

EUROPEAN CENTRE FOR MEDIUM-RANGE WEATHER FORECASTS

APPEALS BOARD

DECISION

In Case No 6

X. v ECMWF

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

Comprising

Michael Groepper, Chair,
Joao Sant'Anna, Member,
Michael Wood, Member,

Assisted by Susan Dunning, Secretary to the Appeals Board,

Having considered

1. the Appeal dated 17 January 2020 lodged by
the **Claimant**, X.,

assisted by Ludovica Moro, Counsel, Schwarzenbergplatz 7, 1030 Vienna,
Austria (c/o Enwc TaylorWessing GmbH),

2. the Comments dated 2 March 2020 lodged by

the **Respondent**, the European Centre for Medium-Range Weather Forecasts (ECMWF or Centre), represented by its Director-General, Florence Rabier,

assisted by Bertrand Wägenbaur LL.M, lawyer, Avenue de Cortenbergh,
66 bte. 11, B-1000, Bruxelles, Belgium,

3. the Claimant's Reply dated 29 March 2020,

4. and the Respondent's Rejoinder dated 15 April 2020,

Has reached on 17 June 2020 the following decision:

1 This case concerns the non-renewal of an employment contract of the Claimant due to expire on 31 May 2020.

I. Facts

- 2 The Claimant, born 1965, now 55 years old, a British national who holds a bachelor's degree in electronic engineering, joined the Centre on 1 June 2009 as a consultant on the basis of a 2-year contract until 31 May 2011. Before joining the Centre, he was a team leader working for VMFX Ltd. and managed a team of local and remote developers. He also managed a studio of freelance workers when employed at Universal.
- 3 His first two contracts were as Consultant in the Operations Department (1 June 2009 to 31 May 2011 and 1 June 2011 to 31 May 2012). In 2012 he signed a new contract as Team Primary Expert on front-end web applications still in the Operations Department, with a duration from 1 June 2012 to 31 May 2014. On 1 July 2013 he became a staff member. His last contract, which he signed in 2018, extended his employment with the Centre until 31 May 2020.
- 4 When he started working at the Centre, he was exempt from contributions to the Funded Pension Scheme. Since 2011, his contracts provide that he contributes to the Funded Pension Scheme at a rate of 10.8% of his basic salary. Following a decision of the Council to open the Funded Pension Scheme to consultants, the Claimant in his second contract was offered an option to validate within six months the two previous years of service as Consultant by making additional payments to the Funded Pension Scheme covering the time between 1 June 2009 and 31 May 2011. The Claimant did not request such a validation.
- 5 On 29 August 2019, the Claimant was notified that he would not be offered a further extension of his contract, which thus would expire on 31 May 2020. By letter of 24 September 2019, the Claimant requested the Director-General to review her decision. On 22 October 2019, the Director-General confirmed her decision not to renew the Claimant's contract due to operational reasons of the Centre, namely the discontinuance of the Claimant's post in its current form and the consequent advertisement of a new job description with revised requirements for the post instead. The present appeal is directed against this decision.
- 6 The Claimant was employed as Analyst in the Operations Department and as of July 2013 as Analyst in the Forecast Department. Regarding the definition of the Claimant's duties, the Respondent (in its Comments paragraph 10 Footnote 2 and paragraph 104) has given the following explanation:
- 7 „**Front-end**“ is software for clients, i.e. the users, whereas “**back-end**” is server software. “**Full stack**” developers work, like back-end developers, on the server side of web programming, but they can also fluently speak the front-end IT-languages that control how content looks on a site's user-facing side. “**Back-end**” refers to the **programming** of the computational models that **process the forecast data**. The **skills** required are a combination of mathematical and meteorological background to allow the interpretation of probabilistic information. “**Front-end**” refers to the **programming** of **user-interfaces** to

display this data and to enable the user to interact with it. The **skills** required are a combination of technical website design and graphic / user-interface design skills.

II. The Claimant's position

8 Summarizing his position, the Claimant submits that there have been procedural irregularities in the non-renewal of his contract, inter alia no proper communication of the reasons underlying the decision of non-renewal and no transparency in the discontinuation / abolition of his role, no efforts to train him or to reassign him to another post within the Centre or with one of the Co-ordinated Organizations and hence no consideration of using internal resources rather than advertising a new post or hiring external consultants. He further complains of an incomplete consideration of the facts, in particular his suitability to similar positions, which shows the Centre did not act in the interest of the service.

9 In particular, the Claimant submits:

a) No proper communication of the true reasons

10 On 13 June 2019, the Claimant was informed that his line manager intended to outsource work, and the Claimant's normal duties were indefinitely suspended in order to meet unspecified deadlines. The alleged reason verbally given for the discontinuation of the Claimant's position was that front-end development work would be outsourced. The follow-on role would be a technical role but allegedly includes managing external resources. The Centre claimed that previous managerial experience were needed.

11 The Claimant submits that he is well aware that fixed-term contracts do not carry expectations of renewal. However, the decision not to extend his contract was made in breach of a rule of form. The Director-General failed to communicate the reasons underlying the decision and lacked transparency in the discontinuation / abolition of his role. He had not been officially provided with a reason for non-renewal prior to the Director-General's contested decision. The reasons verbally provided by his supervisor (need for a managerial role to manage outsourced resources) are in contradiction with the vacancy announcement VN19-30.

12 The vacancy announcement does not require managerial competence; hence it seems that the Claimant's position is being abolished and replaced without proper reasons given and in the absence of organizational needs.

13 From a reading of the Director-General's decision itself, termination of the Claimant's services seems to rely upon the abolition of his post which has been discontinued in its current form in order to abandon front-end development for full stack development. It seems that his position has been targeted for replacement, because he is the only front-end developer affected by the alleged outsourcing, in order to prevent him from having a pension. The Claimant was never properly notified of the abolition of his post, such reason being absent from the written notification of non-renewal, nor was this ever

discussed with him. The abolition of his post as a reason of non-renewal was only communicated to him as part of the Director-General's letter dated 22 October 2019 in response to his request for review. The fact that he was not promptly informed of this decision constituted a serious breach of the Centre's Charter of Ethics which reads, *inter alia*, "The Centre's management ensures that staff are kept well informed of all changes or issues that may affect them". Following the abolition, no reasonable effort was made by the Centre to reassign him to another post within the Centre, neither he was offered a post within one of the Co-ordinated Organizations (comparable or otherwise). The primary reason for the non-extension of his contract was in fact that his services were no longer required by the Centre. However, he has not been officially provided with a reason for the non-renewal. International jurisprudence is unanimous in finding that the real reasons of non-renewal have to be communicated to the affected staff member. He learned the reasons of non-renewal (his services were not necessary anymore) only during the dispute resolution procedure.

14 It is true that the Claimant during the meeting of 13 June 2019 was informed about his line manager's intention to outsource part of his role, but it is also true that outsourcing part of a role does not mean abolishing it *tout court*.

15 By quoting considerations of an ILOAT Judgment ("*the reasons for a decision may be provided in response to a subsequent challenge of the decision*"), the Respondent itself admits that the reasons were communicated only during the dispute resolution internal process. The Director-General did not elaborate in retrospect such reasons but communicated and explained them to the Claimant in her response to his request for review.

16 The Claimant's contract has been terminated due to alleged organizational reasons which are rather unclear. The Centre did not inform the Claimant regarding the discontinuation of his post and the reasons thereof, in a timely manner and transparently, and has not made any concrete and reasonable effort to mitigate the impact that the decision of non-renewal is having on the Claimant's personal and professional life.

17 The Claimant also submits that his "de facto demotion" is the direct reason for the non-renewal. The non-extension decision was a disguised sanction for the work problems encountered in 2019.

b) Outsourcing not in the Centre's interest

18 The Claimant does not question the fact that the Centre is entitled to outsource services. However, it is a principle of good administration to act in the interest of the service. If the staff is available in-house, outsourcing personnel is a waste of funds. Prioritizing internal candidates and resources, with the aid of specific training, is an efficient use of funds and resources to secure the highest ability, efficiency, and integrity of the Centre.

19 According to well-established principles of international administrative law, an organization should make reasonable efforts to reassign a staff member whose position has been abolished or discontinued, and should always act

in the interest of the service. It should therefore make the best use of its internal resources. The Respondent did not demonstrate that the Claimant was and is unsuitable for any of the available vacancies and did not make any effort whatsoever to train him in order to fill the alleged gaps in his expertise to allow him to continue providing his services to the Centre and thereby making the best use of internal resources.

c) Demotion of his post

- 20 The Claimant has been subject to a de facto demotion as his role was indefinitely suspended, notwithstanding his offer to perform further tasks and his good performance for the past ten years.
- 21 Although the suspension was supposed to be temporary, due to a deadline, after that he was told that the suspension was still in effect. It is clear from the written instruction that his normal duties were not to be followed. The deadlines related to some work objectives were not as tight as pictured by his line manager. There has been only one hard deadline (for the delivery of ecCharts-2) which was expiring one month after the Claimant started working on it in June 2018. Due to poor managerial decisions the process was delayed and the work on the project is still ongoing. Nevertheless, a beta-version was released by the deadline.
- 22 As of 19 February 2019, the Claimant's role was redefined as (i) acting as assistant to the domain expert, (ii) testing and (iii) knowledge transfer. Other duties were removed from his portfolio, he was not invited to meetings, involved in discussions and informed of any outcomes.
- 23 The Director-General mentioned that the Centre is in need of someone to carry out "full stack development". As these are skills that experienced staff like the Claimant could acquire with adequate training, the question is why such training was neither offered nor provided to him. The Claimant has been de facto demoted and side-lined, in clear violation of his terms of employment. Since February 2019 his role became mainly that of the domain expert's assistant.
- 24 The *de facto* demotion is proven by the fact that his functions have been suspended. The Respondent links "suspension" to a disciplinary measure. Indeed, disciplinary action was not taken against the Claimant following the slanderous allegations by the Line Manager made against him about disobeying orders; this accusation was made verbally and repeated on more than one occasion in meetings held in February and June 2019. The Claimant was not given the opportunity to respond to the allegations which had never been formalized, nor could he defer the matter to the Disciplinary Board. The Centre did not follow the correct procedure, and instead "disciplined" the Claimant by taking away his function (i.e. suspending) and relegating him to the role of assistant to another team member. In practice, since 19 February 2019, with the full knowledge and complicity of the Line Manager and the Head of Section, the Claimant has been working solely under the supervision of C. S., who has been acting as Project Manager, Domain Expert, Architect, and Lead Developer. The Claimant did not receive

instructions from anyone else other than C. S., who excluded him from any decision related to the project. One of the tasks the Claimant had was to advise C. S., but he never took the Claimant's advice. Several requests to discuss the Claimant's role in detail were refused and the only response was the blanket "[your] role has not changed". The Claimant was assigned for 15 months to a role which was not the same for which he had been appointed. He was transferred (or better said demoted) to a different role (assistant and tester), albeit at a lower level and for more than one year. The Centre chose to remedy the problems without the input of the recognized expert, i.e. the Claimant (the only front-end developer in the team with experience in this area, as his job description specifies) which cannot be said to be 'in the interest of the service'.

d) No other employment offered

- 25 The suitability of the Claimant to fill a different yet similar role and the conclusion that his services are unnecessary is a mistaken conclusion, which cannot be justified by the broad coverage of the "*Centre's broad discretionary power to organize its service*".
- 26 The Claimant provided objective evidence which would have justified his suitability for the redesigned structure. The Claimant did not make "a number of auto-evaluations" – indeed the evaluation of his skills and expertise was based on his curriculum vitae information.
- 27 The Claimant disagrees with a number of statements included in the Director-General's final decision. The Director-General states that the Centre will create a position which requires "Strong back-end expertise", disregarding that the Claimant's previous jobs since 1999 were all full stack jobs and his back-end experience continued at the Centre including in the years 2011-2013. As for the requirement "Sound understanding of meteorology to communicate with domain experts", the Director-General disregards that the Claimant could be considered the ideal candidate for this. As to "Experience of managing third party developers", the Claimant was a team leader when he worked for VMFX Ltd and managed a team of local and remote developers. He also managed a studio of freelance workers when employed at Universal. Despite his qualifications for the role, it was made clear to him verbally that he should not apply. It is unclear why he has been side-lined.
- 28 The Claimant did not apply for vacancies for which he did not meet the requirements; however he did apply for the vacancies in which he met the requirement (e.g. VN20-05 Analyst User Services and VN20-06 Analyst - Full Stack Web Developer (Python)). Up until 28 February 2020, no vacancies for which he meets the stated requirements had been identified. The Claimant was encouraged to apply for this position for which he did not meet the requirements. He was given a few hours' notice and when he attempted to apply, he found that it had been purged from the system and he was not given any practical way to apply.
- 29 The vacancy VN19-30 (EFAS developer) was said to be the model for the new position. It was not the new position itself. The Claimant did not apply

because a) the contract was a short-term project contract and not a core position like his present one so that would not have been a sensible decision, and b) there would have been bias against him as he had been verbally discouraged from applying for positions within the team.

30 Whether he has more back-end or front-end experience is not relevant and does not change the fact that he can demonstrate extensive back-end experience, both at ECMWF and prior.

e) Pension issue not duly considered

31 It seems the Claimant's position had been targeted for replacement in order to terminate his employment before he reached the necessary years of service to benefit from an early pension. Although he is a valuable and capable member of his section, he is the only front-end developer in the team affected by the alleged outsourcing.

32 As the Claimant is currently 55 years old, if he had ten years of service he would be entitled to benefit from an early pension. To terminate his contract at 9 years of pensionable services is extremely unfair and highlights bad faith on the part of the Centre. The Claimant is aware of his shortcoming to validate his initial two years of service and does not make liable the Centre for his omission. Nevertheless, the Centre did not duly take into account that the loss of pension cannot be compensated by the leaving allowance to which he will be entitled.

III. The Centre's position

33 The Respondent submits that the Centre, within the Director-General's wide discretionary powers, can legitimately come to the conclusion that the Claimant's function was no longer required. The Centre is, as is the case with any other international organization, perfectly entitled to outsource services. This right to outsourcing is particularly relevant in an area such as IT-services. The Centre is very much dependent on specific IT-services, and it is thus all the more for the Centre to decide which areas or parts of IT are so specific that they need to be carried out in-house, and which parts are more generic and should thus be covered by an external service provider. IT is an area of technology which evolves constantly, outsourcing certain IT activities provides the Centre with access to the latest technologies, which, for reasons of scale and resources, cannot be developed in-house.

34 In particular, the Centre submits:

a) Lack of due information and reasoning of the decision

35 The Claimant has been duly informed of the reasons why his contract was not renewed. The reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him. The Claimant himself claims in his Appeal that on the occasion of the meeting of 13 June 2019, he was informed about his line

manager's intention to outsource part of his role. The Claimant details this in his appeal, thereby contradicting himself when stating, that the reasons for the abolition of his post were never "discussed with him". The Claimant had another meeting on 21 August 2019 with his line manager, during which he was informed that his line manager had recommended to the Director of Forecasts not to request an extension of the Claimant's contract. His line manager explained during that meeting that he had made this recommendation on the basis of the new strategy for the development of web services. Thus, the non-renewal decision, of which the Claimant was then informed on 29 August 2019 in writing, was taken in a context which was already known to the Claimant.

- 36 More generally, providing reasons does not mean being under an obligation to convince the member of staff that the reasons are well-founded, also because there is no rule providing that the member of staff must agree with the reasons given. The purpose of providing reasons is to enable the member of staff to understand why a given decision was taken.

b) Suitability to the new role

- 37 As to the Claimant's suitability to the new role, the Respondent submits that it is not for the Appeals Board to assess the Claimant's knowledge and suitability where the Centre no longer requires a position which focuses primarily on front-end developments. It is part of the Centre's broad discretionary power to organize its service, including the number of positions and the tasks allocated to each. It is thus not for the Claimant to agree or disagree with the "*role which will replace his position*". While the Claimant, making a number of auto-evaluations in this respect, states that he had the "*qualifications for the role*", he thereby merely substitutes his assessment for that of the Centre, which he is not entitled to do.
- 38 The Claimant is materially wrong in stating that the vacancy announcement VN19-30 published on 16 July 2019 was in any way intended to "replace" the current position of the Claimant: The vacancy announcement VN19-30 was to back-fill another team-member who was due to move out of the section. This role is not a "replacement" of the Claimant's current role. Besides, nothing prevented the Claimant from applying to this position. He claims to possess all skills and experiences required and to be a good fit for the vacancy which he considered to be the replacement of his current position. For reasons unknown to the Respondent, the Claimant did not apply.
- 39 The Claimant's experience in the Centre mainly included applying knowledge and expertise of front-end web technology. He was responsible for engaging internally and externally within the front-end web technology. Therefore, he has more experience and knowledge of front-end, rather than back-end work. As explained to the Claimant in the Director-General's letter, the Centre "*no longer requires a position which focuses primarily on front-end developments*". The new position requires working with external parties, coordinating their work and ensuring necessary backend and API developments. Considering himself as being an "ideal candidate" is a mere auto-

assessment which cannot result in the Claimant substituting his view for that of the Centre.

- 40 The Respondent denied and continues to deny that the Claimant was ever unduly influenced to prevent him from applying to any particular position. At no point was the Claimant discouraged or prevented from applying for any vacancies advertised by the Respondent. On the contrary, the Claimant, as all other members of staff, was informed of the vacancies and had meetings to discuss upcoming vacancies.
- 41 As to the Claimant's statement that with adequate training he could acquire the necessary skills: No such training was offered to the Claimant because "*full stack development*" is not part of the description of his current job. The post currently held by the Claimant will be discontinued in its current form and the Centre will instead create a position to carry out full-stack development. This aspect fundamentally changes the profile of the post which the Claimant is currently holding.
- 42 As to the Claimant's statement that "no reasonable effort was made by the Centre to reassign the Claimant to another post within the Centre, neither he was offered a post with one of the Co-Ordinated Organizations (comparable or otherwise)", the Respondent stresses that judgements to which the Claimant refers apply to cases where the employer unilaterally terminates a contract by giving notice. The present case, however, is not about a termination by giving notice, but about a decision of non-renewal of the Claimant's contract, which is not the same thing. The Centre was under no obligation to reassign him prior to the expiration, i.e. non-renewal of his contract of employment, nor to provide him with any training related to such reassignment.
- 43 The Claimant has so far not applied for any job vacancy published by the Centre by virtue of its obligation provided in Art 4.3 of the Staff Rules ("*The staff members shall be informed of each vacant post for which a recruitment procedure will take place*"). The Claimant failed to make use of the opportunities thereby provided, despite the fact that the Centre's Human Resources have regularly met him in order to discuss upcoming vacancies that may be of interest. Human Resources have even offered to extend the deadline of one specific vacancy to enable the Claimant to apply - which he did not do. The Centre is under no obligation to explore the possibility to reassign the Claimant prior to deciding whether or not to renew his contract.
- 44 The Claimant's statement that the vacancy notice 20-06 (Analyst - Full Stack Web Developer (Python)) would not require any "recent" experience – while the world of IT is constantly evolving - leads to the question of what could be the added value of an experience which is not recent.
- 45 Besides, the Claimant confirms that his experience in managing third party developers is *not* recent. This experience is more than a decade old and has not been put to the test since. Thus, its remaining value is so residual that it cannot be counted as relevant experience to the new job.

46 Whichever back-end development experience he may have had, this experience was at least seven years ago, in an area where technology has developed rapidly. Also, the Claimant has only limited experience with “Python”, which is mentioned in the vacancy notice.

47 The Centre assessed the profile of the Claimant and the required profile for the new function, as the Claimant’s current function was due to be outsourced. It reached the conclusion that the profile of the Claimant did not match the new function and that training would not remedy this. While staff undergoes training with respect to the functions to which they are assigned, the purpose of such training is not to give a member of staff a different professional profile, if and when his contract comes to an end.

c) Suspension and demotion

48 As to the Claimant’s complaints that since 19 February 2019 his “normal duties” had *de facto* been “suspended” and that some duties had been removed from his portfolio, so that he had been “demoted and side-lined”, the Respondent stresses that he has not been “suspended” in any way. A “suspension” is a disciplinary measure which was not imposed onto the Claimant. The Claimant’s job description has not been altered. In fact, the Claimant was repeatedly asked by his line manager, Ms LT, and her supervisor, Mr S, to focus on his 2019 performance objective with the most significant impact on ECMWF’s customers, namely, to deliver a beta version of ecCharts2. His line management, making use of its inherent and thus legitimate right to give instructions in the interest of the service, asked him to deprioritize all of his other 2019 objectives in order to deliver this single objective in a timely manner. The Claimant’s responsibility for a specific piece of work - the so called “intranet plots” - had to be temporarily carried out by an external IT consultant, in order to allow the Claimant to focus on the delivery of the Beta version of ecCharts2, which he had not delivered in time. Missing the external deadline related to this project would have had severe reputational consequences for ECMWF. Consequently, the Claimant’s personal objectives for 2019 had to be reprioritized by his line managers, in order to avoid further delays in the completion of that project. The fact that the Claimant’s personal objectives had to be adjusted due to the reasons of time management cannot be interpreted as a “suspension” or a “*de facto* demotion”. It was in the interest of the service to remedy a situation which required an immediate external support, in order to meet important time-limits. The Claimant’s attempt to construe a link between the Centre’s decision to seek the support of an external IT consultant in a critical situation and the non-renewal of his contract is mere speculation and thus unfounded.

49 No “function” was taken away from the Claimant: In order to avoid delays related to the timely achievement of ecCharts 2, the Claimant’s management asked him to deprioritize all other 2019 objectives and concentrate on this single objective,

50 The Claimant was not transferred “to fill a post other than the one to which he or she was appointed”. The Claimant remained in his post and his line

management had to adjust priorities, for reasons triggered by the Claimant alone.

d) The pension issue

51 As to the Claimant's "Remarks on Pension", the Centre has taken it into account, as part of the Claimant's interest. The Centre expressly balanced the Claimant's interest to obtain an extension of his contract and thereby an entitlement to a pension by ECMWF and the interest of the service, which is to restructure certain positions based upon operational needs and the skills available in a given team. The Centre explained the objective reasons for outsourcing front-end programming and recruiting a Full Stack Web Developer. Balancing those interests implies that the Centre is not under an obligation to make pension aspects prevail, let alone under all circumstances, over the interest of the service. The fact that he did not validate his first two years of service cannot be completely disregarded: The pension aspect exists because the Claimant decided not to validate his first two years and despite the fact that, at the relevant time, the Centre had explicitly drawn his attention to this possibility, thereby complying with its duty of care. An international organization's duty of care towards its officials does not require it to extend an official's appointment for the sole purpose of enabling him to draw a pension.

52 The Claimant's contributions to the Centre's Defined Benefits Funded Pension Scheme have not been in vain. He is fully entitled to a Leaving Allowance under Article 11 of the Funded Pension Scheme in lieu of a retirement pension. The Leaving Allowance adequately covers the financial aspects for all staff members who leave the Centre without a pension. The Leaving Allowance amounts to an amount equal to 2.25 times the Claimant's rate of contribution as applied to his last annual salary, multiplied by the number of reckonable years of service, in the Claimant's case to approximately 169,000 GBP. This reflects an adequate and balanced means to protect the Claimant's financial interests relating to a segment of his career spent with the Centre.

IV. The requests of the Parties

- 53 1. The Claimant requests the Appeals Board
- a. To annul the Director-General's decision and recommend the Respondent to grant the Claimant a renewal of his employment contract;
 - b. In the alternative, to compensate him for the loss of career and contractual opportunity and in any event to grant him moral damages to compensate him for the lack of fairness, transparency and information surrounding the abolition of his post, as appropriate, as well as for the de facto demotion of his role over the past year, overall quantifiable in one year of salary;
 - c. To award reasonable legal costs incurred by being forced to bring this Appeal (schedule of fees incurred available upon demand), quantifiable in approximately € 5,000.

- 54 2. The Centre requests the Appeals Board
- a. To reject the appeal
 - b. To order the Claimant to bear his own costs.

V. Considerations

55 Having consulted the Parties, the Appeals Board deems the facts sufficiently well established and an oral hearing not essential. Both Parties have agreed to waive their right to hearing. In application of Article 4(1) of Annex VII to the Staff Regulations, the Appeals Board thus has decided to decide the case without holding an oral hearing.

1. On admissibility:

56 After receiving the comments of the Director-General the Claimant has reworded his requests. He now asks the Appeals Board to recommend the Respondent to grant the Claimant a renewal of his employment contract, instead of order the Respondent accordingly. This is closer to (but still goes beyond) Annex VII to the Staff Regulations – Conditions of appeal and rules of procedure for the Appeals Board – Article 1 paragraph 3 providing that the Appeals Board may not replace a decision which is has annulled with an alternative decision of its own, or order the Respondent to take any particular action in respect of the Claimant, but can recommend the Respondent to reconsider its decision in the light of the decision of the Appeals Board. The Appeals Board interprets request a. as being that the Appeals Board recommends that the Director-General reconsider her decision. On this basis, Request a., filed in due form and time, is thus admissible.

57 Request b. is admissible according to Article 1 paragraph 4 of Annex VII, providing that the Appeals Board may order the Respondent to compensate the Claimant for damages suffered as a result of the annulled decision.

58 Request c. is admissible according to Article 6 paragraph 3 (c) of Annex VII, providing that reasonable legal costs incurred by the Claimant shall be reimbursed to the extent that an appeal is successful.

59 According to Staff Regulations Article 39.3, 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. This requirement is fulfilled.

2. On the merits

(1) The legal framework

60 Staff Regulations:

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.

5.2 A staff member shall be appointed on a fixed-term contract for the duration of the project (external or internal), or special programme, as applicable. However, the period of the initial contract shall not exceed five years. Any extension as provided for in Article 1.2 or renewal of the contract shall depend upon the continued duration of the project (external or internal), or special programme, as applicable, and the continued availability of funding.

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.

10.1 The Centre has the right to terminate contracts of indefinite duration and fixed-term contracts prior to the end of the contract period for the following reasons:

- (a) If the staff member does not give satisfactory service, or is incapacitated for service
- (b) If the country of which the staff member is a national ceases to be a Member or Co-operating State of the Centre, unless otherwise decided by the Council
- (c) As a result of disciplinary action
- (d) If the post or project which the staff member holds is eliminated or reduced in scope such that the staff member's services are no longer needed

10.2 The termination of a contract shall be notified in writing to the staff member concerned.

61 **Implementing instructions:**

5.2 Two types of contract may be awarded:

- i) Fixed-term renewable two to five-year contracts, normally not renewed beyond a total of nine years of service
- 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).

5.4 The Contract Board will review the award of contracts of type i) which take the total number of years of service beyond five years, and the award of contracts of type ii) to a staff member already holding a contract of type i).

The Board will submit its report to the Director-General, including where applicable a recommendation on renewal of contract and a recommendation for the type of contract to be awarded.

(2) Non-renewal or termination of a contract

62 According to Article 5.1 of the Staff Regulations, 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. Article 5.3 and 5.4 provide that the contract shall state, i.a., the starting date and the duration of the contract.

63 It is important to distinguish between non-renewal of a contract (Staff Regulations Article 5.1, 5.5) and its termination (Article 10.1, 10.2). Both decisions have the same result (the end of contract) but are clearly distinct from one another and entail different legal consequences. In its Decision No 5 of 6 February 2019, paragraph 49, the Appeals Board has said:

The term “Termination” is widely used in the Staff regulations and may have different meanings according to the context in which it is placed. A contract may “terminate” or “be terminated”. In some provisions, the term “Termination” or “terminate” means simply the end of the contract as an effect of any occurring event. In other provisions, it means a voluntary act either of the appointing authority or of the staff member deliberately bringing to an end a contract which would otherwise (if there were no such termination) continue to run. The true meaning in each provision must be determined by interpretation.

64 The non-renewal of a time-limited contract has the effect that it expires ipso jure after its stipulated duration. It is not the termination of a running contract which otherwise would continue to run.

65 As explained above, “termination” (in the technical sense) of a contract is a voluntary act bringing to an end a contract which would otherwise (if there were no such termination) continue to run. Here, the Claimant’s contract ended because this was stipulated in the contract. The Director-General’s decision not to extend the contract did not terminate the contract which otherwise would have continued to run but simply left effective the clause stipulating when it would end. It would have been necessary to make a positive decision to extend the Claimant’s contract in order to make it run beyond its stipulated end. In the absence of such decision the contract comes to its end by the mere expiry of time (31 May 2020). This is consistent with ILOAT judgment No 3448 of 11 February 2015, consideration 6: The non-renewal of a fixed-term contract is not the same thing as termination and does not give rise to any termination indemnity.

(3) Information on non-renewal

66 According to Article 5.5 Staff Regulations, 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.

67 This requirement was fulfilled; the Claimant was informed on 29 August 2019 that he would not be offered a further extension of his contract, which thus would expire on 31 May 2020.

68 Although there is nothing in the Staff Regulations, it is standing jurisprudence (*jurisprudence constante*) of international administrative tribunals that the decision of non-renewal must be reasoned, which means it must disclose to the staff member the reasons why the extension is not granted.

69 In its decision No 96 of 18 January 2016, the ESA Appeals Board has explained:

La Commission de Recours se joint à cette jurisprudence constante des tribunaux administratifs internationaux, notamment au jugement du TAOIT N° 1583 du 30 janvier 1997 dans l'affaire Nouel contre UNESCO, en reconnaissant la nécessité que le non renouvellement d'un contrat à durée limitée fasse l'objet d'une décision communiquée au fonctionnaire, qu'elle soit fondée sur des motifs défendables et, par ailleurs, que les motifs en soient également communiqués en temps utile à l'intéressé, de manière à lui permettre d'exercer ses droits, notamment celui de recourir: voir par exemple les jugements N° 544 (affaire Bordeaux), N° 675 (affaire Pérez del Castillo), N° 946 (affaire Fernandez-Caballero), N° 1128 (affaire Williams), N° 1154 (affaire Bluske), N° 1298 (affaire Ahmad N° 2). La Commission de Recours rappelle qu'elle même, dans l'affaire N° 60, a clairement exprimé que „La dispense de motivation prévue à l'article 9/3 (iv) du Règlement du Personnel, n'exclut pas l'application du principe général du droit qui, afin d'éviter l'arbitraire, exige que toute décision administrative soit basée sur une raison valable dont la personne intéressée doit avoir connaissance en moment opportun pour pouvoir exercer éventuellement son droit de recours“.

Il appartient donc à la Commission de Recours de retenir que même au cas où un contrat à durée limitée se termine automatiquement à la date prévue, l'intéressé a un droit d'être informé de la part de l'Agence de la décision prise à son égard. ...

L'obligation d'informer l'intéressé en due forme et avec un préavis raisonnable de la décision du non renouvellement d'un contrat à durée limitée découle du droit de l'agent - reconnu aussi bien par la jurisprudence de la Commission de Recours que par la juridiction constante des tribunaux administratifs (voir p.e. jugement N° 1583 du TAOIT, paragraphe 5, avec d'autres références) - de pouvoir exercer ses droits, notamment celui de recourir. Quant à la durée d'un préavis « raisonnable », il convient de s'inspirer des règles du Statut du personnel qui le fixe à six mois au cas où le renouvellement est envisagé (Règlement 9/4 paragraphe 2).

La fonction du préavis est de mettre en garde l'agent d'un futur événement et de lui ouvrir la possibilité de se défendre contre une décision qui lui porte atteinte ou de prendre d'autres mesures, surtout de trouver un autre emploi adéquat soit au sein soit à l'extérieur de l'organisation. ...

70 The Appeals Board may also refer to Decision No 6 of the EUMETSAT Appeals Board of 26 September 2018 (paragraph 65) stating that

The Claimant is right when he points out that a decision which is contrary to the Claimant's interest needs to state the reasons on which it is based. A decision not to renew a fixed-term contract must be based on objective and valid grounds. A decision is tainted with a severe procedural error if it is not reasoned. This is the case if there are no reasons at all or if the reasoning is purely pro forma, saying nothing on the substance of the decision.

71 The Centre has given an explanation why the Claimant's contract will not be renewed. The Claimant himself acknowledges that the "primary reason of the non-extension of the Claimant's contract is in fact that his services are no longer required by the Centre". This is confirmed by the letter of the Director-General of 22 October 2019, saying:

The post that you are currently holding will be discontinued in its current form. ECMWF no longer requires a position which focusses primarily on front-end developments. ... Our strategy going forward is to use third party experts to carry out front-end developments to ensure access to the latest technologies and expertise. ... The decision to restructure certain positions is in fact merely based upon operational needs and the skills available in a given team.

72 The Claimant seems to be of the opinion that this explanation came too late and could not remedy the alleged deficiencies contained in the letter of 29 August 2019 in which he was informed that his contract would not be renewed. The Appeals Board does not share this opinion.

73 It is certainly desirable to give the full reasons of a decision as soon as possible. However, failure to do so does not create an incurable fault which renders the decision illegal. On the contrary, the preliminary internal review procedure mentioned in Staff Regulations and more detailed in Annex VII - Conditions of appeal and rules of procedure for the Appeals Board – Article 1 paragraph 1, stating 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,

is meant to allow the Centre to reconsider its decision and to remedy errors or omissions which might have occurred during the foregoing informal procedure. The provision does not infringe the legal position of the staff member. Even if the Claimant did receive the reasons of the decision only in the letter of the Director-General of 22 October 2019, he was given sufficient time to consider if it was advisable to appeal against this decision or not.

After receiving the Director-General's letter of 22 October, the Claimant was in a position to defend his rights before the Appeals Board – which he did.

74 Although it could have been expected that an important reorganization of the service (described by the Respondent as “the new strategy for the development of web services”) was explained or proposed in some official document prior to the challenged decision not to renew the Claimant's contract, the Appeals Board notes that the reason put forward by the Director-General in her letter identifies the reason as being the need to re-organize the service and to recruit full stack developers with competence for managing and interacting with external development firms. This is acceptable as a rationale for the decision of non-renewal, since the reorganization of the service explained by the Director-General was real. The fact that the two vacancy notices (VN 19-30 and VN 20-06) were published and the vacancies filled, is evidence that the re-organization explained to the Claimant was true and that the reasons put forward for not extending his contract were real.

75 It is true that the Claimant did not and does not agree with the reasons given by the Director-General. But this is not essential. As long as it is not patent, that the reasons given by the Director-General are not the true ones and are only meant to hide the true ones and to mislead the potential Claimant (or, in the words of EUMETSAT Appeals Board Decision No 6, quoted above, “if there are no reasons at all or if the reasoning is purely pro forma, saying nothing on the substance of the decision”), the reasons given by the Director-General in her letter of 22 October 2019 fulfil the requirement established by standing jurisprudence that any decision which is detrimental to the Claimant's interests must state the reasons. The Appeals Board agrees with the Respondent who pleads, in the rejoinder paragraph 29, that “providing reasons does not mean being under an obligation to convince the member of staff that the reasons are well founded, also because there is no rule providing that the member of staff must agree with the reasons given. The purpose of providing reasons is to enable the member of staff and the Judges, as the case may be, to understand why a given decision was taken“.

(4) Validity of reasons for non-renewal

76 a) The Claimant complains that his contract has been “terminated” due to alleged organizational reasons which are rather unclear. He contends that the Centre did not inform him regarding the discontinuation of his post and the reasons therefor, in a timely manner and transparently, and did not make any concrete and reasonable effort to mitigate the impact that the decision of non-renewal was having on the Claimant's personal and professional life.

77 In arguing this way, the Claimant does not take into account that his contract was not terminated, but would expire at the end of its stipulated term. There is a difference between abolishing a post following the end of term of its holder, or terminating a running contract in order to abolish the post. In the latter case, the administration is under a strict obligation to justify its measure towards the staff member, because abolishing his post is a severe infringement of his legal position. But even if the employment ends due to the

simple fact that the contract of limited duration is not renewed and thus ends at the end of its stipulated term, international case law acknowledges that the non-renewal decision should be reasoned and the rationale should be conveyed to the staff member.

78 However, the Respondent has submitted – and the Claimant has not disputed – that his line manager had informed the Claimant at an early moment of the discontinuation of his position, since the front-end development work would be outsourced. In his appeal, the Claimant himself submits that on 13 June 2019 he had a meeting with the Head of HR, the Head of the Development Section and his line manager. In the meeting the Head of the Development Section informed him that a) he intended to outsource work, although he was not specific as to the type of work to be outsourced, and b) that the Claimant’s normal duties were indefinitely suspended in order to meet unspecified deadlines. The alleged reason verbally given for the discontinuation of the Claimant’s position was that front-end development work would be outsourced. After all, the Claimant cannot claim not to have been informed in time of events which were contrary to any expectation to get his current contract renewed. Finally, the Respondent complied with its obligation by informing the Claimant comprehensively in the Director-General’s letter of 22 October 2019.

79 b) The Claimant explains why the Centre was wrong in its decision to outsource the duty of which he was in charge, since this would be contrary to the Centre’s interests and since he himself would be the ideal candidate to fill the gap which would be created by the suppression of his post.

80 It is standing practice of international administrative tribunals not to interfere into the policy of the organization. In Decision No 96 already quoted the ESA Appeals Board has said:

Il convient de rappeler qu’il ne relève pas de la compétence de la Commission de Recours de juger la politique commerciale, technique et scientifique de l’ESA.

81 Likewise, the ESA Appeals Board has confirmed, in its decision No 102 of 14 June 2014 (paragraph 54 and 57), “that it does not consider it to be its duty to control or to criticize the Agency’s policy on how to develop its activities or set its goals. ... The Agency has no commitment to organize 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 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”

82 Finally, the Appeals Board has adopted the same position in its Decision No 4 of 21 March 2018 paragraph 81.

- 83 Therefore, the Claimant cannot rely on an assertion that outsourcing the duties until now executed by him was contrary to the Centre's interests, and, as he submits, "waste of funds", while "prioritizing internal candidates and resources with the aid of specific training, would be an efficient use of funds and resources to secure the highest ability, efficiency and integrity of the Centre". It is up to the Centre to fix its goals, to spend its funds and to decide what is in its proper interest. Moreover, the Respondent has given an answer to this which is not obviously wrong, saying that the fast development of IT technology could better be followed up by an external provider than by an internal staff member.
- 84 c) As to the Claimant's contention that he himself would be the ideal candidate to fill the gap which would be created by the suppression of his post, the Respondent has explained that this was an auto-evaluation of the Claimant not shared by the Centre. To this, the Claimant replies that the evaluation of his skills and expertise is based on his curriculum vitae information. But this is not a proof that the Centre had no other reasonable choice than to keep the Claimant in service.
- 85 Moreover, the Centre points out that the Claimant had a fair chance to apply for the vacancy. The Appeals Board may leave open if the Claimant was discouraged to apply to that post or if his application was rejected on insufficient grounds. The Claimant, who admits that he did apply for several vacancies, though without success, did not challenge these specific decisions and cannot, within the present case concerning the non-renewal of his contract, reopen that separate dispute on failed applications for a specific post. The Appeals Board will not engage with the dispute between the parties on "back-end" and "front-end" experience and the duties of a "Full Stack Web Developer". The Appeals Board may ascertain patent errors, but here there is no evidence for such errors. The Appeals Board must leave it to the assessment and to the discretion of the Centre whether or not the Claimant fulfilled the requirements of the vacancies.

(5) Demotion

- 86 With regard to the Claimant's submission that he was the victim of a de facto demotion which amounted to a non-official disciplinary action, there is no clear link between this allegation and the contested decision not to renew his contract. It seems that the Claimant wishes to show that the non-renewal was a logical continuation of the alleged demotion. However, the extension of his contract cannot be considered to be the appropriate compensation or remedy of the alleged demotion. Moreover, the Centre has demonstrated that there was a specific constraint to develop within rather strict time limits a product called "ecCharts2, Beta version" and that the Claimant was freed of most of his other obligations in order to devote his time and skills to that project. This was a decision which his hierarchy was perfectly entitled to take. Even if the Appeals Board had to consider this as a transfer or a reappointment, the Centre would have acted in line with the applicable provision. According to Staff Regulations Article 6.1, "The appointing authority may transfer a staff member to fill a post other than the one to which he or she was appointed. Functions and responsibilities related to this post must be of

a comparable level to those of the post to which the staff member was appointed“. The Claimant does not assert that the task devoted to the ec-Charts2 project was of a lower level than the one to which he was appointed as an Analyst in the Forecast Department.

87 In fact, he complains that he was only tasked as assistant of Mr. C. S., who was acting as Project Manager, Domain expert, Architect, and Lead Developer and who never took the Claimant’s advice. Obviously, the Claimant was in disagreement with Mr. S. The Claimant considers this as a breach of his contractual right to be given a post with functions and responsibilities of a comparable level. This, however, would not entitle him to a renewal of his contract.

88 From Staff Regulation Article 6.4 (“The duration of such temporary duties shall not exceed one year”) the Claimant infers that the situation was illegal because it prevailed for 15 months. However, the said provision does not apply to the Claimant. It refers to Staff Regulations Article 6.3 (“A staff member who is called upon to perform temporarily the duties of a staff member in a higher grade shall receive from the beginning of the third month of such temporary duties an allowance equal to twice the difference in the basic salary between the first and the second step in his or her grade“) which was not the case here.

(6) The pension issue

89 As to the pension issue, the Claimant has underlined that he was aware that he made a mistake when years ago he did not seize the opportunity to fill the time gap in his pension scheme career. He did not want to base his appeal mainly on this argument, but he submits that the Centre should at least have taken it into consideration.

90 It is a legitimate position of the Claimant to insist that his interest to remain in service until he fulfils the necessary time to be eligible to a pension be taken into account by the Respondent when it had to decide whether or not the contract of the Claimant should be extended.

91 The Respondent submits that this was done. In her letter of 22 October 2019, the Director-General explained that she had taken into account that the Claimant will be 56 years of age at the end of his current contract and that his retirement age would be still five years away, so that a short extension of one or two years would be of no use to him. However, she did not address the fact that according to Article 8 paragraph 4 of the Funded Pension Scheme, the Claimant, after ten years of service (starting with his second appointment in 2011), would be entitled to an early pension with a reduction on the regular pension. Instead, the Director-General took into account the leaving allowance to which the Claimant is entitled at the end of his contract.

92 The Appeals Board finds it surprising that the letter of the Director-General, stating the reasons for the decision of non-renewal, misses out completely

this point, while stating that she has carefully taken into account the Claimant's situation and interests.

93 However, this deficiency does not affect the decision of non-renewal to such a degree that it entails its illegality. Since all other reasons presented by the Claimant why he should be granted an extension do not hold, the pension issue would be the only one pleading in favour of a contract renewal. As the Respondent rightly points out, according to international jurisprudence "*an international organisation's duty of care towards its officials does not compel it to extend an official's appointment for the sole purpose of enabling her or him to draw a pension*" (ILOAT No 4037, Consideration 11, with reference to *Judgment 3874, under 14*). Therefore, the Respondent cannot be blamed for an abuse of power by refusing the renewal of the Claimant's contract.

VI. Conclusion

94 For these reasons, the Appeals Board decides:

The Appeal is dismissed.
The Claimant shall bear his own costs.

Michael Groepper

Chair

Susan Dunning

Secretary