Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

C.

v.

EPO

121st Session **Judgment No. 3616**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms B. C. against the European Patent Organisation (EPO) on 18 September 2013 and corrected on 18 November 2013, the EPO's reply of 28 February 2014, the complainant's rejoinder of 17 April, corrected on 29 July, and the EPO's surrejoinder of 24 November 2014;

Considering Article II, paragraph 5, 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 decision not to extend her fixed-term contract and the refusal to grant her a termination indemnity.

The complainant entered the service of the European Patent Office, the EPO's secretariat, on 1 September 2007, to take up a post of administrative employee at grade B1. She initially received a fixed-term contract for a period of one year and ten months. This contract, which was governed by the Conditions of Employment for Contract Staff (CECS), was extended five times, the final extension ending on 31 May 2012. On 29 November 2011 the complainant was informed in writing that, since the reason for employing her, namely a temporary staff shortage, was no longer "valid", her contract would not be extended

beyond its expiry date. On 22 February 2012 she filed her first internal appeal to contest this decision. She contended in particular that the tasks which she had been carrying out for almost five years were of a permanent nature and she requested a permanent appointment, in accordance with article 7, paragraph 3, of the Service Regulations for Permanent Employees of the European Patent Office, or, subsidiarily, the renewal of her contract. She was informed by a letter of 24 April 2012 that the President of the Office was unable to grant these requests and that this first appeal had been referred to the Internal Appeals Committee (IAC). On 14 May 2012 the complainant filed a second internal appeal to contest the decision not to pay her the termination indemnity provided for in Article 15b of the CECS. She explained that, as she had no unemployment insurance, she was relying on that indemnity to meet her financial commitments until she found a new job. On 5 June 2012 the EPO informed her that this request could not be granted. This second appeal was also referred to the IAC.

The IAC heard the parties on 5 December 2012 and issued a single opinion on both appeals on 17 April 2013. It considered that under Article 15a, paragraph 1, of the CECS the complainant was not entitled either to have her contract extended, or to have it converted into another type of employment. It therefore recommended that her request to have her contract converted, or at least extended, should be dismissed.

The IAC also noted that Article 15b of the CECS, which provides for the payment of a termination indemnity, was not in force when the complainant signed her contract and that each of the extensions of the contract which had been offered thereafter stipulated that the terms of the complainant's employment remained unchanged. It inferred from this that she was not entitled to such an indemnity.

However, the IAC found that the EPO had breached its duty of care, particularly in that it had made no provision for an unemployment insurance scheme for contract staff who did not qualify for a termination indemnity and it considered that, when the complainant had signed her contract, she had not been sufficiently informed about

the consequences of joining the EPO's social insurance scheme. The IAC therefore unanimously recommended that the complainant be awarded damages for the resultant material injury which she had suffered, and the majority of its members further recommended that she be paid 4,000 euros in compensation for moral injury and 1,000 euros in costs.

On 18 June 2013 the Vice-President in charge of Directorate General 4 informed the complainant that, in accordance with the opinion of the IAC, he had decided to reject as unfounded her claims for the conversion or extension of her contract and for the payment of a termination indemnity. Regarding the alleged breach by the EPO of its duty to inform, he noted the IAC's finding that, when the complainant had received the job offer from the EPO, she had not asked for any additional information about the EPO's social insurance scheme – which she had chosen to join – or indicated that the applicable rules were insufficiently clear to her. Moreover he explained to the complainant that, in his view, the EPO had not breached its duty of care, because her employment contract had conferred a set of benefits which were not "contrary to any higher ranking legal rules". He therefore rejected all the IAC's recommendations. That is the impugned decision.

The complainant requests the setting aside of the decision not to extend her contract, the payment of the termination indemnity provided for in Article 15b of the CECS and 20,000 euros in damages for the injury suffered and the costs incurred. She also seeks payment of the "compensation granted by the Internal Appeals Committee".

The EPO submits that the complaint should be dismissed as unfounded. It criticises the "approach" of the complainant who, it contends, simply reiterates the arguments which she put forward before the IAC.

CONSIDERATIONS

1. First the EPO questions the receivability of the complaint. It holds that the complainant merely outlines the facts contained in her submissions to the IAC and does not enter any explicit plea.

This criticism will not be accepted. While the arguments of fact and of law of the complainant, who is not assisted by a representative, are rather succinct, they are sufficient to enable the Tribunal and the other party to apprehend with sufficient ease and clarity the complainant's pleas (see Judgment 2264, under 3(e)), which culminate in the claim that the impugned decision should be set aside and that various indemnities should be paid.

2. The first question is whether, at the end of her contract, the complainant was entitled to receive a permanent appointment, or to have her contract extended again.

3. At the time of the decision not to extend the complainant's contract beyond 31 May 2012, Article 1 of the CECS provided that the President of the Office could recruit staff on the basis of two categories of contract, namely non-renewable contracts concluded for the performance of short-term duties (subparagraph (a)), or contracts concluded to cover other temporary needs (subparagraph (b)).

According to paragraph 2 of that article, the Office could conclude such employment contracts only in response to temporary needs, such as a staff shortage, or for the purpose of carrying out occasional tasks which by their nature were non-permanent, or for other legitimate reasons which justified limiting the term of the contract. Article 2, paragraph 3, of the CECS specified that contracts under Article 1, paragraph 1(b), could not be concluded for more than five years, save in exceptional cases where they could be extended by a maximum of two years.

Article 15(a), paragraph 1, of the CECS established the principle that the contracts in question did not confer any right either to an extension or to conversion to another type of employment.

However, under paragraph 2 of this article, where the President of the Office established that the tasks performed under a contract under Article 1, paragraph 1(b), had become permanent, the contract staff member concerned might be eligible for appointment to a corresponding

vacant post as a permanent employee, if certain requirements were fulfilled.

4. When the complainant was informed that her contract would not be extended beyond 31 May 2012, her employment relationship with the EPO was governed by Article 1, paragraph 1(b), of the CECS. A further extension was therefore conceivable in principle having regard to Article 2, paragraph 3, of the CECS. Similarly, her appointment as a permanent employee was by no means ruled out, provided that the conditions laid down in Article 15a, paragraph 2, were met.

(a) It must first be noted that the complainant provides no evidence that the appointing authority, or any other competent body, had given her any form of unequivocal assurance that, upon the expiry of her contract, she would be appointed as a permanent employee, or that her contract would be extended for a further period – an assurance which would have bound the EPO in accordance with the principle of good faith.

(b) The submissions in the complaint and rejoinder are not sufficient grounds for calling into question the principles underlying Article 15a of the CECS which the Tribunal has embodied in its case law. In accordance with these principles, a contract staff member has no automatic entitlement to be appointed as a permanent employee and the employer is under no obligation to extend her or his contract beyond its expiry date (see Judgments 2488, under 6, and 3005, under 11). The only question is therefore whether, by dismissing the internal appeal of 22 February 2012, the President of the Office abused the broad discretion that he enjoys in this area.

It is plain from the file that this is not the case and that this decision was not *ultra vires*, showed no formal or procedural flaw, nor any error of fact or of law, did not overlook a material fact, involved no abuse of authority and that no plainly wrong conclusions had been drawn from the evidence (see, for example, Judgments 3005, under 10, and 3443, under 3, and the case law cited therein).

The organisational reasons given by the EPO for the transfer of a permanent employee in order that he might perform the complainant's duties cannot be termed arbitrary or criticised as a breach of equal treatment.

(c) The complaint must therefore be dismissed insofar as it concerns the refusal to grant the complainant a permanent appointment, or to extend her contract.

5. The complainant, who was in the service of the EPO for four years and nine months, submits subsidiarily that she is entitled to the termination indemnity for which provision is made in Article 15b, paragraph 1, of the CECS, which reads as follows:

> "A contract staff member whose contract ends at the contractually appointed time shall be granted a termination indemnity of one month's basic salary, together with, where appropriate, the household and dependants' allowance, multiplied by the number of years' and fractions of years' service at the Office."

6. The EPO emphasises that Article 9 of Administrative Council Decision CA/D 6/09 of 10 December 2009, pursuant to which this provision was incorporated in the CECS, stipulated that it applied only to contracts concluded as from 1 January 2010, and it submits that the complainant is not entitled to this indemnity as her fixed-term contract was concluded on 25 July 2007.

7. Although the initial duration of the complainant's contract was one year and ten months, it was then extended twice without interruption, in March 2009 for the period 1 July 2009 to 31 December 2009, and in July 2009 for the period 1 January 2010 to 30 June 2010.

8. Unless it expressly provides otherwise and subject to the protection of acquired rights, a statutory provision applies automatically to staff members who are serving under a contract as of the date on which it enters into force. Administrative Council Decision CA/D 6/09, which introduced Article 15b, on the termination indemnity, into the CECS, expressly – and contradictorily – stated that it entered into

force on 10 December 2009 and applied to all contracts concluded from 1 January 2010. For the purposes of applying the above-mentioned provisions of Article 15b, each extension of the complainant's contract must be deemed to be a new contract. The Tribunal therefore considers, in light of the terms of the aforementioned decision, that as from the renewal of her contract that took effect on 1 January 2010, the complainant was entitled to the termination indemnity provided for in Article 15b.

9. Moreover, the Tribunal notes that the reasoning adopted by the EPO in contending that the complainant was not entitled to the termination indemnity would result in inequality bordering on the absurd. A member of the contract staff who first entered the service of the EPO after 1 January 2010 would be entitled *de lege* to that indemnity, but the complainant would not, because she had been in the Organisation's service for longer. Similarly, espousing the EPO's position would mean that the complainant would have been entitled to the indemnity – which she was denied because her appointment was continuing – if she had left the Organisation before 1 January 2010 and had returned to it after a brief interruption of her employment relationship.

10. The EPO's contention that the addenda to the complainant's contract specified that, apart from the duration of the contract, "[a]ll the other terms of employment [were] unchanged" is irrelevant.

This reference to "other terms of employment" could only concern terms of employment stipulated in previous contracts, and not statutory provisions, as any amendments to the latter which had entered into force after the conclusion of her previous contracts were automatically applicable to the complainant.

11. It follows from the foregoing that the complaint must be allowed insofar as it is directed against the refusal to grant the complainant a termination indemnity under Article 15b of the CECS. The EPO shall therefore pay the complainant the indemnity which is due to her under Article 15b of the CECS.

12. The complainant is entitled to an award of damages for the moral injury which she suffered on account of the unlawful nature of the impugned decision. Having regard to all the circumstances of the case, these damages will be set at 8,000 euros.

13. Since by virtue of this judgment the complainant has been awarded the termination indemnity which she claimed and compensation for moral injury, there are no grounds for granting the complainant's claims for payment of the "compensation awarded by the Internal Appeals Committee".

14. As the complainant succeeds in part, she is entitled to costs, which shall be set at 1,000 euros.

DECISION

For the above reasons,

1. The decision of 18 June 2013 is set aside insofar as it concerns the complainant's entitlement to a termination indemnity.
2. The case is remitted to the EPO in order that it may calculate and pay to the complainant the sum due to her under Article 15b of the Conditions of Employment for Contract Staff.
3. The EPO shall pay the complainant moral damages in the amount of 8,000 euros.
4. It shall also pay her 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ