated 14 December 1994.

Joinder

6. The Association objects to the joinder of the six complaints on the grounds that there are material differences in fact between the complaints and that only the cases of Mrs. Raade and Mrs. Sherwood are joinable.
7. It explains that Miss Leicht was offered an appointment in the new secretariat after 30 June 1995 but withdrew her application for employment. But that is irrelevant to the material issue. Either she is entitled to the indemnity or she is not, whether or not she was employed after the date of termination.
8. As to Mrs. Samuelsson, the Association says that she held a temporary appointment on a post that was created for the purpose of the negotiations with the European Union. The records show, however, that after two temporary contracts she held fixed-term, not temporary, ones and that whereas the negotiations were over in 1992 her employment did not end until 30 June 1995. So there is no reason to treat her case separately.
9. EFTA points out that Mrs. Watkinson's contract, unlike those of the other complainants, expired on 30 April 1995. Yet she is in the same position as they in that her appointment expired and her post was abolished on the same day: that is clear from the notice of non-renewal. So the same issues arise in her case even though the dates are different.
10. The defendant says that Mr. Linsbauer challenged -- albeit five months after acceptance -- the decision to grant him a "fixed-term" contract, whereas the others did not. Whether he did or not is irrelevant since his complaint is not about the duration of the contract but about his entitlement to the indemnity on its expiry. The Association also states that he sent the Secretary General a letter on 8 March 1995, and a copy of it to the Advisory Board, claiming termination indemnity under Staff Regulation 12.5. On 26 June 1995 he appealed directly to the Advisory Board and pointed out that in the absence of a reply from the Secretary-General he was entitled under Regulation 41(c) to lodge an appeal with the Tribunal. On 27 June he wrote again to the Advisory Board asking for a "considered opinion on his position". It is clear that he was seeking to exhaust the internal means of appeal. So the correspondence did not put him in a position different from that of the other complainants.
11. The conclusion is that there is no valid objection to joinder of all six complaints.
12. Regulation 10(a)(i) provides that fixed-term contracts are --

"normally granted for two or three years and may in special cases be granted for a period not exceeding five years. Initial contracts for locally recruited staff are normally granted for one year ..."
- Regulation 10(a)(iv) says that a contract for a fixed-term appointment may be renewed if it is in the Association's interest; 12.5(c) contains a schedule fixing the indemnity to be paid to a staff member whose fixed-term appointment is terminated; and 12.5(b) lists the cases in which no indemnity shall be due, one being where a "fixed-term contract expires without being renewed".
13. All of the complainants, who received renewals of appointment, had their attention drawn in their letters of appointment to the fact that the "Staff Regulations and Rules do not provide for a termination indemnity if a fixed-term appointment expires without being renewed". The fact that they all accepted renewal does not estop them from claiming the indemnity in accordance with the rules.
14. Mrs. Raade wrote to the Secretary-General on 10 May 1995 claiming payment of the indemnity and was informed on 22 May 1995 that a decision on payment to staff with less than 10 years' service was "still pending" but that the matter would "hopefully find a positive outcome" at the Supervisory Body's next meeting.
15. On dates ranging from 23 to 29 June 1995 the six complainants wrote to the secretary of the Advisory Board in accordance with Regulation 40(a) claiming the payment of the termination indemnity. In letters of 14 November 1995 the Secretary-General replied that for lack of agreement between the delegations of the seven former and present EFTA member countries the Advisory Board could not be constituted and that, the Board having failed to report within sixty days of the date of notification of the appeals, Regulation 41(b) allowed for direct appeal to the Tribunal.
16. By other letters, also dated 14 November 1995, the Secretary-General informed the complainants that the Supervisory Body had decided on 20 July 1995 to pay termination indemnities to staff with over 10 years'

continuous service but that "consensus could not be found on payments of indemnities to staff members with less than ten years of service".

Receivability

17. The complainants lodged their complaints with the Tribunal, on 7 February 1996, before the expiry of ninety days from the date at which they had received the Secretary-General's letters of 14 November 1995.

18. The Association submits that the complaints are irreceivable on the grounds that for each complainant the challengeable decision by the Secretary-General was the one in the notice of non-renewal and that the refusal to pay the termination indemnity was merely a consequence of the final decision not to renew and entailed no further decision by the Secretary-General. So -- argues EFTA -- if the complainants wanted to claim the indemnity they should have appealed against the decisions not to renew their appointments.

19. That argument betrays misunderstanding of the complainants' case. In claiming the indemnity they were not seeking to impugn the decisions not to renew. What is at issue is not the renewal or length of their appointments but whether, notwithstanding the interpretation put on Regulation 12.5 by the Association, they were entitled to the indemnity on the expiry of the fixed terms stated in their contracts.

20. The complainants give "on or after 20 July 1995" as the date of the decisions impugned and 14 November 1995 as the date at which each had notice of a decision affecting a class of officials.

21. The other letters of 14 November 1995 admitted that the Administration had failed to set up an Advisory Board to deal with the appeals because delegations of the seven former and present member States had failed to agree on "the constitution" of the Board and appeal would therefore lie to the Tribunal. Article VII(3) of the Tribunal's Statute allows for such direct appeal where the Administration has failed to take a decision within sixty days of the notification of the claim, the complaint to be filed within ninety days of the expiry of the sixty. Regulation 41(b)(ii) also allows for appeal to the Tribunal "where the Advisory Board has failed to transmit its opinion or proposals for settlement within sixty days of the receipt of the complaint".

22. It is true that by that reckoning the time limits for filing complaints with the Tribunal would have run out 150 days after the notification of the claims to the Advisory Board, at dates ranging from 20 to 26 November, or only a few days after the complainants got the letters of 14 November 1995 saying that there was no Advisory Board. In Judgment 607 (*in re Verron*), however, the Tribunal said under 8:

"Proper administration requires the setting of time limits. But they are not supposed to be a trap or a means of catching out a staff member who acts in good faith."

Article 40(b) of the Staff Regulations provides that "prior to appealing to the ... Tribunal ... the staff member shall have submitted his case to the Advisory Board". Though the complainants were all told promptly that a new secretary had been named to the Advisory Board, not until mid-November did they hear that there was no such Board. It is questionable whether an appeal may be lodged with the Board by the mere writing of a letter to its secretary when the Board itself has never been constituted. The letters of 14 November 1995 informing the complainants that the Advisory Board would not be constituted made it plain that they would be unable to exhaust the internal means of appeal laid down in the Regulations and the time limit therefore started to run at the date of receipt of those letters. That is indeed what the Secretary-General indicated to them. So the conclusion is that they observed the time limit of ninety days in Article VII(1) of the Statute.

The merits

23. Regulation 12.2 reads:

"(a) The Secretary-General may terminate the fixed-term appointment or permanent appointment or of a staff member:

(i) due to the abolition of the post or if the staff of the Secretariat has to be reduced because of a reduction of its manning table;

(ii) for disciplinary reasons in accordance with Regulation 33;

(iii) if his services are unsatisfactory for other than disciplinary reasons.

(b) If the necessities of the service require abolition of a post or reduction of the staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those with fixed-term appointments. Due regard shall be paid to the competence, integrity and length of service of the staff members concerned and the special circumstances presented by each individual case.

(c) A written notice of termination shall be given which states the grounds and particulars thereof. Except if the contract states otherwise, the period of notice shall be in the case of a fixed-term appointment not less than three months and in the case of permanent appointment not less than six months.

(d) In lieu of notice the Secretary-General may authorize payment of the staff member's total emoluments for the period of notice."

And Regulation 12.5(a):

"A staff member whose appointment is terminated by the Association shall be paid a termination indemnity in accordance with the following provisions."

24. Regulation 12.5(c) provides that in case of termination of a fixed-term appointment the indemnity shall consist of a number of monthly payments of salary that starts at one for someone with one year's service and goes up to 12 for someone who has completed 13 years' service. According to 12.5(c) it makes no difference whether the terminated appointment was for one year or for five, and whether termination occurs at the end of the fixed-term appointment or earlier. The only criterion laid down in 12.5(c) for the reckoning of the indemnity is length of service, which according to Rule 12.5 "is deemed to comprise the total period of a staff member's full time continuous service with the Secretariat". The intent of the regulation is that the amount of the indemnity should depend not on the duration of the fixed-term appointment but on total length of service.

25. The Tribunal is satisfied on the evidence that the Association calculated the extensions of the complainants' appointments so as to make the dates of expiry and of abolition of their posts coincide and so avoid paying them the indemnities in accordance with Regulation 12.5(c). There must have been a need for Mrs. Watkinson's post up to 30 April 1995 and for the other complainants' posts up to 30 June 1995; otherwise they would not have had their appointments renewed to those dates. So the material issue is whether a termination indemnity is payable where the abolition of the post and the expiry of the fixed-term appointment have been deliberately made to coincide.

26. Commenting on the Staff Rules of the Pan American Health Organization (PAHO), the Tribunal held in Judgment 469 (*in re* O'Connell):

"... it must not be assumed that the power of non-renewal under [Staff Rule] 1040 could properly be used to prolong an appointment for a period just long enough to survive the abolition of the post and with the sole object of avoiding payment of an indemnity under 1050."

Though the rules at issue in that case were different, the principle is clear and it is a sound one. Applying it to the present cases means that EFTA was not free to manipulate renewal so as to avoid the payment of the indemnity where, if the normal pattern had been followed, the indemnity would have been payable. EFTA must therefore pay the complainants termination indemnities to be reckoned according to length of service as provided in Regulation 12.5.

27. They are also entitled to costs, and the Tribunal sets the amount at a lump sum of 10,000 Swiss francs.

28. In its surrejoinder the Association takes the complainants to task for having produced three documents with their rejoinder of 13 July 1996. It claims privilege for one appendix to their submissions, which is the text of a legal opinion advising it to pay termination indemnities. A second appendix is, it says, a confidential memorandum of 7 February 1995 addressed to the delegations of its member States about that legal opinion and containing the recommendation of its secretariat to pay indemnities where total employment was more than six years. The third appendix that it sees as confidential is a memorandum dated 12 April 1995 to the delegations about the cost of the indemnities.

29. The Secretary-General wrote to each of the complainants on 23 July 1996 objecting to the production of those documents and asking them to surrender at once all EFTA documents in their possession, to explain how they had come by them and what use had been made of them, and to confirm that they would make no further use of them.

30. The complainants' counsel replied on 29 July 1996 disputing that the legal opinion was confidential on the grounds that EFTA had let the Staff Association have a copy; the complainants had refrained from producing

confidential memoranda in their complaints, but once the defendant produced some of the minutes of the Supervisory Body's discussions there could be no objection to their submitting others.

31. The Association's counsel wrote on 18 September to counsel for the complainants saying that they had no right to have the documents, let alone produce them. In its surrejoinder the defendant says it got no answer. In a further brief the complainants' counsel says that she had replied on 8 October and she appends a copy of the letter. In comments on that brief the Association says it cannot find any trace of the reply but has no objection to putting it in the case records; it maintains its objections to the production of the three items.

32. A legal opinion obtained for the purpose of litigation will ordinarily be privileged. But the defendant does not deny having made the text of the legal opinion available to representatives of the Staff Committee. Having been given the text without any condition or rider, the Staff Association was entitled to make copies available to its members.

33. The two memoranda were before the Supervisory Body. EFTA having submitted to the Tribunal the minutes of some of the Supervisory Body's meetings, the complainants were entitled to disclose those memoranda. Besides, the Tribunal's decision does not turn on the contents of the documents.

DECISION

For the above reasons:

1. The Association shall pay each of the complainants termination indemnity to be reckoned according to length of service.
2. It shall pay them a total lump sum of 10,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner