



Reports of Cases

Case T-296/21

SU

v

European Insurance and Occupational Pensions Authority (EIOPA)

Judgment of the General Court (Fourth Chamber), 14 December 2022

(Civil service – Members of the temporary staff – Contract for a fixed period – Non-renewal – Renewal procedure – Taking into account of appraisal reports – Non-finalised appraisal report – Liability – Material damage – Loss of opportunity – Non-material damage – Unlimited jurisdiction – Implementation of a judgment of the General Court)

1. *Civil service – Members of the temporary staff – Staff reports – Internal directive relating to the staff reports procedure – Legal effects*
(*Staff Regulations, Art. 43; Conditions of Employment of Other Servants, Arts 15(2) and 54*)

(see paragraphs 36-39)

2. *Civil service – Staff reports – Appraisal report – Drawing up – System put in place by the Commission – Challenge before the appeal assessor – Failure to respond – Consequence – Non-finalised report*
(*Staff Regulations, Art. 43; Conditions of Employment of Other Servants, Arts 15(2) and 54*)

(see paragraphs 40-42, 45, 47)

3. *Civil service – Staff reports – Appraisal report – Drawing up – Obligation of the administration – Infringement – Justification based on internal organisation – Not permissible*
(*Staff Regulations, Art. 43*)

(see paragraph 44)

4. *Civil service – Members of the temporary staff – Recruitment – Non-renewal of a fixed-term contract – Adoption of internal directives establishing a procedure for renewal decisions – System put in place by the European Insurance and Occupational Pensions Authority (EIOPA) – Taking into account of a non-finalised appraisal report – Consequences – Annulment of the non-renewal decision – Conditions*
(*Staff Regulations, Art. 43; Conditions of Employment of Other Servants, Arts 8, 15(2) and 54*)

(see paragraphs 51-62, 64-67)

5. *Civil service – Non-contractual liability of the institutions – Conditions – Damage – Loss of earnings following non-renewal of a fixed-term contract – No right to renewal of a contract – No precise and concrete assurance given by the administration as to renewal – Dismissed*
(Arts 266 and 340, 2nd para., TFEU)

(see paragraph 82)

6. *Civil service – Non-contractual liability of the institutions – Conditions – Damage – Material damage arising from the loss of opportunity to have a contract renewed – Evaluation – Criteria – Actual and definitive nature of the loss*
(Arts 266 and 340, 2nd para., TFEU)

(see paragraphs 83-98)

7. *Actions brought by officials – Actions for damages – Annulment of the act challenged not ensuring adequate compensation for non-material damage – Non-material damage caused by the decision not to renew the contract of a member of the temporary staff and by the circumstances surrounding its adoption – Member of the temporary staff on sick leave since the adoption of that decision*
(Art. 340, 2nd para., TFEU)

(see paragraphs 108-113)

8. *Actions brought by officials – Judgment annulling a decision – Effects – Obligation to adopt measures implementing the judgment – Judgment annulling a decision not to renew the contract of a member of the temporary staff – Applicant’s request for compensation for the possibility of acquiring pension rights – Premature request*
(Art. 266 TFEU)

(see paragraph 114)

Résumé

In January 2015, the applicant, SU, was recruited as a member of the temporary staff by the European Insurance and Occupational Pensions Authority (EIOPA), on the basis of a three-year contract, which was subsequently renewed for the same duration.

In the context of the appraisal exercise for 2019, the applicant’s reporting officer observed that her performance was not satisfactory and that her results for 2020 had to improve in order to remain satisfactory overall. The Executive Director of EIOPA, who was also the appeal assessor, did not respond to the applicant’s refusal to accept her appraisal report and comments and accordingly did not take a position on those comments in that report.

In July 2020, following the applicant’s contract renewal report, in which the Head of Department did not recommend a second renewal of her contract, the Executive Director of EIOPA decided not to renew the applicant’s contract (‘the contested decision’).

The General Court, before which the applicant brought her action, annuls the contested decision and explains the consequences of non-finalisation of a staff report on the lawfulness of a decision not to renew a contract. In the part concerning its findings on damages, the judgment sets out the conditions for compensating loss of opportunity, including the opportunity to have a contract renewed. It offers clarification on the conditions of actual and definitive loss of opportunity and explains the relationship between the General Court's unlimited jurisdiction and the administration's obligation to adopt measures implementing a judgment annulling a decision.

Findings of the Court

In its consideration of the head of claim seeking annulment of the contested decision, the General Court begins by examining the legal status of the applicant's 2019 appraisal report.

In that context, it observes that it is clear from the texts applicable to EIOPA¹ that, when the jobholder refuses the appraisal report, it becomes final only following the decision of the appeal assessor. Where the appeal assessor has a complete power of review as to the merits of the assessments contained in an appraisal report, and unlawfully refrains from the exercise of his review, the appraisal report refused by the jobholder does not become final.

However, the administration cannot rely on its internal administrative organisation to justify its failure to comply with its overriding duty to ensure that appraisal reports are drawn up periodically within the time limits and in a proper manner. Accordingly, the appeal assessor's failure to act in the present case, due to an internal organisational error, cannot be regarded as an implicit confirmation of that report which would have the effect of rendering it final and triggering the time limit for lodging a complaint against it.

Turning next to the consequences of the failure to finalise the 2019 appraisal report, the General Court notes that it is apparent from EIOPA's internal directive on contract renewals that, where a contract renewal decision is taken on the basis of the criterion relating to the jobholder's performance, that person's appraisal reports must be taken into account both at the stage of the Head of Department's recommendation and at the stage of adoption of the decision.

In the present case, the fact that the applicant's comments on her 2019 appraisal report were not taken into account and that report did not become final may have had a decisive influence on the renewal procedure. Consequently, the decision not to renew her contract must be annulled.

In its consideration of the head of claim seeking damages, the General Court dismisses the first head of claim for material damage, consisting of loss of earnings arising from the non-renewal of the employment contract. It states that the procedural irregularity at issue does not mean that the applicant must be automatically reinstated, but only that the incomplete appraisal report must be finalised and that the application for renewal of the contract must be re-examined.

Moreover, the loss of earnings is inherent in any end of a fixed-term contract; again, the renewal of such a contract being not a right, but merely an option. Thus, in the absence of any precise and concrete assurance on EIOPA's part as to the renewal of the applicant's contract, she cannot expect to continue to receive her remuneration beyond the end of her fixed-term contract. For

¹ The first paragraph of Article 43 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'); Article 15(2) of the Conditions of Employment of Other Servants of the European Union; Article 7(1) and (4) of Commission Decision C(2013) 8985 of 16 December 2013 laying down general provisions for implementing Article 43 of the Staff Regulations and implementing the first paragraph of Article 44 of the Staff Regulations, applicable to EIOPA by analogy (EIOPA-MB-14/018).

the same reason, it cannot be argued that the annulment of the contested decision would have the effect of entailing the adoption of a new decision having retroactive effect by which EIOPA would renew the applicant's contract.

As regards the second head of material damage alleged, relating to a loss of opportunity to have the contract renewed, the Court notes that, in order to be established and give rise to compensation, that loss must be actual and definitive.

In order to assess whether the loss of opportunity is real, it is necessary to refer to the date on which the non-renewal decision was taken and it must be established to the requisite legal standard that the applicant was deprived not necessarily of the renewal of her contract, which she can never prove would have occurred, but of a genuine opportunity to have her contract renewed, with material damage for the applicant consisting of loss of income. The existence of a genuine opportunity does not depend on the degree of probability that that opportunity would have materialised, as the latter factor is taken into account subsequently, if that existence is recognised, in order to determine the extent of the material damage suffered and of its compensation.

The General Court finds that, in the present case, in the absence of the unlawfulness relating to the use of a non-finalised appraisal report vitiating the non-renewal decision, the possibility could not be ruled out that the applicant's contract might be renewed.

As regards the definitive nature of the loss of opportunity, it is assessed at the time when the Courts of the European Union rule, taking into account all the circumstances of the case, including factors subsequent to the adoption of the unlawful act giving rise to the damage.

In that regard, the institution, agency or body whose act has been annulled is required to take the necessary measures to implement the judgment annulling that act, thereby nullifying the effects of the malfeasance found. Where the annulled act has already been implemented, the nullification of its effects requires, in principle, the restoration of the applicant's legal situation as it stood prior to the adoption of the act. However, that obligation does not necessarily rule out the possibility that the loss of opportunity for the applicant who has obtained the annulment of a decision concerning him or her may be definitive.

The definitive nature of a loss of opportunity may be established where, having regard to all the circumstances of the case, even if it is still possible for the administration to adopt measures to correct the unlawfulness committed, those measures would be of no practical effect for the applicant, who would not be given the same opportunity as the one of which he or she was deprived due to the unlawfulness.

That is the situation in the present case. First, the annulment of the non-renewal decision does not in itself entail the applicant's legal reinstatement in EIOPA's departments as from the date on which that decision took effect. Unlike a decision to dismiss an official or member of staff on a contract for an indefinite period, the non-renewal decision did not interrupt an employment relationship that would have continued in the absence of its intervention. Accordingly, the administration is free to take the view that the new decision which it is for it to take following this judgment will make provision for the future only. Secondly, even if, following the annulment of the non-renewal decision by the General Court, EIOPA were to adopt a new decision renewing the applicant's contract as from the expiry of her previous contract, that decision would have no practical effect for the applicant for the period running from the expiry of her previous contract

to the adoption of the new decision. The applicant is not justified in claiming payment of her remuneration in respect of that period and could perform duties within EIOPA only from the time she was reinstated into that agency.

Making use of its unlimited jurisdiction, so as to guarantee the effectiveness of the annulment of the contested decision, the General Court itself determines the amount of compensation to be paid for the loss of opportunity.