

EUROPEAN CENTRE FOR MEDIUM-RANGE WEATHER FORECASTS

APPEALS BOARD

DECISION

In Case No 4

X v ECMWF

The Appeals Board of the European Centre for Medium-Range Weather Forecasts

comprising

Michael Groepper, Chair,
Kieran Bradley, Vice Chair,
Spyridon Flogaitis,

Assisted by Susan Dunning, Secretary to the Appeals Board,

Having heard in public session on 21st March 2018 in Reading

1. the Claimant, X,
2. assisted by Giovanni Palmieri, Counsel,

For the Administration of the European Centre for Medium-Range Weather Forecasts:

3. Nyall Farrell, Director of Administration,
4. Gregor Wettberg, Head of Legal Services,
5. assisted by Bertrand Wägenbaur, Counsel,

Has reached on 21st March 2018 the following decision:

A. Procedural Summary

- 1 The Appeal of the Claimant was introduced in French on 30th October 2017 and registered with the Appeals Board Secretary as Appeal No 4. It was transmitted to the Director-General for Comments on the same day, followed by an English translation transmitted on 8th November 2017.
- 2 The Director-General submitted her Comments on 11th December 2017, which were transmitted to the Claimant on the same day.
- 3 The Claimant's Reply was submitted in French to the Appeals Board Secretary on 8th January 2018 and transmitted to the Director-General on the same day, followed by an English translation.
- 4 The Director-General's Rejoinder was submitted on 22nd January 2018 and

transmitted to the Claimant on the same day.

5 The Parties were invited to, and attended, the hearing fixed for 21st March 2018.

B. Facts¹

6 This Appeal is mainly directed against the non-extension of the Claimant's staff contract with the European Centre for Medium-Range Weather Forecasts (hereinafter called ECMWF or Centre) beyond 30th June 2018 until 30th June 2021.

7 In September 2001, the Claimant took up a post with the Centre and signed a fixed-term contract, limited for a period of four years. He was assigned to the post of Assistant to the Head of Administration/Personnel Officer. In 2005, the contract was extended for five years until 2010, and again in 2010 for five years until 2015. In 2015, his job title was amended (HR Business Partner). On 25th February 2015, the contract was again extended for two years and 10 months until 30th June 2018. The Claimant accepted this offer on 30th March 2015.

8 As a staff member engaged before 1st July 2003, the Claimant is affiliated to the Budgetised Pension Scheme and eligible for a pension at the age of 60, while staff members who took up employment after that date are affiliated to the Funded Pension Scheme and are eligible for a pension at the age of 63.

9 In a letter dated 29th August 2017, the Director-General informed the Claimant that his last day of employment would be on 30th June 2018, as he would retire on 1st July 2018. In an email dated 2nd September 2017, the Claimant asked for an extension of at least three years up to 30th June 2021, when he would reach the age of 63. On 7th September 2017, the Claimant lodged an "Administrative complaint" against the decision of 29th August 2017. Being asked to formulate his demand more precisely and to specify the content of an alternative decision, the Claimant added in an email of 2nd October 2017, "I therefore believe that to be in line with the normal practice concerning contracts of employment which foresees issuing renewable contracts with a maximum duration of up to five years, the contested administrative decision should be replaced by an offer of a renewable contract with a duration of at least three years, up to 30 June 2021." The complaint was rejected by the Director-General on 4th October 2017.

10 On 27th October 2017, the Claimant filed an Appeal against this decision.

C. The Claimant's position

11 The Claimant submits:

I. On admissibility:

12 The contested decision not to renew the contract was contained in the Director-

¹ As stated in the pleadings of the parties

General's letter of 29th August 2017, which was not for the purpose of "confirming" the contract signed by both parties in 2015. The Centre was obliged by Article 5.5 of the Staff Regulations to inform the Claimant in writing nine months before his contract terminated that it had no intention of renewing his contract. It did so by way of the letter of 29th August which complies with this requirement and contained an (implicit) decision not to renew the contract after the date of expiry. In the rejection decision dated 4th October 2017, the Director-General leaves no room for doubt by qualifying her letter of 29th August 2017 as a "decision" ("my decision dated 29 August 2017 not to offer you a further contract beyond 30 June 2018"). The Claimant was not obliged to ask for the renewal of his contract. The Director-General was aware of his willingness to continue, since the Claimant wrote in the self-assessment section of his evaluation report relating to the year 2016: "I am available to continue to work in the same capacity for another 2/3 years".

II. On the merits:

- 13 The decision is founded on an incorrect interpretation of the provisions in force at the Centre and is therefore vitiated by manifest errors of law. Moreover, a range of concordant evidence points to the Director-General's breach of the general principle of law prohibiting the misuse of powers.
- 14 1. The Claimant is convinced that the key issue of the dispute resides in determining the correct interpretation of the pertinent provisions of the Centre's internal regulations, in particular Article 5.11 of the Staff Regulations (added with effect from 1st July 2013) and No 5.5 of the Implementing instructions. In the first place, the Claimant underlines the terms of Article 5.11 of the Staff Regulations, i.e.: "The age limit for service is normally 65. Any exception to this must be reported to Council by the Director-General". What is meant by "normally", can be seen in Council document ECMWF/C/78(12)5 on the amendment of the relevant rule; there it is stated that "If adopted, this change would not infringe the right of the serving staff to request retirement at the age of 60. However it would allow all serving staff to have their fixed-term contracts of employment normally renewed up to the age of 65, which would become, de facto, the normal retirement age. In the interest of the Centre, employment could also continue after the statutory age limit but in this case no further pension rights would be accrued by the staff member". However, the Director-General insists on making a different interpretation of this regulatory provision and trying to reproduce the previous situation as though it arose from the positive law still in force.
- 15 2. When, in 2013, the Centre's Council adopted the new regulatory texts, the administrative authorities of the Centre were fully aware that the new provisions had radically amended the existing legal situation. During the Council meeting, the Director of Administration had opposed the amendment, stating that so far it had been left to the discretion of the Director-General to extend a contract beyond the age of 60 in well-justified, exceptional cases. Since the procedure had worked well in the past, he could not see any benefit in introducing a statutory age limit. Likewise, the Director-General noted that introducing a statutory age limit would imply that the Council, instead of the Director-General, was making decisions on how long staff could be employed by the Centre. This declaration leaves no doubt as to the interpretation of the new provisions or to the hostility

of the Centre's authorities thereto, fearing the erosion of their discretionary powers. It is in vain that the Director-General cites a Council document of 2002 acknowledging the "flexibility" afforded to the Director-General to dismiss staff members who have reached the age of 60 or are between 60 and 65. In fact, this text refers to the previous legal situation for the simple reason that the regulatory amendments currently in force date from 2013.

- 16 3. In order to claim that Article 5.11 of the Staff Regulations is inoperative, the Director-General invokes No 5.5 of the Implementing Instructions stating that "the retirement age shall be 60 years for staff members affiliated to the Budgeted Pension Scheme and 63 years for staff members affiliated to the Funded Pension Scheme, as a general rule". However, this provision is limited to providing that staff may claim their pension if they have reached 60 years of age and come under the Budgeted Pension Scheme and 63 years of age if they are affiliated to the Funded Pension Scheme. This provision pertains to Article 8, paragraph 1 of the Budgeted Pension Scheme as well as to Article 9.1 of the Staff Regulations in accordance with which "a staff member shall become eligible for a retirement pension at the age of 63". But none of these three provisions refer to the "statutory retirement age" and to an obligation to retire at the indicated age.
- 17 4. The Council's report shows the Centre's opposition to the introduction of a statutory age limit. The comments of the Director of Administration, the Head of Human Resources and the Director-General are very explicit in this regard. Nevertheless, the Member States demonstrated their determination to introduce the statutory age limit of 65 and to raise to 63 the age of eligibility for retirement for members of staff affiliated to the Funded Pension Scheme. The amendments to the Staff Regulations, adopted unanimously by the Council, make no mention whatsoever of the supposed "flexibility" invoked by the Director-General for her decisions concerning the renewal of contracts for those between 60 and 65 years of age.
- 18 5. In each of the six Co-Ordinated Organisations there is a provision on the "age limit" of 65 for staff service. In certain cases, a specific procedure is provided for to extend the contract beyond that age. An age limit not only facilitates the termination of the functions of staff and of the ipso jure expiry of their contracts, but also in the context of allocating the indemnity for loss of job, which, for the Centre, is calculated on the remaining time and shall not be "in excess of the period which the staff member would still have to serve before reaching the age limit specified by the Staff Regulations of the Centre".
- 19 6. In the Centre's legal order, it is Staff Regulation Article 5.11 that establishes the age limit and not Implementing Instruction No 5.5. If the latter were in conflict with Article 5.11 of the Staff Regulations, the former prevails by virtue of the principle of hierarchy of legal norms. The Staff Regulations is a source hierarchically superior to its Implementing Instructions.
- 20 a) Article 5.11 of the Staff Regulations provides for an age limit which is "normally" 65 years. "Normally" simply means "in accordance with the general rules". It does happen that members of staff of an International Organisation retire before the statutory age limit, firstly by choice and secondly because

there can be other reasons for duties to terminate, as provided for by the Staff Regulations.

- 21 b) The interpretation of No 5.5 of the Implementing Instructions on which the principal hypothesis of the Defendant rests is incompatible with Article 5.11 of the Staff Regulations because based on this hypothesis, 60 and 63 years respectively would be the ages from which a member of staff may be obliged to retire, as is the Claimant's case in accordance with the contested decision. Based on this hypothesis, the renewal of this staff member's contract would arise from the broader discretionary powers of the Director-General.
- 22 7. The Director-General's interpretation of No 5.5 of the Implementing Instructions creates inequality of treatment between the staff of the Centre. The establishment of two different ages (60 and 63 years) and the fact of transforming these ages into statutory age limits would entail not only unequal treatment but also discrimination. Belonging to one or the other pension scheme has no bearing on the importance of the abilities of the member of staff concerned or on the interest for the Organisation in continuing with the functions performed by that member of staff.
- 23 8. The Claimant's case concerns the renewal of a contract considerably before the age limit. Thus, the discretionary powers of the Director-General are limited to the application of the general legal principles as they arise from the case law of international administrative jurisdictions. While it is true that the Claimant does not have a right to renewal, he does at least have a "legitimate hope" of such renewal and the right for the decisions affecting him to be exempt from legal or factual errors in their reasoning.
- 24 a) The Claimant complains that, by examining his request based on the extremely restrictive question of whether continuation of his employment could be considered a necessity for the Centre, the Director-General has committed a legal error. The Director-General has implicitly deemed that the legal principles that apply to her decision not to renew the contract are those that apply to decisions to extend the employment of a member of staff over and above the statutory age limit and not those that govern the renewal of fixed-term contracts.
- 25 b) In the event of contract renewal before reaching the age limit, several criteria restrict the discretionary powers of the Director-General, the first being the duration of the Claimant's contract with the Centre. The Centre disregards the many years for which the Claimant has been employed. For members of staff whose contract has been renewed several times in succession and who have remained consistently employed by an international Organisation for many years, as is the case with the Claimant, the discretionary powers of the Director-General are diminished.
- 26 c) Furthermore, the quality of the Claimant's work is an important criterion.
- 27 9. As to the administrative practice of the Centre, since the revision of the regulations (1st July 2013), 23 members of staff have reached the age of 60. Of these, 83 %, i.e. 19 people, benefited from renewal beyond the age of 60, whilst 3 asserted their right to retirement with their full consent. Only one staff

member has contested a decision not to renew and has reached an agreement with the Centre.

- 28 10. The Claimant further complains of misuse of power. The ends pursued by the Director-General are clearly to resume an administrative practice in accordance with the texts that existed before the reform but which is no longer in accordance with the new texts adopted in 2013. The Director-General and the Director of Administration manifested their disapproval with regard to the new texts which originates from their fear losing part of their discretionary powers. The Director-General has persisted in her opposition to the new text by acting as though Article 5.11 of the Staff Regulations did not exist. By her decision not to renew the Claimant's contract, the Director-General therefore denied the legal reality introduced by the regulatory reform of 2013 and attempted to achieve an objective other than that which she should have achieved.
- 29 11. Finally, the Claimant points to two facts indicating a conspiracy by the administrative authorities against him: Firstly, he was kept in ignorance of the large majority of material projects for the reform of the Human Resources section. Such an attitude is hard to explain in a unit as small as the Centre's Human Resources section and given the Claimant's experience in this domain; secondly, the Claimant has not yet received his assessment for 2016, which is contrary to the rules given to evaluators.

D. The Centre's position

I. On admissibility:

- 30 The letter of 29th August 2017, which the Claimant considers to be a "decision", is not a challengeable act directly and individually affecting the Claimant's legal position, as it merely confirms the contents of the contract of employment the Claimant signed in 2015. The explicit reference in the Claimant's contract to the "30 June 2018, [i.e.] the end of the month when you reach the age of 60 years, unless previously terminated...." is a clear reference to Implementing Instruction 5.5. The Claimant's contract came into force on 30th March 2015, which means that pursuant to Article 1.1 of Annex VII of the Staff Regulations he had 20 days from that date to lodge an administrative complaint against his contract, which he did not do. Consequently, his contract of employment became definitive and is no longer challengeable.
- 31 The letter of 29th August 2017 does not meet the requirements of a "decision" established in case law of international administrative tribunals. It refers to Article 5.5 of the Staff Regulations, but does so only because the Director-General needs to comply with the period of nine months it provides, which is a general rule that applies regardless of the circumstances of the individual case. Compliance with the said time limit thus does not in any way alter the contents of the contract of employment the Claimant signed in 2015. Both the wording and the purpose of the letter of 29th August 2017 illustrate that the Director-General did not thereby reconsider the contents of point 1 of the Claimant's contract of employment. Indeed, the Director-General had no reason for reassessing or otherwise reviewing the contents of the said point 1, since the contract stipulates explicitly the last day of the Claimant's contract, and, implicitly, the ab-

sence of any service-related reasons which would justify an extension of the said contract beyond the retirement age, within the limit of the statutory age limit set by Article 5.11 of the Staff Regulations. The Claimant did not lodge a request to have his contract extended beyond the age of retirement, i.e. 60, a date of which he was aware since the date on which he signed the contract, back in 2015. Against this background, the letter is a mere confirmation of point 1 of the contract of employment.

II. On the merits:

- 32 1. Contracts are, in principle, renewed according to a variety of factors reflecting the interest and need for the service, until the member of staff reaches the retirement age, i.e. until the member of staff is either 60 or 63 years old, depending upon the pension scheme applicable. In the particular case of an offer by which a given contract is being renewed until the aforementioned retirement age, which is the case here, the Centre will also need to decide on whether there are service reasons for extending the contract beyond the retirement age within the upper limit of the statutory age limit of 65 years.
- 33 2. The Council had decided that “the current practice of retirement age at 60 with the flexibility given to the Director to separate staff between the ages of 60 and 65 according to the service requirements will continue”, not questioning, but taking into account the Centre’s recommendation that the discretionary flexibility for the Director-General to retain staff members up to the statutory age limit (currently 65) be maintained. Thus, the possibility of extending a given contract beyond the pensionable age and up to a maximum of 65 years, is a reality, both in law and in practice. The right to extend given employment contracts beyond the retirement age (regardless of what that age was) existed before 2002, and in practice, successive Director-Generals have made abundant use of said right. Every decision regarding an extension of a given contract beyond the pension age and the exact duration of such extension is determined by the individual circumstances, such as service requirements and the profile of the staff member concerned. Such needs are not necessarily static, but may be dynamic according to changing factual circumstances. In the case of the Claimant, the Centre found that there was no need to extend his contract. The statistical figures referred to by the Claimant are not corroborated by the Centre’s figures.
- 34 3. The Director-General does not at all ignore or otherwise disregard Article 5 (11) of the Staff Regulations by substituting the statutory age limit of 65 with the retirement age of 60. The Implementing Instruction 5.5 remains within the legal framework defined by the legislature in the Staff Regulations. Implementing Instruction 5.5 defines the retirement age on the basis of the pensionable age set by Article 8 (1) and 9 (1) of the Pension Schemes without prejudice to the statutory age limit set by Article 5 (11) of the Staff Regulations, which remains fully applicable in law and in practice, since it sets the normal limit up to which a given contract of employment may, for service requirements, be extended beyond the retirement age of the staff member concerned. This does not prevent the Director-General from adopting a policy pursuant to which the duration of contracts is limited by the pensionable age according to the applicable Pension Scheme. The retirement age in Implementing Instruction 5.5 does not at all set

an absolute limit to the duration of a given contract, since the possibility to extend contracts until the age of 65 exists in law and is frequently applied in practice. However, in the case of the Claimant there were no reasons to extend his contract beyond the age of 60. The absence of any service requirements resulted from the fact that the Centre decided, in May 2017, to discontinue the Claimant's position in its present form and grade and advertise it with a different profile. The Centre's Human Resources and Finance sections are currently implementing a fully integrated Enterprise Resource Planning system which will lead to a number of very practical consequences, among others for the position held by the Claimant. The statistical figures referred to by the Claimant are not corroborated by the Centre's figures.

- 35 4. The Claimant's view is unfounded, that the wording and the ratio legis of Article 5.11 of the Staff Regulations, which provides that the statutory age limit for service is "normally" 65, means that the contracts of staff will "normally" be renewed until the age of 65. The purpose of creating a statutory age limit was to fill a gap, if not a lacuna, which had hitherto existed in the legislation. The wording of Article 5.11, 1st sentence ("The age limit is normally 65") clearly refers to the statutory age limit, not to the duration of contracts on which it remains completely silent. The requirement of a report to the Council if the Director-General intends to extend a contract beyond the normal age limit of 65 is meant to make the financial implications of contract renewals and extensions foreseeable and thereby avoid presenting the budgetary authority, i.e. the Council, with a "fait accompli". This provision illustrates, a contrario, that no report to the Council is required in the case of the extension of a given contract to an age below or up to 65, which is for the Director-General to decide. The Centre does not view the age limit of 60 or 63 as a statutory age limit, since said limit is defined by Article 5.11 of the Staff Regulations, as the upper-limit to which contracts may be – and in practice are in very many cases being – extended beyond the age of retirement.
- 36 5. The Claimant's view that the Director-General is confusing eligibility for a pension, as provided by the Pension Schemes, with an obligation to take the retirement pension at age 60 or 63, is unfounded. However, the Director-General is under no obligation to extend contracts until the member of staff reaches the age of 65, regardless of whether there is a service requirement or not.
- 37 6. There is no hierarchical conflict between Article 5.11 of the Staff Regulations and Implementing Instruction No 5.5.
- 38 7. As to an alleged discrimination, the Centre submits: The fact that Implementing Instruction No 5.5 draws a distinction between the retirement age of 60 and 63 is not discriminatory, since this distinction merely reflects a distinction in the Pension Schemes which the Council adopted unanimously in 2013, which means treating different facts differently. The Claimant is subject to the retirement age of 60. He has been treated like all other members of staff to whom the said retirement age applies. The fact that in the case of other staff members there was a service requirement to extend their contract beyond the retirement age of 60 does not amount to discrimination either. In those cases there were service-related reasons for doing so, while in the case of the Claimant no such

reasons exist. There is no general rule that contracts limited by the retirement age are extended, since this is decided on a case by case basis. The Claimant never put forward any factual and service-related reasons why in his case an extension of his contract beyond the retirement age of 60 would be justified. While his qualifications are not doubted, “service requirements” cannot arise from the talents of a staff member, but only from the work load ECMWF is facing. Thus, the Claimant did not suffer any unequal treatment.

- 39 8. As to the “legitimate expectations”, the fact that a given function or post is discontinued or altered, is a plausible reason for not extending an appointment which has expired. As to the Claimant’s view that he could have a legitimate expectation to have his contract turned into one of indefinite duration, or that in the case of a long series of contracts a non-renewal of a contract of definite duration amounts to terminating a contract of indefinite duration, the Claimant would have had a reason to complain against the proposed last contract renewal in 2015, leading up to retirement, which he did not do.

E. Conclusions of the Parties

40 I. The Claimant requests the Appeals Board

- to annul the decision of the Director-General of 4th October 2017 refusing to renew his contract;
- to award a sum of 8,000 GBP as a reimbursement of the costs incurred by the present procedure.

41 II. The Director-General requests the Appeals Board

- to reject the Appeal;
- to order the Claimant to bear his own costs.

F. Findings of the Appeals Board

I. On admissibility

- 42 1. The Procedural Rules governing the Appeals Board are laid down in Article 39 of the Staff Regulations and Annex VII - Conditions of appeal and rules of procedure for the Appeals Board - amended in July 2017 following a decision by the Council at its 90th session (see ECMWF/C/90(17)M, para. 27 and document ECMWF/C/90(17)9).

- 43 According to Article 39.2 of the Staff Regulations, “the Appeals Board shall have the authority to settle disputes arising out of these Staff Regulations or of the contracts provided for in Article 5. To this end, it shall have jurisdiction with regard to appeals brought by staff members or by former staff members or by their heirs and assigns against a decision of the Director-General”. According to Article 39.2 and 39.3 of the Staff Regulations, “appeals shall be admissible only if the Centre’s dispute resolution procedures have been exhausted, if such procedures are applicable and if the Claimant and the Director-General did not agree otherwise”.

- 44 Annex VII - Conditions of appeal and rules of procedure for the Appeals Board (Article 39 of the Staff Regulations) provides in Article 1.1 that “the Appeals Board shall only admit appeals provided that the Claimant has written to the Director-General within 20 days of the date of notification of the decision appealed from, requesting that such decision be withdrawn or modified, and provided that the Director-General has either rejected such request or failed to reply to the Claimant within 20 days. The Appeals Board shall annul any decision against which there was an appeal, if the decision is directed against the Claimant and affects his or her personal rights, and if the decision is contrary to the Staff Regulations, a policy or instruction, or to the Claimant’s terms of appointment”.
- 45 2. The Claimant submits that the Director-General’s letter of 29th August 2017 was a decision; the Centre denies it.
- 46 a) According to the standing practice of international jurisdiction, the term “decision” means an act by an officer of an organisation which has a legal effect (see, for example, ILOAT Judgments 532 – Devisme v EPO –, under 3, and 3141 – I.T. v WHO –, under 21, and Judgment 3861 – L.G. v ICC –, Cons. 5.). Somewhat more precisely, the ESA Appeals Board has said in its decision No 94 of 7th July 2014: “The term ‘decision’ has a legal meaning which differs from the common one. It means the utterance of a will that can be attributed to the Agency (and not only to a single staff member), addressed to an addressee (a staff member, a former staff member or a person entitled under him) and intended to have a legal effect, namely to improve, lessen or alter otherwise his legal position, to clarify a disputed question or to confirm or to deny a disputed right of his. As to the form, the decision may be reached implicitly, orally or in writing; however the usual form of a decision is in writing, so that its content can be proven and the decision be notified”.
- 47 b) In her letter of 29th August 2017 to the Claimant the Director-General says:
- 48 “In accordance with Article 5, paragraph 5, of the Staff Regulations, I wish to inform you that your last day of employment will be on 30 June 2018, as you will retire on 1 July 2018. Please note that your first payment of retirement pension will be at the end of July 2018 (Article 9, Paragraph 1 of the Pension Scheme Rules refers). Closer to the time, a member of the HR team will discuss with you all the practical arrangements relating to your retirement but in the meantime, should you have any further queries, please contact ... Finally, I look forward to another opportunity to focus on your retirement closer to the time ...”
- 49 c) The Appeals Board agrees with the Centre’s view that this letter explicitly does not contain more than information, reminding the Claimant of the end of his contract coming forth automatically, and inviting him to prepare the necessary arrangements. The letter is not meant to answer a request of the Claimant to extend his contract, since the Claimant did not lodge such a request prior to the letter, arguing that such a request would be unnecessary, since the Director-General has to decide *ex officio* on the extension.
- 50 d) However, Article 5.5 of the Staff Regulations provides that “Nine months be-

fore a staff member's contract terminates, the appointing authority will inform the staff member in writing whether or not it intends to offer a further contract". According to this provision, the Director-General was bound to make a decision whether or not she intended to offer the Claimant a further contract. The reference to Article 5.5 of the Staff Regulations in the letter shows that she was well aware of her obligation and willing to comply with it. This obligation was not to remind the Claimant of the forthcoming end of his contract, but to inform him of the decision that had been made regarding whether or not he would be offered a further contract. Obviously, this decision was negative, and even if the letter fails to mention it in any way, the decision was made (and later justified) by the Centre. So, although the letter of 29th August 2017 fails to explicitly inform the Claimant of the decision, it is nevertheless based on, and meant to convey, the implicit decision not to offer the Claimant a further contract. The fact that the Director-General failed to explicitly inform the Claimant of it, cannot deprive the Claimant of his statutory right to appeal the decision. The Claimant appealed against this decision within the time limit of 20 days and in due form as an "administrative complaint", thus exhausting the internal remedy provided for in Article 1.1 of Annex VII to the Staff Regulations.

51 3. In view of this, the Appeals Board considers the appeal of the Claimant to be admissible.

II. On the merits

52 1. There is no dispute between the Parties that neither contractual rights nor statutory rights give the Claimant any strict right to have his contract extended (or renewed) until he reaches the age of 63.

53 a) In his last contract offered by the Centre on 25th March 2015 and accepted by the Claimant on 30th March 2015, there is just one clause – clause i – dealing with the duration of the contract. The clause says

54 i. Duration and Termination of Contract

This contract will take effect on 1 September 2015 to 30 June 2018, the end of the month when you reach the age of 60 years, unless previously terminated in accordance with the provisions of the Staff Regulations.

The contract may be terminated by either party giving three months' notice in writing.

55 Nothing in this clause gives the Claimant any right to have the contract extended beyond the date stipulated therein.

56 b) In clause iv, the contract refers to the Staff Regulations:

57 iv. Other Conditions

This contract is subject to the Staff Regulations of the Centre, which may be amended by decision of the Council.

58 The Staff Regulations provide as follows:

59 Article 5.1: A staff member shall be appointed on a fixed-term renewable

contract with a minimum duration of two and a maximum duration of five years. Contracts may be renewed for a further period of time up to a maximum duration of five years. After completion of the contract and after at least five years' service, a staff member may be appointed on a contract of indefinite duration.

Article 5.5: Nine months before a staff member's contract terminates, the appointing authority will inform the staff member in writing whether or not it intends to offer a further contract. However, if the second or subsequent contract is of nine months' duration, or less, the requirement to inform the staff member in writing nine months before the termination of the contract may be waived by the mutual consent of the Director-General and the staff member concerned.

Article 5.11: The age limit for service is normally 65. Any exception to this must be reported to Council by the Director-General.

60 The *Implementing Instructions* provide:

61 5.2 *Two types of contract may be awarded:*

1. *i) Fixed-term renewable two to five-year contracts, normally not renewed beyond a total of nine years of service*
2. *ii) Contracts of indefinite duration*

Contracts of type ii) can take effect only after at least five years of service under contracts of type i).

5.3 *Although management and scientific staff will not normally hold contracts of indefinite duration, the Director-General may award contracts of indefinite duration in exceptional cases.*

Of the A and L grade administrative and technical staff, those who are involved in support functions (e.g. accountants, translators, analysts, engineers) may hold contracts of type ii).

5.5 *The retirement age shall be 60 years for staff members affiliated to the Budgetised Pension Scheme and 63 years for staff members affiliated to the Funded Pension Scheme, as a general rule.*

62 c) Thus, the Appeals Board is not able to ascertain that the Claimant has a right to have his contract extended (or renewed) beyond its stipulated duration. This is accepted by the Claimant himself who acknowledges that he has no right to be granted an extension.

63 2. Furthermore, the Parties agree that extending (or renewing) a contract of limited duration is a matter of discretion to be exercised by the Director-General.

64 a) It is well established in the case law of international administrative tribunals that in such cases the margin of discretion which the administrative authorities have is fairly broad (see e.g. ILOAT Judgment No 3970 – M. v EPO – of 24th January 2018, with reference to prior jurisdiction, consideration 2: "The Tribunal

has consistently held that a decision to retain an official beyond the normal retirement age is an exceptional measure over which the executive head of an organisation exercises wide discretion. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority”). Thus, the discretionary decision to grant or not to grant such an extension may be based on any valid reason falling within the purpose of the extension clauses applicable to staff members who are due to reach their agreed pension age.

- 65 b) The discretion which has to be exercised by the Director-General has been conferred on her by Article 9.2 of the Convention Establishing The European Centre For Medium-Range Weather Forecasts, stating that “The Director-General shall: ...; b) exercise the powers accorded to him under the Staff Regulations, subject to Article 10(4)”. The said Article 10(4) [of the Convention] states that “The Council shall approve the appointment and dismissal of officials in the upper grades defined in the Staff Regulations, and of the Financial Controller and his deputy”, thus leaving the appointment of other staff such as the Claimant at the sole discretion of the Director-General.
- 66 c) The legal framework referred to above shows that the Director-General has discretion to extend contracts beyond the stipulated duration. The margin of discretion extends from no extension at all to an extension up to the age of 65, which is the statutory age limit. Contracts may even be extended beyond that age; however, such extension does not lie solely within the discretion of the Director-General, but must be reported to the Council – which means that its consent is needed.
- 67 d) As a general rule, the discretion to extend contracts may be guided either by the interest of the Centre or by the interest of the staff member. In its decision No 102 of 14th June 2017, the ESA Appeals Board has held in an analogous case that “any provision which opens up the possibility to extend the duration of contracts ending at a fixed age of the staff member serves a dual purpose: (1) give the Centre the chance to keep staff in service who are vital (indispensable) for the Centre, and (2) give the staff member concerned the chance to accumulate more years of service in order to improve the pension amount which depends on the number of reckonable years of service. It is obvious that extending a contract is not a reward for years of service, and it is not the meaning of the extension clause that the longer a staff member has served, the more he would be entitled to an extension”.
- 68 e) The Claimant is right in asserting that the two statutory provisions dealing with contracts, namely Article 5.11 of the Staff Regulations and No 5.5 of the Implementing Instructions, must be read and interpreted with due respect to the hierarchy of norms. However, there is no conflict between them. These provisions deal with different matters. Neither of them directly deal with the duration of contracts, especially not their termination or extension. Article 5.11 of the Staff Regulations establishes a statutory age limit of 65 years, but does not fix the retirement age. It only limits the possible duration of unlimited contracts as

well as contracts with limited duration, thus reducing the margin of discretion of the Director-General by setting an upper limit. Up to this limit, the Director-General is free to extend or renew contracts of limited duration. The Director-General may even exceed the age of 65 years, but must report to (and, obviously obtain the consent of) the Council. On the other hand, No 5.5 of the Implementing Instructions fix, “as a general rule”, the retirement age at 60 or 63, in line with the age which the staff member must have reached in order to be eligible for a pension under one of the two applicable pension schemes. Fixing the retirement age at 60 (63) years thus is the normal procedure foreseen as the standard practice which needs no justification in the individual case. However, neither Article 5.11 of the Staff Regulations nor No 5.5 of the Implementing Instructions limit the discretionary margin of the Director-General to extend or renew contracts beyond the “normal” retirement age of 60 (63) years. The provisions laid down in the Pension Schemes fixing a pension age of 60 or 63 years (as the case may be) do not confer either on the staff or on the Director-General any right to terminate the contract before its stipulated end. Implementing Instruction No 5.5 neither means that the Claimant is entitled to retire at that age (unless so stipulated) nor that the Centre may force a staff member to retire at that age if another retirement age is stipulated in his contract.

- 69 It may be true that neither the Director-General nor the Director of Administration saw a necessity to introduce a statutory age limit in 2013. However, the Appeals Board agrees that a statutory age limit was intended to fill a gap in the existing Staff Regulations. As the Claimant has made clear himself, prior to 2013 the amount of indemnity for loss of job to which the staff member was entitled was open to doubt. Article 27 referred to an “age limit specified by the Staff Regulations” which did not exist before Article 5.11 of the Staff Regulations was added.
- 70 f) The Appeals Board has examined whether or not the Director-General’s decision not to offer the Claimant a further contract, was taken within the discretionary margins described by the aforesaid provisions. The Claimant invokes several alleged errors committed by the Director-General in exercising her discretion.
- 71 aa) The Claimant submits that the Director-General was unaware that she had discretion when deciding on the extension. Instead, she erroneously took the provision of the Implementing Instruction No 5.5 as legally binding not to extend contracts, once the pension age mentioned in that provision had been reached.
- 72 One of the typical errors in exercising discretion occurs if the administration is unaware of the fact that it has discretion. This may be the case if it feels bound by legal constraints which in fact do not exist. However, the evidence from the papers does not support this submission. It would imply that the Director-General was not aware that Implementing Instruction No 5.5 does not set an absolute limit, but only describes, “as a general rule”, that the age at which staff members should retire should coincide with the age at which the staff members are eligible for their pension.
- 73 bb) The Claimant submits that the Centre misinterpreted the purpose of the new Staff Regulation Article 5.11 establishing a statutory age limit of 65 which

should be the “normal” pension age for all staff members. By setting a new statutory age limit of 65, the Council wanted to limit the Director-General’s discretion or to guide it in the direction that contracts should “normally” be extended up to 65 years. Instead, the Centre considered the Implementing Instruction No 5.5 to prevail, thus disregarding the hierarchy of legal norms. The Centre did not act in conformity with the new legal situation fixing a “normal” statutory age of 65, because it considered it to be detrimental to the Director-General’s power and discretion. Under the new legal provision, the Director-General had no discretion to stay below the age limit of 65, this “being the normal retirement age”. By not applying the “normal” age limit to the Claimant’s contract, the Director-General wished to maintain her former discretionary power, thus illegally opposing the Council’s intentions.

- 74 This view is clearly erroneous. From the documents submitted to the Appeals Board it is clear that the introduction of an age was not intended to restrict the Director-General’s discretion to grant a contract extension for a period by the end of which the staff member would be below the statutory age limit. Previously, when there was no such age limit, the Director-General had a very wide discretion to extend contracts without regard to the age of the staff member concerned. The new provision fixing an age limit of 65 and providing that any extension beyond that age be subject to the Council’s prior consent merely restricts the Director-General’s discretion by setting an upper ceiling. From now on, contracts shall “normally” not be extended beyond 65. It cannot be construed as directing the Director-General’s discretion to fully exhaust this time limit. Although the Director-General and the Director of Administration might have considered such a provision to be unnecessary, they did not express their discontent for reasons of safeguarding the Director-General’s discretionary margin. On the contrary, the Director-General assumed that introducing a statutory age limit would not diminish the Director-General’s discretionary power, and nothing in the documents shows that the Council was of the opposite opinion. The old Implementing Instruction No 5.5, harmonizing the retirement age with the age at which the staff member becomes eligible for a pension, remained unchanged.
- 75 cc) The Claimant submits that the Director-General did not take into account his personal interests, especially his professional performance, the length of his service and his legitimate expectation that his contract be renewed.
- 76 This submission is unfounded.
- 77 (1) Following a general principle of administrative law, the Director-General, exercising her discretion in personnel matters, has to take into account the interest of the staff member. It is a sound interest of the staff member not to leave the service before becoming eligible for a pension, in the case of the Claimant, at the age of 60. This does not mean that the staff member who holds a contract with fixed-term duration has an absolute right for the contract to be extended at least until he becomes eligible for a pension, but it means that the Director-General has to take this interest duly into account and has to balance it against other interests which might tend to not extending the contract. In the Claimant’s case, this interest had already been taken into account by the provision in his contract that it should not end before he became eligible

for a pension.

78 (2) However, if reaching the pension age is a point which the Director-General has to consider if she has to decide on the extension of a contract, this is also true for the non-extension. The Director-General cannot be accused of abusing her discretion when she decides not to extend the contract of a staff member whose contract ends when he reaches the age at which he becomes eligible for a pension. Reaching this age is a possible and a very legitimate reason not to extend the contract. This is more true if the end of the contract has been directly linked to reaching that age, as it is the case here. In the Claimant's contract (clause i sentence 1) it is expressly stated that "This contract will take effect on 1 September 2015 to 30 June 2018, the end of the month when you reach the age of 60 years". So it was the clear intention of this made-to-measure contract to create a link between the end of the contract and the Claimant's becoming eligible for a pension. It is not abusive if the Director-General, in her decision not to extend the contract, reiterates that intention.

79 (3) The Director-General did not disregard the Claimant's professional performance. She has expressed her esteem for the Claimant's performance, and there is nothing in the documentary evidence showing any discontent. There is no evidence showing that the non-extension was based on unsatisfactory performance of the Claimant. On the contrary, the documents show that the Claimant's contract should not be extended because the Centre decided, in May 2017, to discontinue the Claimant's position in its present format and grade and advertise it with a different profile. The Centre's Human Resources and Finance sections are currently implementing a fully integrated Enterprise Resource Planning system ("CIRRUS"), leading to a number of very practical consequences, among others for the position held by the Claimant. The Appeals Board does not see any element in this which could be regarded as a mere pretence to justify the non-extension of his contract.

80 In its Decision No 102 of 14th June 2017, the ESA Appeals Board held with regard to a similar argument (paragraphs 54 and 57):

81 The Appeals Board ... does not consider it to be its duty to control or to criticise the Agency's policy on how to develop its activities or set its goals. ... The Agency has no commitment to organise its internal structures according to the needs or personal desires of staff members. It is free to follow strategic goals without regard to the existing personnel. The Agency was under no obligation to maintain ... the post held by the Claimant for the sole purpose of giving him a chance to keep this post until the age of 63. A post held by a staff member is not his personal property, and holding it does not form part of the staff member's "terms of appointment or vested rights" ... The Agency was under no obligation to "prove" to the Claimant that "his" post was to be suppressed after his departure. ... The Agency has given sufficient reasons why the post of the Claimant was not retained. ... The Board cannot trace in the written evidence any suggestion that the suppression of the Claimant's post was a mere pretext to justify the non-extension of his contract.

82 3. The Appeals Board does not share the Claimant's view that he had a legiti-

mate expectation that his contract be extended. Such legitimate expectation may arise from previous correspondence, from promises made, from a constant practice or another element stemming from the sphere of the Director-General or created, maintained or supported by her. No such element has been presented to the Appeals Board. The Claimant was well aware that his contract was going to expire. If he was keen to continue his contract beyond its stipulated end, it was up to him to inform the Director-General of his intention well in advance. The Appeals Board does not accept the Claimant's position that he was not "obliged" to ask himself for the renewal of his contract, since the Director-General must have been aware of his willingness to continue from what he wrote in the self-assessment section of his evaluation report relating to the year 2016: "I am available to continue to work in the same capacity for another 2/3 years". Such a remark could as well be regarded as a declaration not to oppose to an extension, should the Centre wish him to continue. This rather vague sentence has not the same value as an explicit demand to extend his contract until the age of 63. Since he did not submit such a demand, the Appeals Board cannot see on which factual basis the Claimant might have built up a legitimate expectation.

83 4. The Claimant submits that the Director-General violated the principle of equal treatment, when she refused to extend the Claimant's contract while, in several other cases, such an extension was granted.

84 Even if it were true that in a number of cases (the figures are disputed between the parties) contracts were extended until the age of 65, this would not demonstrate the existence of a standing practice. The Centre is a too small an entity to provide a sufficiently large statistical sample – this is the more so as the Claimant is not a member of the technical and scientific staff as most of the other staff members are. There is nothing in the file to contradict the Centre's position that each case is decided separately upon its own merits.

85 The fact that staff members who belong to different pension schemes providing for eligibility for a pension either at 60 or 63 are subject to different retirement ages cannot be regarded as an illegitimate discrimination. On the contrary: when assessing the interests of the staff member, the Director-General has, inter alia, to take into consideration whether the staff member is entitled to a pension. Since at the Centre two pension schemes actually co-exist, it is in line with the non-discrimination-principle to treat equal cases equally and unequal cases unequally.

86 5. Finally, the Appeals Board sees no reason to consider the Claimant's allegations that he was kept in ignorance of the large majority of material projects for the reform of the Human Resources section and that he has not yet received his assessment for 2016. Even if these grievances were founded, they would not entail an obligation for the Centre to extend or to renew his contract.

87 6. At the hearing, the Claimant raised certain matters concerning an alleged initiative on the part of the Centre to commence disciplinary proceedings against him following the lodging of his Claim. Such matters had not been previously brought to the attention of the Appeals Board and clearly can have no impact on the validity of an administrative decision adopted several months

previously. The Appeals Board takes the view that raising these matters during the course of the hearing was vexatious and an abuse of process.

G. Conclusion

88 For these reasons, the Appeals Board decides

I. The appeal is dismissed as unfounded.

II. The Claimant will bear his own costs.

Michael Groepper
Chair

Susan Dunning
Secretary