

**JUDGMENT N°1/2020 OF THE ORGAN OF FIRST INSTANCE OF THE EUROPEAN
UNIVERSITY INSTITUTE**

Concerning an appeal introduced under Article 2, paragraph 3 of the Common Provisions by

- “AB”, initially appearing in person without legal representation, and from 21 September 2020 represented by Maître Melodie Vandebussche and Maître Laure Levi, avocats of the Brussels Bar, appellant,

v

- The European University Institute (hereinafter “EUI”), via dei Roccettini 9, 50014 San Domenico di Fiesole, Italy, represented by the President of the European University Institute, Professor Renaud Dehousse, and at the oral hearing by Avv. Alberto Dal Ferro, of the Vicenza Bar, respondent,

against the decision of the President of the European University Institute of 9 September 2019 rejecting a complaint filed by the appellant concerning the non-renewal of her contract as a member of the contract staff of the EUI.

THE ORGAN OF FIRST INSTANCE

Member of the Organ of First Instance exercising the judicial function in accordance with Articles 2 and 3 of Decision 8/06 of the High Council of 8 December 2006 establishing an Organ of First Instance within the Appeals Board of the European University Institute: D. O’Keeffe,

Secretary of the Organ of First Instance: Mr L. Wiczerzak (in office from 16 July 2020), and Ms. A. Tasheva (Acting Secretary until 15 July 2020),

Having regard to the written procedure and further to the oral hearing on 16 October 2020,

Gives the following

Judgment

FACTS

1. The appellant was appointed a member of the contract staff of the EUI from 1 July 2013 in accordance with Article 3a of the Conditions of Employment of Other Servants (“CEOS”) of the EUI. The contract, dated 19 June 2013, was for a fixed period of 3 years until 30 June 2016 at the level of function group II, grade 5, step 1. Following a probationary period, she was established in her post. By letter of 1 December 2015, her contract was extended for a 3-year term, for the period from 1 July 2016 to 30 June 2019. The appellant worked in the X Department.
2. The appellant was granted parental leave from 1 September 2018 to 28 February 2019 in order to care for her child. On 9 December 2018, the appellant requested unpaid leave on personal grounds from 1 March 2019 (when her parental leave would expire) to 30 June 2019 in order to be with her husband and child. She declared in her Personal Leave application that she intended to return to the EUI on 1 July 2019. By decision of 5 February 2019, the Secretary General of the EUI granted her request for Personal Leave.

3. By decision of 22 February 2019, the Secretary General wrote to the appellant as follows (hereinafter “Secretary General’s Decision”): “I refer to your request for leave on personal grounds dated the 9th of December 2018 in which you stated your intention to return to the European University Institute on the 1st of July 2019. The European University Institute has to inform you that it has been decided not to renew your contract ending on the 30th of June 2019.” The Secretary General stated that before proceeding with the renewal of a staff member’s contract, an assessment of the performance of the individual is requested of the relevant Unit. He stated that “the assessment done by the X Department was not positive, underlining a weak commitment and motivation towards the Departmental activities. We understand that the Department has already been in contact with you in this respect.”
4. On 22 May 2019, the appellant made a complaint to the President of the EUI under Article 1(2) of the Common Provisions for the Teaching and Administrative Staff, contesting the decision not to renew her contract. She contested the allegation of weak commitment and motivation given by the Secretary General in his decision. She supposed that the decision was solely due to her leave requests whereas she maintained that the assessment should evaluate her performance at work and not her leave requests which are foreseen in the Staff Regulations.
5. By decision of 9 September 2019, the President rejected the appellant’s complaint (hereinafter “President’s Decision”). The President’s Decision stated that the EUI had given the appellant the reasons for the non-renewal and given her adequate opportunities to present her position. The EUI was not obliged to state reasons for its decision not to renew a contract. The EUI stated first that there was no automatic renewal of contracts or contractual obligation to renew contracts. Second, the EUI contested the appellant’s assertion that she had never received written or oral unsatisfactory evaluations of her work, by referring to the appellant’s First Probationary Report of 15 January 2015 which noted room for improvement in various areas. The EUI referred to “targeted feedback” which allegedly took place in a phone call between the appellant and the Departmental Coordinator on 10 January 2019 [later established to have taken place on 28 January 2019], identifying several areas where the appellant’s performance would need to be improved. The EUI stated inter alia that the phone call highlighted “the low interest and motivation you showed during the last months.”

Staff File

6. It appears from the file that the appellant’s probationary period was suspended from 7 January 2014 until 3 December 2014 as she was absent on sick leave and then maternity leave. Her First Probationary Report was on 15 January 2015. The probationary period was extended until 26 August 2015. A Second Probationary Report followed on 2 July 2015 which deemed her performance satisfactory. In the Second Probationary Report, on page 3, the evaluations were all either “good” or “very good” (“good” is defined as “corresponding to a high level which is supposed to be required by a EUI employee” and “very good” is defined as “corresponding to a specially high level”. The then Head of Department stated that “The probationer's performance corresponds to the level required by an EUI employee”. Following this report, the appellant was established in her post. Her file contains staff assessment reports for 2015, 2016 and 2017, but not for 2018. She was on leave for part of 2018 but the Director of the Human Resources Service (hereinafter “HR”) stated at the hearing that due to an internal review of the way assessments and promotions are carried out, lasting from 1 January 2018 until summer 2019, an assessment was not carried out on the appellant’s performance for 2018,

hence the absence of an annual staff assessment report for 2018 (Transcript of the Oral Hearing, page 53, hereinafter “Transcript”).

7. At the request of the OFI, the HR service prepared a schedule of the various leaves taken by the appellant as the appellant maintained that the real reason for not extending her contract was because of her various leaves. The schedule reveals that the appellant was granted maternity leave from 7 January 2014 which expired on 3 July 2014, followed by parental leave from 4 July 2014 to 3 December 2014. She took parental leave from 1 September 2016 to 30 November 2016. She was granted parental leave from 1 September 2018 to 28 February 2019, followed as explained above by Personal Leave until 30 June 2019. The appellant was granted leave to work part-time (75%) from 24 March 2015, and this permission was successively renewed until September 2018 when she went on leave. A table supplied by the HR Service at the request of the OFI calculated for the years 2013 to 2019, the appellant’s ordinary leave, special leave, maternity leave, parental leave, sick leave with and without certificate and found that out of 1469 expected working days, the appellant was “absent” for 654 days, or 44,5% of the expected working days.
8. The appellant’s Staff File contains *inter alia* 3 emails between HR and the Department dated 10, 23 and 28 January 2019. In the email of 23 January 2019, the Department Coordinator stated that “I confirm that we will not extend [the appellant’s] contract after 1 July 2019.” In the email of 28 January 2019, the Coordinator wrote: “I have informed [the appellant] this morning. You can proceed with the formal notification from HR.”

PROCEDURE BEFORE THE ORGAN OF FIRST INSTANCE

9. By letter dated 5 December 2019, received by the Secretariat of the OFI on 9 December 2019, the appellant appealed against the decision of the President of the EUI of 9 September 2019 rejecting her complaint of 22 May 2019 concerning the non-renewal of her contract as a member of the contract staff of the EUI.
10. The written observations of the EUI were received at the OFI on 18 February 2019, in accordance with Rule 16 of the Rules of Procedure.
11. On 19 February 2020, as a measure of inquiry under Rule 30(2) of the Rules of Procedure the OFI made the following request for information to the EUI: “The OFI requests the EUI to lodge the appellant’s entire staff file with the Secretary of the Organ of First Instance by 6 March, to be treated with utmost confidentiality, even if this entails duplicating documents already submitted by [the appellant]. This should include all contracts and related documents, evaluations and official and unofficial assessments of [the appellant] including electronic communications. The file should include the request for leave on Personal Grounds of December 2018 submitted by the appellant, the reply by the Secretary General of 6 February 2019, and the letter of the Secretary General to [the appellant] of 22 February 2019. It should also contain details of the amount of leave on Personal Grounds taken by [the appellant] since 2013.”
12. On 5 March 2020, the EUI supplied information to the OFI in reply to its request of 19 February 2020. It did not supply the appellant’s “entire staff file” as requested by the OFI. The part of the file concerning “assessment” contained 2 categories marked as follows: 1) official part of the personal

file and accessible to the staff member on request and 2) a file marked “Assessment (not shared with staff member nor part of the personal file”. The first of these files contained a report bearing the date 3 June 2014 which was apparently a draft report on the appellant but which had never been shown to her, together with a cover email from the then Head of Department. The second file contained emails concerning the appellant between the Departmental Coordinator and one of the professors for whom the appellant worked. This was not shared with the appellant and was not part of the personal file.

13. On 30 April 2020, received at the OFI Secretariat on 1 May 2020, the appellant lodged observations on the EUI’s reply to her appeal. She stated that the EUI had not informed the OFI that she had been promoted in 2016 following a recommendation by her Department prepared by 30 May 2016. She referred to Decision 35/2016 of 25 July 2016 of the President of the EUI (hereinafter “Promotion Decision”) promoting her with effect from 1 November 2016. The OFI had not known of this promotion as the Departmental Recommendation for Promotion and the Promotion Decision were not contained in the documentation provided by the EUI on 5 March 2020 and had not been mentioned in the EUI’s written pleadings or in the Decisions of the Secretary General and the President.
14. In her observations of 30 April 2020, the appellant stated that in the phone call in January 2019, the Departmental Coordinator told her that her contract would not be renewed due her leaves. Nothing negative was said about her performance.
15. She noted that she had not been shown some assessments on her performance, including a 2014 report with covering email from the then head of Department. The appellant noted that the President had referred only to negative comments from the First Probationary Report in 2015 whereas she had received good reports in 2016 for her promotion and in 2018 in relation to 2017 which contradicted the 2015 report but were not mentioned by the President. The appellant concluded that all the negative reports on her were made to justify the EUI’s intention not to confirm, or renew her contract for reasons related to her absences (maternity leave, parental leave and leave on personal grounds). She also inquired how the phone call fitted into a formal procedure.
16. The OFI ordered certain Measures of Instruction on 5 May 2020 as a result of the appellant’s observations. In reply on 18 May 2020, the EUI explained that the documents relating to the appellant’s 2016 promotion had not been transmitted to the OFI because the documentation related to promotions were filed separately and not kept on the staff file of the staff member. The EUI explained that the documents transmitted by the EUI did not constitute “the full staff file in its entirety” and did “not include documents which EUI did not deem relevant to this case”.
17. On 10 July 2020, in reply to written questions posed by the OFI, the appellant submitted that she had been discriminated against on ground of gender. She also gave further details as regards her claim for damages.
18. On 29 July 202 the EUI provided a detailed reconstruction, with supporting documentation in annexes, of the procedure leading to the Decision not to renew the appellant’s contract. On 21 September 2020 the appellant produced an email of 18 February 2014 from the then Deputy Head of HR stating « il se peut qu’une demande de congé parental introduite juste après votre congé de maternité puisse avoir des répercussions sur la décision de vous confirmer dans vos fonctions. » (“it is possible that a request for parental leave submitted immediately after your maternity leave may have

an impact on the decision to establish you in the post).” This had not been produced by the EUI in response to the OFI’s requests for production of all documentation including electronic communications of 19 February 2020 and 5 May 2020. The appellant noted *inter alia* that she had not been shown the draft report on her from June 2014 which was on her file.

19. On 21 September 2020, the appellant informed the OFI that she was represented by counsel. On 25 September 2020, the OFI asked counsel for the appellant to provide “medical or other evidence” in relation to the appellant’s claim that her health and well-being had been affected by the decision not to renew her contract, and to address this issue at the hearing. By letter of 5 October 2020, the appellant modified her claims as set out below.
20. On 5 October 2020, the EUI submitted further observations and what purported to be the appellant’s full staff file, but the file was rejected as being out of time by the OFI.
21. In accordance with Rule 23 of the Rules of Procedure, the OFI decided to call as witnesses, the appellant, the Secretary General of the EUI, the Director of Human resources of the EUI, Professor M of Department X, and the Departmental Coordinator. The EUIFI called as witness the Head of Department X. The hearing was held on 16 October 2020. The witnesses were heard by video-conferencing during the hearing, and were questioned by counsel for both parties and by the OFI.
22. At the Hearing, the OFI asked counsel for the parties to lodge further submissions on damages and the relief sought following the appellant’s change in claim of 5 October 2020. The parties replied on 23 and 30 October 2020.

Special procedural issues

23. At the suggestion of the OFI on 7 July 2020, the parties attempted to use mediation, and when the nomination of a mediator failed, attempted direct negotiations between the parties, but these were not successful.
24. As a result of the global health emergency, by decision of 12 March 2020 the OFI decided that email should be used for lodging all documentation and communications with the parties, as part of its inherent jurisdiction to ensure the administration of justice. The OFI decided on 5 May 2020 to hold an oral hearing in camera to protect the dignity of the appellant in accordance with Article 13 of the Rules of Procedure.
25. On 9 September 2020, the OFI issued a communication to the parties under Chapter III of the Rules of procedure. The OFI decided that the oral hearing should take place using video-conferencing, including the arguments by counsel for the parties and the hearing of witnesses.
26. . By email of 25 September 2020, transmitted to the parties on 28 September, the member of the OFI exercising the judicial function offered to recuse himself on the grounds of his acquaintance 20-30 years before with the Head of the X Department whom the EUI had called as a witness, and with the recently appointed lawyer for the EUI. This offer was rejected by the parties on 30 September 2020.
27. The OFI considers it appropriate, exceptionally, to publicly recognise the outstanding task performed by counsel for both parties in elucidating the legal issues in the best traditions of cooperation between Bench and Bar.

FORMS OF ORDER SOUGHT BY THE PARTIES

28. The applicant, at the time of lodging her appeal, was not assisted by a lawyer, and initially claimed that the Organ of First Instance should:

- a) Determine that the non-extension of her contract was invalid having regard to the Staff Regulations and her contract;
- b) Hold that the decision not to extend her contract was based on personal judgements only and not on objective grounds
- c) To be treated like any other EUI staff member whose performance supported by proper evidence (staff assessment reports) is the basis for the contract renewal decision;
- d) To reinstate her in her previous position as of 1 July 2019;
- e) to pay her salary as of 1 July 2019
- f) to pay compensational loss for reputational loss suffered as a result of the non-extension of her contract equal to at least 10 monthly salaries.

29. By letter of 5 October 2020, the appellant modified her claims and stated that considering “the negative attitude of the EUI towards her and harm during the written procedure, she no longer wishes to be reinstated in her position as she does not believe it will be possible to have a fresh start and “have a fair and fulfilling career at the EUP”. Accordingly, she modified her claims. As regards points d and e above, she asks to be awarded compensation for the loss of a chance to have her contract renewed for an indefinite period, and for the loss of a chance to complete at least 10 years’ service needed to qualify for a pension, having already served 6 years. The damages under this head are estimated at 4 years’ salary plus 100% pension contributions for that period. She maintains her claim for 10 months’ salary under point f above and qualifies it as a claim for non-material damages for the detriment to her health, dignity and professional reputation.

30. The EUI did not initially formulate specific claims as regards the Order sought but clearly opposed the appellant’s claims in its reply. By letter of 29 July 2020, the EUI asked the OFI to dismiss the Appeal in any of its requests and decide on costs according to the relevant provisions. In submissions of 23 October and 30 October 2020, filed in response to a request from the OFI, the EUI contests the admissibility and validity of the appellant’s modified claims.

LAW

31. The appellant seeks relief on the ground that the non-renewal of her contract was invalid having regard to the Staff Regulations and her contract. She also seeks damages as compensation for the harm allegedly caused to her by the EUI on account of the non-renewal of her contract.

32. The appellant claims that the EUI’s conduct is illegal in that it infringes the obligation to state reasons. She also claims an infringement of her right to be heard.

33. As regards the claim for damages, it is settled case-law concerning civil service matters that an institution can be held liable for damages only if a number of conditions have been satisfied as regards the illegality of the allegedly wrongful conduct imputed to the institution, the actual harm suffered and the existence of a causal link between that conduct and the harm alleged to have been

suffered.¹ Those conditions must be cumulatively satisfied, so that failure to satisfy one of them is a sufficient ground upon which to dismiss the claim for damages.²

Duty to give reasons

34. Under Article 47 of the Conditions of Employment of Other Servants (CEOS), applicable to contract staff, where a contract of employment is for a fixed period, the employment shall cease on the date stated in the contract. Thus, according to the case-law of the courts of the European Union, an institution is not required to state reasons for its decision not to renew a contract when it expires.³ However the case-law holds that a decision by which the administration rejects a staff member's request for renewal of his contract must state the grounds on which it is based since it constitutes an act adversely affecting that person.⁴
35. In her application for Personal Leave of 9 December 2018, the appellant specifically stated that she intended to return to work at the EUI on 1 July 2019. This declaration is to be considered as an implicit request for renewal of her contract and in fact the EUI considered it as an "implied request for a contractual renewal" (see paras. 14 and 16 of its submission to the OFI of 29 July 2020). It follows that the Secretary General, in his decision of 22 February 2019, was obliged to state the reasons for not renewing the appellant's contract.
36. The Secretary General's Decision stated that the reason for non-renewal was that "the assessment done by the Law Department was not positive, underlining a weak commitment and motivation towards the Departmental activities." No further reasoning is given. The Secretary General added that "we understand that the Department has already been in contact with you in this respect".
37. In the President's Decision, the EUI made a number of points which can legitimately be taken into account in supplementing the reasoning in the Secretary General's decision.⁵ First the decision stated that the EUI was not bound to give reasons when not renewing the contract of a temporary staff member. Second, the EUI stated that the appellant's work had been unsatisfactory and referred in detail to the First Probationary Report of January 2015. The EUI also referred to "targeted feedback" from the Departmental Coordinator in January 2019 highlighting several areas where the appellant's performance would need to be improved. The President concluded that the appellant had been given reasons for the non-renewal and had been given adequate opportunities to present her position.

¹ See judgment of 22 March 2018, *HJ v EMA*, T 579/16, not published, EU:T:2018:168, paragraph 173 and the case-law cited.

² Case T 579/16, above, paras. 174 and 175.

³ Case T-580/17, *Kevin Karp v. Parliament*, Judgment of the General Court of 6 February 2019

⁴ Judgment of 27 November 2012, *Sipos v OHIM*, F-59/11, EU:F:2012:164, paragraph 71; see also, to that effect, judgments of 1 March 2005, *Smit v Europol*, T-143/03, EU:T:2005:71, paragraphs 26 and 27, and of 17 January 2017, *LP v Europol*, T-719/15 P, not published, EU:T:2017:7, paragraph 27.

⁵ See judgment of the European General Court in Case 17 January 2017, *LP v Europol*, T-719/15 P, not published, EU:T:2017:7, paragraphs 18-20 and the case-law cited.

38. The OFI rules that the decision not to renew the appellant's contract was irrational and illogical as it was manifestly in contradiction with the evaluations of the appellant enumerated below. The Secretary General's decision not to renew the appellant's contract on 22 February 2019 therefore constituted a manifest error of assessment. It follows that the President's decision of 9 September 2019 rejecting the appellant's appeal is also invalid on the same grounds in that it upholds the Secretary General's unlawful decision. The decision also violated the appellant's right to be heard, the rights of the defence and the duty to have due regard to the welfare of officials. For reasons given below, the President's Decision also constitutes an abuse of power and a violation of the principle of good administration.
39. The Secretary General's decision not to renew the appellant's contract contained only the very nebulous reason of "weak commitment and motivation towards the Departmental activities" and was not based on objective factors. The President's decision of 9 September 2019 relies on various comments, all negative, all exclusively contained in a single report, the First Probationary Report of January 2015, as expressly admitted by the EUI to the OFI on 5 October 2020.⁶ The President's contested decision is dated 9 September 2019, more than 4 years after the First Probationary Report on which the EUI exclusively relied. The OFI notes that between January 2015 and September 2019, the appellant was the subject of no less than 6 subsequent reports and a decision of the then President to promote her, which were selectively ignored by the EUI. These are:
- (1) Positive second probationary report of 2 July 2015, which led to her being established in her post;
 - (2) Satisfactory annual staff assessment report for 2015;⁷
 - (3) Satisfactory annual staff assessment report for 2016;⁸
 - (4) Satisfactory annual staff assessment report for 2017;⁹
 - (5) Promotion proposal of 2016 (authored by the then Head of Department, followed by Decision 35/2016 of 25 July 2016 of the President of the EUI promoting the appellant; and
 - (6) Satisfactory annual staff assessment report for 2017 (drafted in 2018, authored by the previous Head of Department, Professor M.
40. In these 6 reports or evaluations, the appellant received positive or very positive comments from the Department and particularly from the professors for whom she worked (no annual staff report is available for 2018 as explained above). The Promotion Recommendation for 2016 and the Staff Assessment Report for 2017 (it emerged at the Hearing that both were written by Professor M., Head of Department X until the end of 2017), were balanced and objective and assessed all findings,

⁶ The fact that the President's Decision relied exclusively on the First Probationary Report was confirmed by the President to the OFI on 5 October 2020. The President sent a copy of the Report and highlighted the parts which were used for the Decision.

⁷ In the 2015 Staff Assessment Report, the Departmental Coordinator states that she is "overall happy with [the appellant's] performance" and that she has "seen much progress during the last year". Two professors for whom the appellant worked provided excellent recommendations on her work.

⁸ The Staff Assessment Report for 2016 was good, with a positive evaluation by the evaluator and complimentary comments by professors.

⁹ The Report for 2017, dated 14 March 2018, drafted by the previous Head of Department, Prof. M., was good, with the appellant clearly seen as a valuable member of the team. The Departmental coordinator and had been on leave and the Appellant coped well. His overall assessment was "[the appellant] has performed well in 2017: she discharges her duties efficiently and she is keen to solve problems and queries that emerge."

positive, negative and neutral, to give an overall constructive and balanced positive evaluation of the appellant. The appellant had clearly progressed professionally from January 2015, as evidenced by staff assessments, the 2016 Promotion recommendation and her subsequent promotion.

41. It is settled case-law that when taking a decision concerning the situation of a member of temporary staff, the competent authority must take account of all the factors which may affect its decision.¹⁰
42. It follows that when taking the decision not to renew the appellant's contract, the Secretary General's Decision and the President's Decision were obliged to take account of the 6 subsequent reports on the appellant, and the 2016 promotion decision. However the President specifically confirmed to the OFI on 5 October 2020 that the negative comments in his decision relied exclusively on the First Probationary Report of January 2015. Moreover, only the negative evaluations in the First Probation Report were considered; the positive or neutral evaluations in that report were ignored,¹¹ The EUI thus arbitrarily chose to rely exclusively and selectively on the negative features of the oldest report on the appellant, to the exclusion of subsequent and more favourable reports and a promotion decision.
43. It is perplexing that even if the EUI chose to rely on an outdated report which could not take account of the appellant's professional development since January 2015, it arbitrarily ignored the evaluations of the appellant in the First Probationary Report which were favourable to her or at least neutral. Thus, the appellant's positive evaluations in the First Probationary Report in January 2015 concerning "ability of written and/or oral expression" (*sic*) and "human relations" were both evaluated as "very good" which is defined on page 3 of that document as "corresponding to a specially high level" but the President's decision does not refer to them as one would expect from a balanced objective analysis. Similarly, two evaluations of "acceptable" (defined as "corresponding to an acceptable level" under the analytical assessment scheme) which were presumably at least neutral or positive but were not taken into account.
44. In order to have carried out a balanced, objective and fair assessment as was required, taking account of all factors (negative, positive and neutral), the EUI had to look no further than the subsequent report on the appellant 6 months later, the Second Probationary Report of 2 July 2015, which contained 11 evaluations of "good", characterised by the evaluations scheme as "corresponding to corresponding to a high level which is supposed to be required by a EUI employee" and 2 evaluations of "very good" ("corresponding to a specially high level"). There was not one negative evaluation. The EUI did not consider the Second Probationary Report in the contested Decision although it referred to it subsequently in the written procedure to quote a professor's comment alleged to be negative.¹²

¹⁰ Judgment of the European Union Civil Service Tribunal, Case F-1/05, *Landgren v. European Training Foundation*, 26 October 2006 ECLI:EU:F:2006:112 at para. 83. Confirmed on Appeal, Case T-404/06 P, judgment of the European Court of First Instance, 8 September 2009.

¹¹ This was as confirmed by the President to the OFI on 5 October 2020.

¹² In a submission to the OFI on 29 July 2020, the EUI quotes a comment of Professor K. in the Second Probationary Report of July 2015 which was alleged to have been negative, whereas in the 2016 Annual Staff Assessment, Professor K. stated "**I am very happy with [the appellant's] work and was delighted she returned from ... [omissis] to rejoin the Department. I think**

45. An examination of the other reports shows that they varied, containing good, negative or neutral assessments. However, all reports considered the applicant's performance satisfactory. The professors' comments were excellent,¹³ Some reports are good or even very good, such as the Promotion Proposal in 2016 or the 2017 Staff Assessment Report. In fact, the contrast between these two assessments and the wholly negative evaluation of the appellant in the President's Decision and the Secretary General's Decision is incomprehensible.
46. In view of the above findings, the OFI must rule that the decisions of the Secretary General and the President are illogical and irrational as there was no attempt to provide a balanced overall assessment of the appellant's performance and take account of positive evaluations, her professional development, or her 2016 promotion. Rather the reasons given for the non-renewal of her contract were either vague, nebulous, subjective and unverifiable (Secretary General's decision) or exclusively negative drawn from a single outdated source and which did not take account of the appellant's professional development as described above and evidenced by later assessments and evaluations (President's decision).
47. The EUI or the Department did not carry out a fair, objective and balanced evaluation of the appellant when deciding not to renew her contract. This was a manifest error of assessment which was illogical and irrational having regard to the reports and promotion just mentioned. The President's Decision upholding the Secretary General's decision repeats the manifest error of assessment but it relies selectively only on negative assessments of the appellant in her First Probationary Report, disregarding no less than 6 later assessments including a promotion proposal and subsequent promotion decision, it must be held to constitute an abuse of power. It also runs counter to the principle of good administration now set out in Article 41 of the EU Charter of Fundamental Rights ("the Charter").¹⁴

that her understanding and enjoyment of all her various roles has increased during her time here making her a very valuable member of the administrative team." Since the first comment is from 1 July 2015, it would have been fair either to give the more recent assessment or to balance the July 2015 assessment by also giving the positive assessment in 2016 (see Staff Assessment Report 2016, page 7).

¹³ Staff Assessment Report 2015: Professor MA; [the appellant] is very good assistant, always available and very efficient. It is a pleasure to work with her.

Staff Report 2015: Professor CR: [The appellant] performs her functions very conscientiously, reliably, and with good humour and good grace. She is available and helpful and seeks to solve problems and come up with solutions, She is generally very prompt at responding to questions and requests. As far as I have seen she relates very well with different interlocutors (researchers; professors, administration, visitors etc.), She is careful and good at attention to detail, and If she doesn't know the answer, she is not afraid to ask (which is important). She is not yet very proactive, but she has become more so in the last year as she has grown in confidence and in her knowledge of rules and procedures, so I do not see this as a problem. Altogether [she] is a pleasure to work with.

Staff Report 2016: Professor MA: "She has- been great, very competent and always very kind."

¹⁴ Article 41 provides: "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every

Right to be heard

48. The decision not to renew the appellant's contract violated her right to be heard, in violation of fundamental case-law of the EU Courts. It also runs counter to the principle now enshrined in Article 41(2)(a) of the Charter.
49. According to the Secretary General's evidence at the Oral Hearing, he discussed the appellant's situation with the Director of HR, the Head of Department and the Departmental Coordinator. However, it appears that no formal meetings were held, and no specific records of these consultations were taken. The Secretary General's Decision does not mention these consultations. It also does not appear from that Decision or the President's that the appellant's staff file, her separate promotion file or the EUI's secret file on her were consulted
50. Rather the Secretary General spoke to the Head of Department on the margins of a meeting (Transcript, page 66). He believed he spoke to the Departmental Coordinator at some point but could not remember the circumstances. The Secretary General's consultations were not mentioned in the otherwise apparently exhaustive reconstruction of the facts and procedure contained in the letter of 29 July 2020 sent by the EUI to the OFI, nor were they mentioned in the Decision of the Secretary General, or in the President's Decision, or indeed in any of the documents or pleadings contained in the large case-file. It may be that consultations were made but not formally recorded and not considered in a formal context on the basis of objective elements such as the annual staff assessment reports and promotion decision. Conversations in corridors and the like are no substitute for clear and objective assessments based on concrete evidence which is evaluated in a balanced and fair way, involving an examination of the appellant's staff file, her annual staff assessment reports and recommendations, including her promotion. It is good practice that such consultations should take place during the course of a minuted corporeal or incorporeal meeting. Above all, it is fundamental that the staff member concerned must be given the opportunity to be heard, and make her position known. This did not happen in violation of the appellant's right to a fair hearing and the rights of the defence.
51. The Secretary General and the President both refer in their decisions to a phone call from the Departmental Coordinator to the appellant. This conversation took place on 28 January 2019. It appears to be the EUI view, as emerges from the President's decision, that this had a dual purpose: it served as a "hearing" of the appellant prior to not renewing her contract, giving her the reasons for non-renewal of her contract, and also served as an opportunity to set out her position.¹⁵

person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decision.

¹⁵ "More recently, on the 10th of January [2019], the Departmental Coordinator provided you with targeted feedback over the phone. [She] highlighted several areas where your performance would need to be improved; uncertainty about administrative procedures, the low interest and motivation you showed during the last months, the low speed when executing tasks, the low autonomy and lack of initiative when managing the website of the Department for example." In fact, the phone conversation took place on 28 January 2019.

52. However, the EUI's view of the phone call is not supported by the facts. The Departmental Coordinator had already written to HR on 23 January 2019 stating the appellant's contract would not be renewed.¹⁶ During the phone call with the appellant on 28 January 2020, as emerged at the oral hearing, the Departmental Coordinator informed the appellant of the decision which had been taken. Therefore, the phone call cannot be held to constitute feedback to the appellant concerning her performance as she could not improve her performance so as to influence the decision on renewal of her contract as that decision had already been taken. Moreover, as the EUI already knew, there was no possibility of improving her performance as she would be on leave until the end of her contract. Neither can the phone call be considered as an opportunity to explain to the appellant the reasons for the non-renewal of her contract and to offer her the right to be heard in this regard, as the decision had already been taken and she could not influence it. Finally, in her email of 28 January 2019 to HR,¹⁷ the Departmental Coordinator did not report on the comments made by the appellant during the phone call but simply instructed him to proceed with the non-renewal of the appellant's contract. Thus, even if one took the view that the phone call constituted a hearing, *quod non*, the appellant's comments were not fed into the assessment procedure informing the decision of the Secretary General not to renew her contract. To conclude, the phone call cannot be considered to be a fair hearing to allow the appellant to present her view as the decision had already been taken. Thus the statement in the President's Decision that the appellant had been given adequate opportunities to present her position is inaccurate.

53. The EUI did not appear to have a suitable procedure in place to hear the appellant. A phone call criticising the appellant's performance while simultaneously announcing the decision not to renew her contract because of the negative evaluation, cannot be held to constitute good administration and to respect the appellant's right to a fair hearing. It violates the duty to have due regard to the welfare of officials. The failure to hear a staff member in this position and effectively deny her the opportunity to be heard is an error of the most serious kind and should give rise to the greatest concern within the EUI senior management, irrespective of the final outcome of this litigation.

Conclusions of the OFI on the duty to give reasons and the right to be heard

54. It follows that the conditions for establishing the liability of an institution in damages have been satisfied. The President's decision constitutes a manifest error of assessment. It infringes the obligation to state reasons in that the reasons stated are illogical and irrational having regard to the appellant's annual staff reports, promotion proposal and promotion decision as shown above. The failure to conduct a balanced and objective assessment of the appellant's performance and the selective reliance on exclusively negative and outdated assessments despite the obligation to take account also of the six more recent assessments and of the Promotion Decision is inexplicable and arbitrary to the point that it must be judged to constitute an abuse of power in the technical sense. The EUI also denied the appellant the right to be heard, in violation of established case-law concerning the rights of defence and the right to a fair hearing, and the principle set out in Article 41 of the EU Charter on Fundamental Rights. There is a causal link between the illegality and the actual

¹⁶ Exhibit 16 annexed to EUI letter to OFI of 29 July 2020.

¹⁷ Exhibit 17 annexed to EUI letter to OFI of 29 July 2020.

harm suffered by the appellant as the appellant's contract was not renewed as a result of the EUI's illegal conduct.

Gender-Based Discrimination and Discrimination due to Leaves

55. The appellant alleged she was the subject of discrimination on the ground of gender. She admits that the evidence for this is circumstantial. She points to the email from the Deputy Head of HR in February 2014 stating that if she took additional leave following maternity leave, she ran the risk that she might not be confirmed in her post. She also claims that the draft Departmental report or note of 3 June 2014 shows that the EUI's negative perception of her was directly related to her absences from work and that these legitimate absences, all related to pregnancy or parental or maternity leave, and perfectly legitimate, were interpreted to discredit her and her performance. She also alleges that the cover email written by the then Head of Department accompanying the June 2014 report shows that the issue was not the quality of her work but her pregnancy, maternity and related absences.
56. The OFI finds that the allegation of discrimination on grounds of gender is not proven. The HR email of February 2014 was later corrected to conform with non-discrimination law. The Head of Department's email, also in 2014, and the draft report or note of June 2014 are not conclusive. These episodes in 2014 appear to be too remote and circumstantial to substantiate a claim to gender-based discrimination in 2019, as there appears to be no causal link. Therefore this claim must be rejected.
57. The appellant also claimed that the EUI discriminated against her and did not renew her contract because of her absences, all of which were foreseen in the Staff Regulations and received the consent of the appropriate EUI authorities. However, the appellant has furnished only circumstantial evidence so this claim must also be rejected.

DAMAGES

58. By her amended claim, the appellant abandoned her request to be reinstated and claimed compensation for the loss of a chance to have her contract renewed for an indefinite period, and for the loss of a chance to complete at least the period of 10 years' service needed to qualify for a pension, having already served 6 years. The damages claimed under this head amount to 4 years' salary plus 100% pension contributions for that period. She maintains her original claim for 10 months' salary for damages to health dignity and professional reputation. Both these claims are contested by the EUI.
59. According to Article 9 (2) of the Rules of Procedure, as amended, in disputes of a pecuniary nature, the OFI has unlimited jurisdiction. According to settled case-law of the European Courts, the OFI has, in disputes of a financial character, unlimited jurisdiction, pursuant to which it has the power, if need be, of its own motion to order the defendant to pay compensation for the damage caused by the defendant's wrongful act including the power to order the defendant institution to pay specific amounts plus interest when appropriate,¹⁸ and, in such a case, taking account of all of the

¹⁸ See judgment of the Court of First Instance of 8 September 2009, Case T 404/06 P, *European Training Foundation v. Landgren*, (para 232 et seq) and the case-law referred to therein. In disputes of a financial character, the Tribunal has unlimited jurisdiction which permits it to order the defendant institution to pay specific amounts plus interest when appropriate.

circumstances of the case, to assess the damage suffered *ex aequo et bono*.¹⁹ The action brought by the applicant is at least partly of a financial character since the decision not to renew the contract has an effect on her financial rights.²⁰ Accordingly, in the present case the OFI has unlimited jurisdiction, which entrusts it with the task of providing a complete solution.²¹

60. The appellant's decision to modify her claims is admissible as her core arguments concerning the illegality of the decision not to renew her contract are unchanged in substance. The decision not to return to the EUI is obviously wholly a matter for the appellant's discretion. However, when ruling on damages, the OFI must make an objective assessment founded in law.
61. Counsel for the appellant has asked the OFI to essentially follow the approach taken by the European Union Civil Service Tribunal in Case F-1/05, *Landgren*.²² However the OFI does not consider that judgment is relevant to the award of damages in this case, for the reasons given by the EUI,
62. It follows from settled case-law that the annulment of a measure by the courts has the effect of retroactively eliminating that measure from the legal system.²³ Where the measure annulled has already been carried out, the abolition of its effects means that the applicant must be restored to the legal position he was in before it was adopted (Case 22/70 *Commission v Council* [1971] ECR 263, paragraph 60, and *Girardot v Commission*, paragraph 84).
63. In the present case, there is no need to consider the possibility of an entitlement on the part of the appellant to be re-employed in the event of unlawful dismissal. as the appellant has specifically resiled from that remedy.
64. However, the appellant claims that the OFI should award damages to compensate her for the loss of the possibility to remain in her post until reaching entitlement to a pension. Therefore, the appellant seeks 4 years salary and 100% pension contributions for the loss of chance. This is opposed by the EUI.
65. The OFI observes that even if the appellant had been continued in her post from 1 July 2019, she had no automatic right to continue in her post until reaching entitlement to a pension. In that hypothesis, she would have had a contract for an indefinite period. However the employer retained the right to terminate her contract before she reached entitlement to a pension in compliance with the relevant law.

¹⁹ Judgment of the European Court of Justice of 20 May 2010 in Case C 583/08P, *Gogos v Commission*, paragraphs 44-48 and case-law cited therein.

²⁰ See para 233 of the *Landgren* judgment and the case-law referred to therein: judgment of the Court of First Instance of 8 September 2009, Case T 404/06 P, *European Training Foundation v. Landgren*.

²¹ *Gogos v Commission*, above, paragraph 49.

²² Case F-1/05, *Landgren v. European Training Foundation*, 26 October 2006 ECLI:EU:F:2006:112

²³ Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others v Commission* [1988] ECR 2181, paragraph 30, and Case T-10/02 *Girardot v Commission* [2004] ECR-SC I-A-109 and II-483, paragraph 84).

66. As noted above, the OFI has unlimited jurisdiction to order payment of compensation for the damage caused by a wrongful act and has the duty when appropriate to assess the damage suffered *ex aqua et bono* to provide a complete solution.
67. The OFI in assessing damages must therefore take account of the manifest error of assessment, and the violations found in this judgment concerning interference with the rights of the defence including the right to a fair hearing, the duty to have due regard to the welfare of officials, abuse of power and failure to respect the principle of good administration. The OFI takes a particularly serious view of the EUI's violation of the appellant's right to be heard.
68. The OFI considers that *ex aqua et bono* compensation is the payment for 18 months of the appellant's full salary (100% as she had not sought or received permission to work part-time), the period starting on 1 July 2019 and ending on 31 December 2020. The damages under this head shall include full pension contributions at 100% and all the allowances to which the applicant would have been entitled during that time period (including those calculated on a yearly basis), as well as any increase in salary to which she would have been entitled including due to an increase in remuneration or a change in step or any other factor during the period 1 July 2019 to 31 December 2020,
69. The parties are ordered to consult on the calculation of damages under this head, agree on the final sum and inform the OFI of the final sum, and when it is paid. In the event of a disagreement as to the amount and/or the calculations used, counsel for either party may contact the EUI secretariat by email before the deadline of 12.00 (12.00 noon) on 21 January 2021 to request an emergency incorporeal hearing of the OFI by telephone or video conferencing in the presence of the Secretary to the OFI. Where necessary the OFI will make a supplementary order on damages after hearing the submissions of counsel for both parties.
70. The appellant also claims non material damages for detriment to her health dignity and professional reputation caused by the EUI's decision. The OFI is unable to express an opinion on the appellant's account of damage to her health as she did not offer medical or other evidence as requested by the OFI in its email of 25 September 2020. That part of her claim must therefore be rejected as unsubstantiated.
71. The appellant relies on case-law holding that medical proof is not necessary if the annulment of an act does not constitute appropriate and sufficient compensation for the non-material harm which the measure may have caused if the act contains an explicitly negative assessment of the staff members abilities which is likely to hurt him or her if the illegality is particularly serious or the annulment is deprived of useful effect.
72. In this respect, the OFI agrees with the appellant that the current case is particularly serious. However, it considers first that the present judgment constitutes a partial remedy vindicating the appellant. Second, for the rest, in the light of the circumstances of the case, the OFI, assessing the damage suffered *ex aqua et bono*, considers that an award of € 15,000.00 (Fifteen Thousand Euro) constitutes adequate compensation to the applicant as damages in respect of harm to dignity and loss of reputation. No damages lie for injury to health for the reasons given.

COSTS

73. In accordance with Rule 33 of the Rules of Procedure, judgments shall include an order for costs in accordance with Article 2(6) of the Commons Provisions. That provision states that the EUI shall bear its own costs. As the EUI has failed, it is ordered to pay the appellant's costs. In the event of a dispute as to costs, the parties may apply to the OFI for taxation of costs.

NOTIFICATION AND EFFECTS

74. This judgment shall take effect after it has been notified to the parties. By virtue of the OFI's inherent powers to administer justice, in the event of the current global health emergency such notification shall take place by email, with the parties required to acknowledge receipt on the same day. Time for lodging an appeal shall run from the date of notification to the parties.
75. According to Article 5(2) of High Council Decision 8/06 of 8 December 2006 establishing an Organ of First Instance within the Appeals Board of the European University Institute, an appeal before the Appeals Board from a decision of the OFI shall not have suspensory effect. The OFI rules that exceptionally, damages shall not be paid until the deadline for filing an appeal to the Appeals Board has elapsed. In the event of an appeal to the Appeals Board, damages shall not be paid until that superior jurisdiction has issued its final judgment. However, costs concerning the proceedings before the OFI shall be paid in the normal way once the OFI judgment takes effect.

OPERATIVE PART

On those grounds,

THE ORGAN OF FIRST INSTANCE

hereby:

1. Annuls the decision of the President of the European University Institute of 9 September 2019 rejecting a complaint filed by the appellant concerning the non-renewal of her contract as a member of the contract staff of the EUI;
2. Orders the EUI to pay the appellant her full salary (100%) for the period starting on 1 July 2019 and ending on 31 December 2020, including full pension contributions at 100% and all the allowances to which the applicant would have been entitled during that time period (including those calculated on a yearly basis), as well as any increase in salary to which she would have been entitled including due to an increase in remuneration or a change in step or any other factor during the period 1 July 2019 to 31 December 2020.
3. Orders the EUI to pay an additional amount of € 15,000.00 (Fifteen Thousand Euro) as non-material damages.
4. Orders that damages shall not be paid until the deadline for filing an appeal to the Appeals Board has elapsed, and in the event of an appeal to the Appeals Board, damages shall not be paid until that superior jurisdiction has issued its final judgment.

5. Orders the EUI to bear the appellant's costs.

Member of the Organ of First Instance exercising the judicial function: D. O'Keeffe

Secretary of the Organ of First Instance: Mr Lukasz Wiczerzak

Given on 7 January 2021