

L. (No. 9)

v.

EPO

133rd Session

Judgment No. 4490

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Ms M. L. against the European Patent Organisation (EPO) on 6 December 2019, the EPO's reply of 2 April 2020, the complainant's rejoinder of 17 June and the EPO's surrejoinder of 8 September 2020;

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 amount of damages awarded for the unlawful decision not to renew her fixed-term contract as a Principal Director and to reinstate her in a lower-level post instead.

The complainant is a former employee of the EPO. She joined the European Patent Office, the EPO's secretariat, in 1988 as a patent examiner. On 1 August 2004 she was appointed as Principal Director Pure and Applied Organic Chemistry (a grade A6 post) for a term of five years. On 11 May 2009 her Principal Director contract was renewed with effect from 1 August 2009 for a further term of five years, namely until 31 July 2014. As from 19 July 2010 she was transferred to the post of Principal Director of Principal Directorate Quality Management and, on 15 November 2012, she was transferred to the post of Senior Advisor on Quality, still at grade A6.

As from September 2012 the complainant was on sick leave.

On 28 January 2014 the President of the Office informed the complainant that, in view of new organisational developments which had taken place in 2013 and the management of the quality roadmap, the post of Senior Advisor on Quality would cease to exist as from 1 August 2014. The President had therefore decided not to renew the complainant's Principal Director contract. Pursuant to Article 5a of her contract, she would be reinstated to an A5 post and would occupy step 13 in that grade.

The complainant requested the review of the decision not to renew her Principal Director contract on 7 April and, on 29 April, she submitted a letter of resignation to the President with effect from 31 July 2014. Her request for review was rejected on 12 June 2014.

On 12 August 2014 the complainant filed an internal appeal against the decision to reject her request for review.

In its opinion of 17 October 2018 the Appeals Committee unanimously found that the reasons given for the abolition of the complainant's Senior Advisor post were artificial and unsound, because the EPO had not provided any convincing evidence that the abolition was objectively justified. As the abolition of the post formed the sole basis of the decision not to renew her Principal Director contract, that decision was unlawful and should be set aside. However, the Appeals Committee also found that the complainant had no right or legitimate expectation to the renewal of her contract. With respect to her pleas of harassment and constructive dismissal, it found that her plea of constructive dismissal was dependent on the outcome of her complaint of harassment, which was the subject of other proceedings. It concluded that, while the appeal should be allowed in part and the decision not to renew her contract should be considered unlawful, there was no guarantee that, had the unlawful decision not been taken, her Principal Director contract would nevertheless have been renewed. Accordingly, it recommended to award the complainant 10,000 euros for the loss of the opportunity to have her contract renewed and to award her 300 euros in moral damages for the excessive length of the internal appeal procedure.

The complainant was informed on 10 September 2019 that the EPO had decided to follow the unanimous recommendations of the Appeals Committee. Consequently, she was awarded 10,000 euros in damages for the loss of the opportunity to have her Principal Director contract

renewed, as well as 300 euros for the excessive length of the procedure. That is the impugned decision.

The complainant asks the Tribunal to join the present complaint with her seventh and eighth complaints. In the event that the Tribunal rejects her request for joinder, she asks subsidiarily that the Tribunal treat the three complaints in sequence. She claims material damages for loss of earnings in an amount corresponding to the difference between the A6 salary (basic plus allowances) which the complainant would have received if she were on active duty in an A6 post and the actual pension received for the period 1 August 2014 to 31 January 2017, the date of her statutory retirement. She further claims payment, as from 1 February 2017, of a newly calculated pension corresponding to the amount which she would have received had she remained in active duty at grade A6 until 31 January 2017. She further claims 25,000 euros in moral damages for injury to her health and dignity, 3,000 euros for undue delay in the procedure, as well as costs.

The EPO objects to the joinder on the ground that the cases do not raise the same issues of fact and law. It objects to the receivability of any claim that the challenged decision amounted to harassment, as the complainant has not filed a complaint of harassment in accordance with applicable rules and, therefore, internal means of redress have not been exhausted. To the extent that her allegations of harassment overlap with those raised in the decisions that were the subject of Judgments 4261, 4262, 4263, 4264 and 4265, those allegations are inadmissible on the grounds of *res judicata*. It asks the Tribunal to dismiss the complaint as irreceivable in part and otherwise unfounded on its merits.

CONSIDERATIONS

1. The complainant had been employed by the EPO until her separation from service in 2014. By letter dated 28 January 2014 from the President of the Office, the complainant was informed the Principal Director post she then occupied at grade A6, Senior Advisor on Quality, was to be abolished and her Principal Director contract, expiring on 31 July 2014, would not be renewed. The letter said:

“[...] your post will cease to exist as from 01.08.2014 and your PD contract will not be renewed for a further term. Pursuant to Art.5a of your contract, you will therefore be reinstated to an A5 post and you will occupy step 13 in that grade.

According to the information currently available, you will be on certified sick leave until 30.06.2014. Upon your return to work, you will be reassigned to a new post and duties, on which you will have the opportunity to be consulted in the scope of your reintegration process.”

2. The complainant sought the review of this decision by letter dated 7 April 2014. In that letter the complainant characterised the decision as a “decision not to renew for a further term [her] Principal Director contract due to expire on 31.07.2014 and to reinstate [her] in an A5 post as from 1 August 2014”. Importantly, the complainant sought, by way of relief, that the decision of 28 January 2014 be set aside, that her Principal Director contract be renewed for a further three-year term and that she be appointed to a Principal Director post which was commensurate with her grade, performance and which respected the dignity of a senior official of the EPO. Thus, the course the complainant was charting if she was successful, was, as a first step, the renewal of her Principal Director contract.

3. This application for review was rejected by letter dated 12 June 2014 from the President who characterised the rejected request as one to “quash the decision not to extend [the complainant’s] PD contract”. It should be noted that the complainant submitted a letter of resignation from the EPO on 29 April 2014 based on the state of her health.

4. On 12 August 2014, the complainant filed an internal appeal. The notice of appeal commenced with several headings. The first heading was the “Initial decision challenged” and under that heading the complainant set out the substance of the letter of 28 January 2014. The second heading was the “Request for a review procedure” and under that heading the complainant referred to her letter of 7 April 2014. The third heading was “Outcome of the review”. At the commencement of the section, the complainant wrote:

“With letter dated 12 June 2014 [...] the President informed me of his decision to reject my request to quash the decision not to extend the PD contract [...] This decision is contested by way of the present internal appeal.”

Thus, consistent with the way the complainant’s grievance had been framed to this point, the substance of the grievance was the decision not to extend her Principal Director contract.

5. After recounting the facts under the fourth heading “Brief statement of the facts leading to the challenged act or decision”, the complainant then addressed the fifth heading “Explanation why I believe that the decision or act is contrary to my rights and obligations as foreseen in the EPO’s regulations”. The complainant then gave her account, over more than two typed pages, of her recent experiences at the EPO, which, at one point, she described as “systematic and progressive retaliatory actions against [her]”. She concluded this section of the notice of appeal by saying “[...] the non-renewal of [her] PD contract is flawed and founded on errors which are directly attributable to the EPO”.

6. The remaining substantive heading was “Remedy sought”. The complainant explained that because of the deterioration of her health it was no longer possible for her to claim reinstatement in a Principal Director post commensurate with her grade and performance. She then said:

“As my forced resignation has *inter alia* resulted in severe financial losses in terms of salary and pension accrual, I request the following financial compensations:

- a) Material damages for constructive dismissal and loss of earnings: supplementary payment of a sum corresponding to the difference between my full monthly A6 salary and the actually paid pension until I reach the regular retirement age of 65 on 1 February 2017 (30 months), i.e. a total sum of about 270,000 [euros] (as calculated on the basis of the salary scales DE 07/2013);
- b) As from 1 February 2017, payment of a newly calculated pension corresponding to the amount I would have received if my PD contract had been renewed and I had retired normally at the age of 65;
- c) Payment of moral damages in the amount of 25,000 [euros] for the severe injuries to my health and to my professional dignity and standing.”

7. The complainant appears to have been transforming her grievance from one challenging the specific decision not to renew the Principal Director contract, to one alleging she had been constructively dismissed. Whether that has any material legal relevance will be discussed shortly.

8. It is unnecessary to summarise the detailed and lengthy opinion of the Appeals Committee of 17 October 2018. However, the Committee was, albeit in moderated language, what can fairly be described as highly critical (particularly in paragraphs 26 to 29 of its opinion) of the

reasons advanced by the EPO for abolishing the complainant's post of Senior Advisor on Quality. While the Appeals Committee did not express it in these terms, the clear import of what it said is that the decision was not taken *bona fide*. Suffice it to note two additional things. The first is that the Committee decided it would not consider the complainant's claim of constructive dismissal as it was dependent on an established harassment claim. The second is that the Committee concluded that the decision not to renew the complainant's Principal Director contract was solely based on the decision to abolish the position she then held, namely Senior Advisor on Quality. The Committee also concluded that the reasons given for the abolition of the complainant's post were artificial and unsound. Thus, as the Committee concluded, "that decision not to renew the contract must be considered unlawful and should be set aside".

9. It is tolerably clear that the EPO does not dispute this conclusion. In the impugned decision of 10 September 2019, the Principal Director Human Resources said that she would follow the unanimous recommendation of the Appeals Committee. No criticism is made, in that decision, of any aspect of the reasoning of the Committee, particularly any criticism of the conclusion that the decision not to renew the Principal Director contract was unlawful. Moreover, that conclusion was foundational to the Committee's recommendation about paying the complainant 10,000 euros in damages, which was agreed to and adopted in the impugned decision. Additionally, no attempt is made to challenge that finding in the EPO's pleas in these proceedings before the Tribunal.

10. Accordingly, the Tribunal can proceed on the basis that it is common ground and not in issue that the decision not to renew the complainant's contract was unlawful. The Appeals Committee was correct in approaching the assessment of damages for the unlawful non-renewal decision as ultimately requiring an assessment of what were the prospects that the contract would, at its expiry, be renewed by lawful decision in any event and, viewed from that perspective, assessing the financial consequences to the complainant in losing the opportunity to have the contract renewed (see, for example, Judgments 2867, consideration 18, 4062, consideration 17, and 4170, consideration 15). Some aspects of the Committee's approach to the assessment of damages were, however, flawed as discussed shortly as was their adoption by the Principal Director Human Resources.

11. If a decision is made not to renew a fixed-term contract but the decision was unlawful then an assessment must be made of lost future income with the organisation (adjusted and offset by any future income from other employment) which will involve an assessment of what the prospects were of the contract being renewed and its duration.

12. However, the position would, at least in a case such as the present, be no different in substance if the complainant's grievance had initially been and had remained an allegation of constructive dismissal. In a case of unlawful dismissal, if reinstatement is not ordered (in this case not sought), then the material damages are the lost future income in the position with the organisation adjusted by an assessment of whether the staff member would have remained in that position and, if not, also adjusted by future income from other employment (see Judgment 4234, consideration 10). This assessment can also be approached compendiously by assessing the value of the lost opportunity to remain in employment (see, for example, Judgment 4305, consideration 14).

13. It is not entirely clear when the alleged unlawful constructive dismissal is said by the complainant to have occurred or taken effect, but most probably, on her case, it was when her resignation took effect, namely 31 July 2014, which coincided with the time of the expiry of her contract and also coincided with the operative date of the abolition of her post. Thus, the inquiry would become for the unlawful constructive dismissal, what were the material damages. As just discussed, the process of assessment would, in this case, have been the same in substance as for an unlawful abolition of the post leading to an unlawful non-renewal.

14. The Appeals Committee's recommendation concerning material damages which was adopted by the Principal Director Human Resources, was first to identify the difference between the monthly net salary for the unlawfully abolished post and the grade A5 post referred to in the letter of 28 January 2014 in consideration 1 above (approximately 1,000 euros). It then calculated what, in aggregate, that difference would represent over the roughly two and a half years before the complainant reached retirement age and then discounted that amount by two thirds. While it is not entirely clear why the amount was discounted in this way and in this amount, it may have well reflected the Appeals Committee's views about the prospects, at least notionally, of the complainant's Principal

Director contract being renewed. In relation to moral damages, the Committee recommended none because, it appears, they were seen to be dependent on the complainant's allegations of harassment being made out.

15. This approach is flawed. The financial effect on the complainant of the decision not to renew her contract should be assessed by reference to the circumstances existing at the time the decision was made, namely 28 January 2014. The grade A5 post should not have been identified as creating a salary floor. The offer of that post was contingent on the effective abolition of the grade A6 post then occupied by the complainant. Legally, that abolition was ineffective and thus the contingent offer of the other post was also legally ineffective. Moreover, the complainant could not have been under any legal obligation to accept the grade A5 post on the assumption that her Principal Director contract was not renewed. The non-renewal of her contract would have occurred (but for her resignation) in circumstances where her earlier transfer to the post she then occupied was unlawful (see Judgment 4488 given in this session) and the President had arbitrarily and for no demonstrably good reason refrained from finalising her 2011 performance management report and also her report for part of 2012 (see Judgment 4489 given in this session).

16. While in form those performance management reports were not complete, in substance they were and her performance had been assessed as "Very good". There is a real prospect her Principal Director contract would have been renewed for a period pending her retirement if the decision whether to renew it had been approached in good faith. There is no need, in this respect, to call in aid or discuss the former President's Implementation decision on the extension of Principal Directors' contracts (the "Pompidou decision") referred to in the pleas. The complainant had been employed at a very senior level since 2004 and, shortly before these events, was receiving extremely favourable assessments of her performance, both overall and in relation to many specific aspects. But for the unlawful acts of the EPO culminating in the decision to abolish the post of Senior Advisor on Quality, it is probable the complainant would not have gone on sick leave and ultimately would not have resigned on medical grounds.

17. The complainant calculates her material loss referable to income she would have earned from 1 August 2014 to the date of her retirement, in the ordinary course at age 65, on 1 February 2017. The sum is about 270,000 euros (less pension payments) and this is not challenged by the EPO in its pleas. However, this would not be an appropriate amount of material damages because it does not allow for the possibility the contract would lawfully not have been renewed. Focusing only on the possibility the contract would not have been renewed, an appropriate amount of material damages is 200,000 euros net of any substitute income and income from employment received during that period. Her case that her pension entitlements were adversely affected was not particularised and does not provide a firm foundation for awarding material damages on this basis.

18. The complainant's claim to moral damages is not dependent on the complainant proving harassment, as the Appeals Committee believed. It is tolerably clear from the terms of the complainant's letter of resignation of 29 April 2014 and the contemporaneous medical certificate from her treating physician (the contents of neither, as they related to the effect of events on the complainant, were challenged by the EPO) that the decision to abolish her post and not to renew her Principal Director contract had a serious and negative effect on the complainant's health and well-being culminating in her resignation. In assessing her moral damages in these proceedings, regard must be had to the moral damages awarded to her in the two other judgments (Judgments 4488 and 4489) concerning the events immediately anterior to the decision not to renew the contract. There cannot be further compensation in these proceedings for the same events. The complainant claims 25,000 euros in moral damages. An appropriate amount is 20,000 euros. She is entitled to costs in the sum of 1,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 200,000 euros in material damages less any amount already paid and less any income the complainant received from other employment in the period 1 August 2014 to 1 February 2017.
2. The EPO shall pay the complainant 20,000 euros in moral damages.
3. The EPO shall pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ