JUDGEMENT NO 1/2022 OF THE APPEALS BOARD OF THE EUROPEAN UNIVERSITY INSTITUTE

IN CASE 1/2020

Regarding an appeal under Article 4 of Decision No. 8/06 of the High Council of the European University Institute (EUI), introduced on March 3, 2021, against JUDGEMENT No. 1/2020 of the First Instance Body of the European University Institute (hereinafter "FIB") by

The EUROPEAN UNIVERSITY INSTITUTE (hereinafter "EUI"), represented by its President, Professor Renaud Déhousse,

appellant,

the other party to the proceedings being:

"AB", represented by Ms Mélodie Vandenbussche and Ms Laure Levi, lawyers of the Brussels Bar,

appellant at first instance,

THE APPEALS BOARD

Consisting of Ms Marta Ayllón, rapporteur, Ms Eugenia Prevedourou and Mr Christophe Schiltz.

Secretary of the Appeals Board, Mr Lukasz Wieczerzak

Having regard to the written procedure,

Pronounces this

JUDGEMENT

1. With its appeal, the EUI requests the annulment of Judgement No. 1/2020 of the First Instance Body (FIB) of the European University Institute of January 7, 2021, deciding:

- to annul the decision of the EUI President of 9 September 2019 rejecting the complaint lodged by the appellant AB concerning the non-renewal of her contract as a temporary agent of the EUI;
- to order the EUI to pay the appellant AB her full salary (100%) for the period beginning July 1st, 2019, and ending on December 31st, 2020, including pension contributions at the full rate of 100% and all the allowances to which the appellant AB would have been entitled during this period (including those calculated on an annual basis) as well as any salary increase to which she would have been entitled, in particular due to a pay increase, a change in pay grade, or any other factor during the period from July 1st, 2019, to December 31st, 2020;
- to order the EUI to pay an additional sum of € 15,000.00 (fifteen thousand Euro) for immaterial damage;
- to order that said damage not be paid before the expiry of the time limit for lodging an appeal with the Appeals Board (hereinafter the "Board") and, in the event of an appeal to the Board, that compensation shall not be paid until said higher court has issued its final judgement.

THE BACKGROUND TO THE DISPUTE

2. The background to the dispute was set out by the FIB in paragraphs 1-30 of the contested judgement.

PROCEDURE BEFORE THE APPEALS BOARD

3. The appeal was lodged by the EUI President on March 3rd, 2021. The representation of AB submitted its observations on May 4th, 2021.

4. On May 21st, 2021, the Board, pursuant to Article 21 of the Rules of Procedure, proposed to replace the oral phase by a presentation of written observations. The Parties to the proceedings accepted this proposal on May 25th, 2021.

5. On August 5th, 2021, the EUI President submitted his observations. On October 20th, 2021, the representation of AB filed its observations.

6. On December 16th, 2021, the appeal proceedings were declared closed and the case awaiting judgement.

SUBMISSIONS OF THE PARTIES TO THE BOARD

7. With its appeal, the EUI requests the annulment of Judgement No. 1/2020 of the First Instance Body of the European University Institute of January 7th, 2021, and in conclusion, requests the Appeals Board:

- in the event of an annulment for procedural reasons, that the Board refer the matter back to the FIB so that the decision can be adopted by a substitute member of the FIB;

- in the event of an annulment of the contested judgement for the reasons of law expressed in points 40-90, that the Board rule directly on the question, rejecting all the conclusions expressed by AB in her application and accepting the conclusions of the EUI requested in the first instance;

- that the Board decide on the costs according to the applicable provisions.

8. The representation of AB kindly requests the Board to dismiss the action in its entirety as totally inadmissible and unfounded and order the appellant to pay the costs.

BY LAW

9. In support of her action, the appellant AB relies on two groups of arguments, the first relating to procedural issues, the second to the substance of the contested decision.

PROCEDURAL ISSUES

10. The appellant AB puts forward in her plea six arguments relating to procedural issues.

On the first argument

11. The first argument alleges a violation by the FIB of Article 34 of the Rules of Procedure before the Board introduced by decision 12/89 of the High Council of the EUI and applicable, *mutatis mutandis*, to the procedure before the FIB by virtue of article 3, paragraph 1, of the decision of the High Council 8/06.

12. The EUI contends that serving the Parties with an anonymized version of the judgement would be contrary to this article of the rules. However, the article in question limits itself to stating that the original of each judgement shall be deposited in the archives of the secretariat and that the secretary shall give a copy to each of the Parties. No allusion to the anonymization of judgements is made either in this article or in the regulations as a whole. Since the anonymization of court decisions is a practice widely established in the laws of Member States of the European Union, the absence of a mention of this question in the rules cannot be identified with a prohibition.

13. Article 40 of the Rules of Procedure establishes that matters not covered by these rules shall be settled by decision of the Board – the FIB in this case – which is binding only for the particular case.

14. In the present case, the decision to anonymize the judgement was taken by the FIB in the legitimate exercise of the procedural powers conferred on it by the rules with the express agreement of both Parties. This decision is fully in accordance with the Rules of Procedure.

15. On the other hand, the decision to serve the Parties with an anonymized version of the judgement does not infringe their rights of defence. The EUI cannot seriously claim that the anonymized version of the judgement made it difficult to identify it, especially considering that this is the only procedure followed before the FIB since 2011.

16. It follows from these considerations that this first argument is fruitless.

On the second argument

17. With her second argument, the appellant AB claims that the fact of having held the hearing by videoconference on October 16, 2020, constitutes a violation of the procedure given that the rules do not envisage this possibility.

18. This argument is fruitless.

19. On the one hand, as previously stated, Article 40 of the Rules of Procedure allows matters not covered by these rules to be settled by a decision of the FIB which will only be binding on the particular case.

20. On the other hand, Article 21 of the Rules provides that oral proceedings shall take place unless the Board, or the FIB, decides otherwise after the Parties have given their written consent.

21. It seems clear that while the Rules of Procedure allow the judge to decide whether or not to hold an oral hearing, subject to the agreement of the Parties, the judge may also decide, under article 40 of the rules, that this hearing can take place by videoconference unless the Parties object.

22. In the present case, the FIB, due to the health crisis situation caused by COVID-19, had asked the Parties if they would object to the oral hearing taking place by videoconference. Neither of the Parties rejected this possibility within the time allowed and both participated in the videoconference, tacitly consenting to its realization.

23. It must be concluded that the holding of the hearing by videoconference does not constitute a procedural error. The argument must therefore be dismissed.

On the third argument

24. With her third argument, the appellant AB reproaches the FIB for having held the hearing of October 16th, 2020, behind closed doors.

25. Article 13 of the Rules of Procedure envisages that hearings before the Board – as well as before the FIB – are public. However, on its own initiative or at the request of one of the Parties, the Board – or the FIB – may decide, giving reasons for its decision, that the hearing will be held entirely or partially behind closed doors.

26. The decision of the FIB to hold the hearing behind closed doors in order to protect the dignity of AB was previously communicated to the Parties and adopted by the FIB pursuant to Article 13 of the rules. This decision appears to be sufficiently justified.

27. No breach of procedure was committed. The argument must therefore be rejected.

On the fourth argument

28. With this argument, the appellant AB complains that the FIB lacked impartiality which, in her opinion, constitutes a procedural error.

29. The appellant AB seems to be asking for the FIB to be challenged at this stage of the proceedings, which is not admissible.

30. Challenging the FIB and the members of the Board is not envisaged in the Rules of Procedure. However, in a commendable concern for transparency and impartiality, the FIB proposed to the Parties on September 28, 2020, to withdraw on the grounds that it had met in the past, 20 to 30 years earlier, with the head of the department called as a witness and with the Institute's newly appointed lawyer. This possibility having been expressly rejected by the Parties on September 30, 2020, the challenge is therefore excluded.

31. It must be added that, in any event, the EUI does not provide any information likely to call into question, even slightly, the proven impartiality of the FIB. The EUI merely criticizes the meaning of the judgement and complains of the existence of alleged interruptions in the speech of its lawyer which would have, moreover, however been adequately compensated by the granting of time for an additional intervention.

32. This argument must therefore be rejected as inadmissible.

On the fifth argument

33. With this argument, the appellant AB claims that the decision of the FIB postponing the payment of damages by the EUI until the expiry of the time limit for appeal or until the Board pronounces its judgement would be contrary to Article 5 of the Rules of Procedure according to which appeals before the Board shall not have a suspensive effect.

34. This same Article 5 of the Rules of Procedure envisages that an appeal before the Board may be based on a violation of the procedure before the FIB which is detrimental to the interests of the party concerned.

35. The decision of the FIB challenged by this means does not affect nor harm the EUI, on the contrary, it is clearly beneficial to it. Since the EUI does not have the capacity to request the annulment of the judgement for this reason, the argument must be rejected.

On the sixth argument

36. In this argument, the EUI contests the decision of the FIB to order the EUI to bear the costs of AB.

37. It must be recalled that it is settled case law that, in the event that all the other arguments in appeal have been rejected, the conclusions relating to an alleged irregularity of the decision of the General Court – in this case the FIB – on costs must be dismissed as inadmissible, pursuant to the second paragraph of Article 58 of the Statute of the Court of Justice of the European Union, under the terms of which an appeal cannot relate solely to the bearing and amount of costs (see Judgement of the Court of December 17th, 2020, C-601/19P, BP/FRA, EU:C:2020:1048, paragraph 101 and the case law cited).

38. Along the same lines as Article 58 of the Statute of the Court, Article 5 of Decision No. 8/06 of the High Council of the EUI of December 8th, 2006, establishes that a plea before the Appeals Board cannot relate solely to the amount of the costs or to the Party ordered to bear them.

39. This question should therefore be dealt with last, which shall be done in paragraphs 137 and 138 of this judgement.

MATERIAL ISSUES

40. The appellant AB relies on the substance of five arguments.

On the first argument

41. The first argument alleges an erroneous assessment by FIB of the facts and evidence concerning the alleged failure to comply with the obligation of motivation. The appellant challenges paragraphs 34 to 47 of the contested judgement by setting out a series of complaints which we will attempt to summarize as follows.

42. She thus considers that the FIB did not correctly assess the specific details of fixed-term contracts by considering, apparently, that agents are entitled to automatic renewal, unless they do something inappropriate, that the decision of the Secretary General of February 22nd, 2019, by which it was decided not to renew AB's contract as a temporary agent of the EUI was sufficiently motivated, that this reasoning was supplemented by the President's Decision and by the observations presented to the FIB during the procedure, that the FIB's decision is insufficiently motivated in that it makes no reference to the interests of the service invoked by the EUI and that the FIB incorrectly established that these decisions were adopted solely on the basis of the negative comments contained in the oldest evaluation reports.

43. First of all, the argument that the FIB did not correctly assess the specific details of fixed-term contracts must be rejected.

44. The FIB correctly started from the principle that the administration is not required to motivate its decision not to renew a contract upon its expiry (point 34 of the judgement). Indeed, as a general rule, and as indicated in the President's Decision, each of the contracting parties must expect, from the start of the contractual relationship, that the other party will use its right to avail itself of the terms of the contract, as they were established, and, in particular, of the expected end date of the contract.

45. However, the FIB also considers, and correctly so, that when an agent submits a request for renewal of his or her employment contract before the expiry of said contract, the decision by which the administration rejects such a request must be motivated since it constitutes an adverse action, distinct from the contract in question.

46. The obligation for the administration to motivate its decisions, enshrined in Article 41, paragraph 2, sub, c) of the Charter of Fundamental Rights of the European Union (hereinafter the "Charter") constitutes an essential principle of European Union law which can only be derogated from for compelling reasons (see Judgement of the General Court of December 21st, 2021, KS vs. Frontex, T-409/20, EU:T:2021:914) .

47. More specifically, it is clear from the case law that, in a situation where a temporary staff contract may be subject to renewal, the decision of the authority vested with the power to decide not to renew said contract, adopted at the end of a procedure specifically envisaged to this end or in response to a request of the interested party, constitutes an adverse act, distinct from the contract in question, which is likely to be the subject of a complaint, or even a plea (see Judgement of April 24th, 2017, HF vs. Parliament, T-584/16, EU:T:2017:282 point 53 and the Judgement of November 11the, 2020, AD / ECHA, T-25/19 , EU:T:2020:536 point 71).

48. It is undisputed and expressly acknowledged by the EUI in this case that AB's statement in her letter of December 9th, 2018, constituted an implicit request to renew her contract.

49. Article 25 of the service regulations for administrative staff of the EUI, introduced by High Council Decision no. 6/2014 on December 5th, 2014, states that staff members may submit requests concerning the matters covered by these regulations to the authority vested with the power of appointment of the EUI, and that any decision adversely affecting a member of staff must be motivated. This article also applies to temporary agents pursuant to Articles 11 and 81 of the Terms of Service for Other Agents.

50. The FIB was therefore correct to establish in paragraphs 34 and 35 of the judgement that the Secretary General´s decision needed to be motivated without disregarding the specific details of fixed-term contracts. The appellant's complaint must therefore be dismissed as manifestly unfounded.

51. Secondly, the EUI specifies that the decision of the Secretary General of February 22nd,2019, by which it was decided not to renew the contract of AB as a temporary agent of the EUI was sufficiently motivated, and that this motivation was supplemented by the President's Decision and by the observations presented to the FIB during the procedure.

52. The purpose of the obligation of motivation is, on the one hand, to provide the person concerned with sufficient information to assess the merits of the act adversely affecting him or her and the advisability of bringing a plea before the General Court – in this case the FIB – and, on the other hand, to allow the latter to exercise its control over the legality of the act. The extent of the obligation of motivation must, in each case, be assessed according to the concrete circumstances, in particular the content of the act, the nature of the grounds invoked and the interest that the addressee may have in receiving explanations. In particular, a decision is sufficiently motivated when it is made within a context known to the official concerned, which allows him or her to understand the scope of the measure taken in his regard. (see Judgement of the General Court of May 3rd,2018, SB/EUIPO, T-200/17, EU:T:2018:244, paragraphs 41, 42 and 54 and the case law cited).

53. It is also settled case law that an institution of the Union may remedy any lack of motivation by providing adequate reasons at the stage of replying to the complaint, this latter reasoning being deemed to coincide with the motivation for the decision against which the complaint was directed (see Order of the General Court of September 28th, 2015, Christiana Kriscak/European Police Office (Europol) F-73/14, EU:F:2015:111, paragraph 47 and the case law cited).

54. Contrary to what the appellant seems to be maintaining, the FIB has taken this doctrine into account in paragraph 37 of the judgement, considering that the President's Decision rejecting the complaint contains arguments which can legitimately be taken into account in addition to the motivation for the Secretary General's decision.

55. In reality, the appellant's argument relating to the sufficiency of the motivation for the decisions in question is irrelevant since the judgement of the FIB, despite the fact that points 34 to 47 are generically titled "obligation of motivation", does not annul the contested decisions on the argument that they were vitiated by a lack of motivation, but on the argument that the EUI committed a manifest error of assessment, that it violated the appellant's right to be heard, her rights of defence and that it did not respect the duty of care which, in her opinion, constitutes an abuse of power and a breach of the principle of good administration (paragraphs 38, 47 and 54 of the contested judgement).

56. It must be recalled that the obligation of motivation constitutes a substantial formality which must be distinguished from the question of the merits of the grounds, the latter relating to the substantive legality of the disputed act. Indeed, the motivation of a decision consists in formally expressing the reasons on which this decision is grounded. If these reasons are tainted with errors, these in turn taint the substantive legality of the decision, but not its motivation, which may be sufficient albeit expressing erroneous reasons. (see Judgement of the General Court of February 12th, 2020, WD/EFSA, T-320/18, EU:T:2020:45, paragraphs 106 and 110 and the case law cited).

57. Once this important precision has been introduced regarding the concrete grounds for annulling the administrative decisions considered in the judgement, it must be noted that the FIB's decision is appropriate and in accordance with the law.

58. It follows from settled case law that, even if the administration enjoys ample discretion in matters of contract renewal, the Court – the FIB in this case – seized by an action for annulment directed against an act adopted in the exercise of such a power, nevertheless exercises a control of legality, which manifests in multiple respects. With regard to a request for annulment of a decision not to renew a contract as a temporary agent, which constitutes an act adversely affecting the appellant, the review by the judge of the European Union must be limited to verification of the absence of a manifest error of assessment in evaluating the interests of the service which could have justified this decision, and of misuse of powers, as well as the absence of a breach of duty of care that is incumbent on an administration when it is called upon to decide on the renewal of a contract that binds it to one of its agents. In addition, the Court checks whether the administration has committed material inaccuracies. (see Judgement of the General Court of December 13th, 2018, Kari Wahlström vs. Frontex, T-591/16, EU:T:2018:938 paragraph 47 and the case law cited).

59. In this case, the FIB considered that the EUI did not carry out a balanced, objective and fair assessment of all the facts, thus violating the duty of care enshrined in case law and, by extension, the duty of good administration (Article 41 of the Charter) and that the decisions of the Secretary General and the President are vitiated by a manifest error of judgement, since the complete file of AB presents overall positive appraisals, all of the reports showing a clear professional development.

60. As for the duty of care, it should be recalled that this reflects the balance of reciprocal rights and obligations which the statute and, by analogy, the regime applicable to other officials, has created in the relations between the public authority and public-service officials. This balance implies in particular

that, when deciding on an agent's situation, the authority vested with the power of decision takes into consideration all the elements likely to determine the position and that, in doing so, it takes into account not only the interest of the service, but also, and in particular, that of the agent concerned. Applied to a decision on the possible renewal of the contract of a temporary agent, the duty of care thus requires the competent authority, when ruling, to balance the interests of the service and the interest of the agent. Duty of care is also reflected in the obligation for the competent authority to indicate in the motivation behind the decision not to proceed with the renewal, the reasons which led it to make the interest of the service prevail (see Judgement of the General Court of June 30th, 2021, FD vs. European Joint Undertaking for ITER and the development of fusion energy, T-641/19, EU:T:2021:388, paragraphs 131 to 133; Judgement of the General Court of May 7th2019, WP/EUIPO, T-407/18, EU:T:2019:290, points 57 to 60 and the case law cited).

61. The appellant incorrectly claims that the mere invocation of the principle of the interest of the service would in itself justify a decision not to renew the contract (paragraph 47 of the action). In fact, the case law cited shows that, even when it comes to the exercise of prerogatives endowed with very ample discretionary power, the administration must always balance the particular interests of the service in question as well as those of the staff member concerned and, where appropriate, give sufficient reasons why it intends that the interests of the service should prevail.

62. In the present case, the EUI has not provided any details on the concrete interests of the service nor the institutional needs which could be negatively affected by keeping the appellant in her post. In view of this absence of arguments, the FIB cannot be blamed for not having made any reference to this question. It should be recalled, in this sense, that the obligation incumbent on the judge to give reasons for his decisions does not imply that he responds in detail to each argument put forward by a party, in particular if the latter is not sufficiently clear and precise and is not based on detailed evidence (see Judgement of March 2nd, Doktor vs. Council; T-248/08P, paragraph 64; Judgement of November 24th 2010, Marcuccio vs. Commission, T -9/09P, point 30 and Order of June 21st 2011, Rosenbaum vs. Commission; T.452/09P, point 35).

63. As for the existence of a manifest error, according to case law, an error may only be described as manifest when it is easily perceptible and can be clearly detected, in the light of the criteria to which the legislator intended to subordinate the administration's exercise of its discretion. Establishing that the administration committed an error in its assessment of the facts such as to justify the annulment of the decision taken on the basis of this assessment therefore presupposes that the evidence, which it is incumbent upon the appellant to provide, is sufficient to deprive the assessments made by the administration of plausibility. Put another way, the argument alleging manifest error must be rejected if, despite the elements put forward by the appellant, the assessment called into question can still be accepted as being justified and coherent. (see Judgement of the General Court of December 16th, 2020, VP/Cedefop, T-187/18, EU:T:2020:613, paragraph 107 and the case law cited).

64. The FIB considers that the decision is vitiated by a manifest error of assessment in that the reasons given by the Secretary General are vague, subjective and unverifiable in the file, and that the President's Decision rejecting the complaint against the refusal to renew the contract of the Secretary General is based exclusively on the negative assessments contained in the appellant's first evaluation report, without taking into account the fact that no less than six subsequent reports deemed her performance satisfactory, including a proposal for promotion and a pending decision on subsequent promotion.

65. The FIB reached these conclusions after carrying out a rigorous and balanced analysis of all the evidence at its disposal, as detailed in paragraphs 39, 40, 42, 43 and 44 of the judgement. In particular, the proven fact that the President only took into account the first evaluation report of January 2015 is duly justified in the judgement both by reference to the literal wording of this decision and by the President's own confirmation sent to the FIB on October 5th, 2020.

66. In accordance with Article 5, paragraph 1, of the Decision of the High Council of the EUI n° 8/06, establishing a First Instance Body, a plea before the Board must be limited to points of law . It may be based on a violation of the procedure before the body that harms the interests of the party concerned, as well as on a violation of applicable legal instruments.

67. It follows, by analogy with the case law of the Court of Justice of the European Union which applies the same principle, that the FIB is solely competent to find and assess the relevant facts as well as to evaluate the evidence. It is only in the event that a material inaccuracy in the observation of the facts made by the FIB clearly emerges from the documents in the file submitted to it or in the event of distortion of the evidence retained in support of these facts, that this finding and the assessment of the evidence constitute questions of law subject to review by the Board. It also appears that such a distortion would exist in particular when the FIB had manifestly exceeded the limits of a reasonable evaluation of the evidence, it being specified that it must appear clearly from the documents in the file, without it being necessary to carry out a new assessment of the facts and evidence (see the same situation in the Judgement of January 12th, 2017, Timab Industries and CFRP vs. Commission, C-411/15P, EU:C:2011:11, paragraph 89 and the case law cited).

68. The appellant does not justify the existence of any manifest distortion of the evidence which could give rise to an annulment of the judgement, but is content to present arguments of a factual nature by reiterating her own assessment of the facts, already produced in the first instance. It must be concluded that, under cover of an allegation of distortion of the evidence, the complaints set out in points 45 to 49 of the appeal seek to prompt the Appeals Board to carry out a new assessment of these elements, which is beyond the control of the Board. These complaints must therefore be dismissed as manifestly inadmissible.

69. In view of the foregoing, this argument must be dismissed, being in part clearly inadmissible and in part unfounded.

On the second argument

70. The second argument alleges an incorrect legal assessment of the concept of “abuse of power”. The appellant considers that the FIB, by using this expression in paragraphs 38 and 47 of the judgement, may have wished to point out the existence of a misuse of powers and that, in this case, the judgement should be annulled for lack of motivation.

71. As explained in the previous section, the contested judgement quashed the decision of the EUI President on the grounds that a manifest error of judgement had been made and that the duty of care and the right to be heard – which constitute two expressions of the principle of good administration – had been violated.

72. In this context, the *obiter dictum* reference to an “abuse of power” in the noted points of the judgement must rather be interpreted in the sense that the EUI used its ample discretion in a manifestly erroneous manner, arguably even arbitrary. No reasoning in the judgement suggests that the FIB found the existence of a misuse of powers in the sense alleged by the EUI. It should be noted, in this regard, that the appellant’s allegations that the reasons for not renewing her contract were based, not on the interests of the service, but on a discriminatory intent, or on the fact that she had previously benefited from several leaves of absence, were expressly rejected by the FIB in points 55 to 57 of the judgement.

73. The argument must therefore be rejected as manifestly unfounded.

74. It should in any event be made clear that, even in the unlikely event that the judgement had incorrectly established the existence of a misuse of powers, this fact alone would not justify the

annulment of the judgement. A judgement which envisages other reasons for annulling the contested decisions. As is clear from the case law, a possible error of law committed by the General Court – in this case the FIB – is not such as to invalidate the contested judgement if the operative part of the latter appears to be well-founded on other grounds of law (see Judgement of September 20th, 2018, Spain vs. Commission, C-114/17P, EU:C:2018:753, point 62 and the case law cited).

On the third argument

75. The third argument alleges insufficient motivation with regard to the breach of the rights of defence and the breach of the duty of care found by the FIB in the contested judgement.

76. It emerges from the case law that the right to defence occupies a prominent place in the organization and conduct of a fair trial and include the adversarial principle. This principle applies to any procedure likely to lead to a decision by an institution that significantly affects a person's interests. It implies, as a general rule, the right for the parties to a trial to be able to take a stance on the facts and documents on which a judicial decision will be based, as well as to discuss the evidence and observations presented before the judge. and the means raised *ex officio* by the judge, on which the latter intends to base his or her decision. (see Judgement of the General Court of June 3rd, 2015, BP/FRA, T-658/13, EU:T:2015:356, paragraph 53 and the case law cited).

77. The right to defence, now enshrined in Article 41 of the Charter, which, according to the judge of the European Union, is of general application, covers, albeit more extensively, the procedural right pursuant to paragraph 2(a) of said article of any person to be heard before an individual measure which would affect him or her adversely is taken with regard to him or her (see Judgement of the General Court of February 7th 2019, RK vs. Council of the European Union and European Parliament, T-11/17, EU:T:2019:65, paragraph 176 and the case law cited).

78. Consequently, any infringement of the right to be heard involves a violation of the right to defence, so that the appellant's argument, which moreover accepts that the contested judgement provides adequate reasons for the infringement of the right to be heard, is manifestly unfounded.

79. The argument relating to insufficiency of the motivation for the breach of the duty of care cannot be upheld either.

80. According to settled case law, the duty of care and the principle of good administration imply in particular that, when ruling on the situation of an official or agent, even within the framework of ample discretion, the competent authority shall take into consideration all the elements likely to affect its decision. In so doing, it is its responsibility to take into account not only the interests of the service, but also those of the official or agent concerned. Taking into account precisely the extent of the discretion enjoyed by the institutions in assessing the interests of the service, the review by the courts of the European Union must however be limited to the question of whether the competent authority remained within reasonable limits and did not use its discretion in a manifestly erroneous manner. (see Judgement of the General Court of December 13th, 2018, Kari Wahlström vs. Frontex, T-591/16, EU:T:2018:938, paragraph 50 and the case law cited and the Judgement of the General Court of December 16th, 2020, VP vs. Cedefop, T-187 /18, EU:T:2020:613, point 106).

81. The breach of the duty of care appears to have been correctly motivated in paragraphs 41 to 46 of the contested judgement.

82. the FIB correctly considers that when taking the decision not to renew the contract and confirming this decision, both the Secretary General and the President should have taken into account AB's entire

file, considering all the negative, positive, and neutral elements contained in her evaluation reports in order to carry out a balanced, objective and fair analysis.

83. However, as indicated in paragraph 46 of the judgement, the reasons given for the non-renewal of the contract were either vague, nebulous, subjective or unverifiable (decision of the Secretary General), or exclusively negative, drawn from a single obsolete source which did not take into account the appellant's professional development, as reflected in her later appraisals (President's Decision).

84. The FIB concludes that the administration did not take into account all the elements of the file which should have determined its decision – a violation of the duty of care – which led it to adopt a manifestly erroneous decision, given that the evaluation reports, taken as a whole, show satisfactory performance and progress in her career, as evidenced by her promotion in 2016.

85. In view of the foregoing, the argument must be rejected in its entirety.

On the fourth argument

86. The fourth argument alleges contradictory statements by the FIB on the breach of the right to be heard. The EUI also claims that the FIB erroneously established that there was a violation of AB's right to be heard, that the administration heard AB before making the decision not to renew her contract in an adequate and sufficient manner and that the FIB disregarded the case law which states that the right to be heard must be exercised if a possible decision likely to affect a party is going to be adopted and not if this decision has not even been considered by the administration.

87. As regards the existence of a contradiction, the EUI reports that the contested judgement states first, in point 2, that the decision not to renew the contract was adopted on February 22nd, 2019, and that, subsequently, the FIB considers in point 52 that the decision had already been taken on January 29th, 2019. The EUI considers that the FIB apodictically attributed to the letter of January 23rd, 2019, with the manifest internal intention of the services not to renew the contract, the same nature as the official decision which was then legitimately taken and signed on February 22nd, 2019 (points 70 and 73 of the EUI appeal).

88. This complaint is based on a selective and erroneous reading of the contested judgement.

89. The judgement establishes unequivocally that the contested administrative act was a decision of the EUI President of September 9th, 2019, rejecting the complaint lodged by AB in accordance with Article 1, paragraph 2, of the common provisions against the previous decision of the Secretary General of February 22nd, 2019, which contains the non-renewal of her fixed-term contract.

90. In paragraph 52 of the judgement, the FIB established, in light of the evidence produced, the following facts: that during a telephone conversation of January 28th, 2019, the department coordinator informed the person concerned that it had been decided not to renew her contract, a fact which the department coordinator had previously notified the director of human resources of in writing (email of January 23rd, 3019, Exhibit 16 appended to the observations of July 29th, 2020) and that, on the same day as the telephone call, the department coordinator had sent an e-mail to the director of human resources communicating that she had informed the person concerned and that the human resources department could therefore proceed with formal notification of non-renewal. On the basis of these facts, the FIB concluded that the call to the interested party was not intended to usefully gather her point of view, since the non-renewal of the contract was presented to her as a fait accompli.

91. Lastly, the decision not to renew the contract was formally adopted by the Secretary General on February 22nd, 2019. The FIB notes in paragraphs 49 and 50 of the judgement that even if the Secretary

General had declared during the hearing that he had previously consulted the director of human resources, the department head and the department coordinator regarding the appellant's situation, no proof of these consultations could be obtained and that, in any case, the opinion of the appellant, since it was never collected, does not seem to have been reported to the Secretary General.

92. The Board does not see any contradictions in this exposition. Contrary to the statements of the EUI in point 73 of the appeal, at no time did the contested judgement attribute to the email of January 23, 2019, the same nature as the formal decision signed by the Secretary General. The complaint based on the existence of contradictory arguments in the contested judgement is therefore unfounded and must be rejected.

93. The EUI considers, secondly, that the contested judgement disregards the case law of the courts of the European Union and that, in accordance with said case law, the telephone call made by the department coordinator to AB would have been sufficient and adequate to exercise her right to be heard.

94. Settled case law emphasizes that the right to be heard requires that the person concerned be given the opportunity to effectively make known his or her point of view on the subject of the elements which could be held against him or her in the action to be taken. The right to be heard pursues a twofold objective: on the one hand, it serves to investigate the documentation and to establish the facts as precisely and correctly as possible, on the other, it makes it possible to ensure effective protection of the interested party. The right to be heard aims in particular at guaranteeing that any adverse decision is adopted with full knowledge of the facts, and is intended specifically to enable the competent authority to correct an error, or the person concerned to submit the elements relating to his or her personal situation which militate against the decision to be taken, or not to be taken, or for it to have such and such content (see Judgement of the General Court of February 12th 2020, WD/EFSA, T-320/18, EU:T: 2020:45, points 115 to 117 and the case law cited).

95. Respect for the right to be heard in any procedure initiated against a person and likely to lead to an act adversely affecting that person, constitutes a fundamental principle of European Union law and must be ensured even in the absence of any regulation concerning the procedure in question (see Judgement of the General Court of December 16th, 2020, VP/Cedefop, T-187/18, EU:T:2020:613, paragraph 152 and the case law cited).

96. That said, the case law accepts that a decision not to renew a fixed-term contract can only be adopted after the person concerned has been given the opportunity to effectively make his or her point of view known, where appropriate by a simple announcement by the competent authority of its intention and the reasons for not making use of the option to extend this contract, and this, within the framework of a written or oral exchange, even of a short duration (see Judgement of the General Court of April 24th, 2017, HF/European Parliament, T-584/16, EU:T:2017:282, paragraph 153).

97. It is nevertheless essential that this exchange, even if of a short duration, be helpful and effective, so that the opinion of the person concerned can be taken into account by the competent authority before adopting a final decision.

98. Settled case law has established that the right to be heard also implies that the administration pays all due attention to the observations thus submitted by the person concerned, by examining, carefully and impartially, all the relevant elements of the case and motivating its decision in a detailed way; the obligation to motivate a decision in a sufficiently specific and concrete way allowing the person concerned to understand the reasons for the refusal which is opposed to his or her request thus constituting the corollary of the principle of respect to rights of defence (see Judgement of the Court of November 22nd, 2012, MM./Minister for Justice, Equality and Law Reform, Ireland, C-277/11,

EU:C:2012:744, paragraph 88 and the case law cited and the Judgement of the General Court of January 10th, 2019, RY vs. Commission, T-160/17, EU:T:2019:1, paragraph 26).

99. Furthermore, it has been considered that the right to defence is respected most effectively when the person concerned is able to express him- or herself in full knowledge of all the elements available to the competent authority. (see Judgement of the General Court of June 3rd, 2015, BP/FRA, T-658/13, EU:T:2015:356, paragraph 57 and the case law cited).

100. In this case, the FIB considered that the telephone call from the department coordinator was in no way intended to obtain the point of view of the person concerned on the non-renewal of her contract in order to include it in the file and submit it to the competent authority to take its final decision (in this case the Secretary General). He reached his conclusion on the basis of the evidence available to him which showed that AB had been informed by the departmental coordinator that her contract would not be renewed and that the matter had been presented to her as a fait accompli.

101. The FIB also considers that there is no evidence that the Secretary General had the opportunity to hear and assess the point of view of the person concerned before taking a decision, since the comments she was able to express (assuming that she actually had the opportunity to do so) are not in the record.

102. In any event, this fact alone renders the telephone call pointless and ineffectual for the purposes of the right to be heard by the competent authority (see in the same sense the Judgement of the General Court of June 3rd, 2015, BP /FRA, T-658/13, EU:T:2015:356, paragraph 62).

103. The FIB's assessment of the evidence is irreproachable, insofar as it carried out a balanced and motivated appraisal of the various elements produced. It also complied with the rules for assessing evidence established by the case law in this area.

104. In this respect, it must be remembered that proving the existence and circumstances of an exchange by means of which the right of the person concerned to be heard by the competent authority has been exercised is the responsibility of the administration. (see Judgement of the General Court of January 10th, 2019, TY vs. Commission, T-160/17, EU:T:2019:1, paragraph 45 and the case law cited) without it being possible to confer on simple assertions by the administration any primacy over the denials of the other party since this would amount to effecting, to the detriment of the latter, a reversal of the burden of proof (see in the same sense the Judgement of the Court of January 30th, 2006, Luigi Marcuccio vs. Commission of the European Communities, C-59/06 P, EU:C:2007:756, points 69 and 70).

105. We must therefore conclude that the contested judgement did not err in law and that the FIB correctly established that the telephone call made by the department coordinator to AB cannot be considered an effective means of exercising the right to be heard.

106. Lastly, the EUI maintains that the contested judgement disregards the case law which establishes that the right to be heard must be exercised if a possible decision affecting the person concerned needs to be taken, but not if such a decision is not even considered by the administration.

107. It must be recalled in this respect that, even if the decision of an administration not to make use, when it has such an option, of the possibility of renewing the fixed-term employment contract of an agent is not, formally, a decision adopted at the end of a procedure initiated against the person concerned, it follows from settled case law that when an agent submits a request for a renewal of his or her contract before the expiry of said contract, or where the institution envisages, in its internal rules, for the confirmation of an appointment in good time, before the expiry of an agent's contract, with a specific procedure relating to the renewal of said contract, it must be considered that, at the end of such a procedure or in response to a statutory request, a decision relating to the renewal of the contract of the person concerned is adopted by the competent authority and that, if such a decision

adversely affects the person concerned, the latter must have been heard by the competent authority before this decision was adopted (see Judgement of the General Court of February 6th, 2029, Kevin Karp vs. European Parliament, T-580/17, EU:T:2019:62, paragraphs 89 and 90 and cases cited).

108. The case law considers that a hearing of the person concerned constitutes a minimum guarantee when the administration acts (as in the present case) in an area where it enjoys ample discretion (see Judgement of the General Court of April 24th, 2017, HF/European Parliament, T-584/16, EU:T:2017:282, point 155 and the case law cited).

109. Therefore, contrary to what the appellant seems to be asserting, the right to be heard in a procedure such as that at issue had to be respected.

110. However, the question may then be asked as to whether the procedural defect in question is serious enough to justify the annulment of the contested decision.

111. Here we should recall the case law according to which a procedural irregularity can only be penalized by annulment of the contested decision if it can be established that this procedural irregularity could have influenced the content of the decision (see Judgement of General Court of May 7th, 2019, WP/EUIPO, T-407/18, EU:T:2019:290, paragraph 128 and the case law cited).

112. More specifically, it follows from settled case law that a breach of the principle of respect for the right to defence, in particular the right to be heard, does not entail the annulment of a decision adopted at the end of a procedure unless, in the absence of that irregularity, that procedure could have led to a different result (see Judgement of the General Court of September 12th, 2019, Camélia Manea vs. CdT, T-225/18, EU:T:2019:595, point 34 and the case law cited).

113. That said, a decision whether or not to renew an agent's contract is based to a large extent on value judgements which, because of their subjective nature, are innately liable to change in the context of an exchange with the person concerned (see, by analogy, the Judgement of September 18th, 2015, Wahlström/Frontex, T-653/13 P, EU:T:2015:652, paragraph 28).

114. The case law holds in situations similar to the one considered in the present case, that, in addition, whatever the degree of subjectivity of the assessments in question, by not offering any possibility to the person concerned to express his or her point of view, the administration comes to deprive the latter of a chance to convince the competent authority that another assessment of his or her way of acting was possible. This same case law concludes that to maintain, in such circumstances, that the administration would necessarily have adopted an identical decision had the appellant been given the opportunity to put forward her point of view effectively during the administrative procedure, would amount to emptying the fundamental right to be heard of its substance, as enshrined in Article 41(2)(a) of the Charter, since the very content of this right implies that the person concerned has the possibility of influencing the relevant decision-making process (see, by analogy, the Judgements of the General Court of September 14th, 2011, Luigi Marcuccio vs. European Commission T-236/02, EU:T:2011:465, paragraph 115; of October 5th, 2016, ECDC/CJ, T-395/15 , EU:T:2016:598, point 80 and of December 16th, 2020, VP/Cedefop, T-187/18, EU:T:2020:613, point 165).

115. It must therefore be concluded that the FIB correctly established that the violation of the right to be heard should lead to an annulment of the decision taken. To maintain, in the present case, that the exercise of this right would not have modified the meaning of the decision would amount to depriving the fundamental right in question of its substance and cannot be accepted.

116. In view of the foregoing, the argument must be rejected in its entirety.

On the fifth argument

117. The fifth argument alleges a failure to state reasons concerning the decision on damages.

118. The appellant argues that the contested judgement contains a contradiction in that although the FIB indicates that both material damage and immaterial damage must be calculated *ex æquo et bono*, it appears to have used a mathematical criterion to calculate the material damage when it establishes that the sum to be paid shall be the equivalent of 18 months of full salary of the appellant for the period from July 1st, 2019, to December 31st, 2020. The EUI claims that these material damages were calculated mathematically on the basis of the period from July 1st, 2019, to October 5th, 2020, the date on which the appellant modified her conclusions by expressing her intention not to be readmitted to the EUI. Finally, the EUI considers that the decision concerning immaterial damage is not motivated and that the sum of € 15,000 established by the FIB is disproportionate.

119. In its appeal, the EUI does not contest the existence of the material and immaterial damage established by the FIB.

120. When existence of damage has been proven, as is apparent in the present case, but it is difficult to establish a precise amount, the Court – in this case the FIB – has the obligation to fix the amount objectively, on the basis of a coefficient or a mathematical calculation or, in alternatively, *ex æquo et bono*.

121. The material damage suffered by AB in this case consists of a loss of opportunity. It would be, more precisely, the disappointed hope of obtaining a contract of indefinite duration as covered by Article 85.1 of the Employment Conditions of Other Agents of the EUI, fixed by the Decision of the High Council nº 6 /2014 of December 5th, given that she had previously obtained two temporary contracts.

122. According to the case law, where possible, the opportunity of which an official or agent has been deprived must be determined objectively, in the form of a mathematical coefficient resulting from a precise analysis. However, when that opportunity cannot be quantified in this way, it is accepted that the damage suffered may be assessed *ex æquo et bono* (see Judgement of the General Court of December 16th, 2020, VP/CEDEFOP; T-187/18, EU: T:2020:613 point 199 and the case law cited).

123. Quantification of the damage resulting from the loss of opportunity cannot be established mathematically in the present case. To do this, it would be necessary to have an idea, at least approximate and based on objective elements, of the duration of the employment relationship that would have taken place had the renewal of the contract not been refused. However, the continuation of the appellant in her post as well as, if necessary, the duration of her service at the EUI cannot be known, not even approximately, since both would have depended on various assumptions on which we can only speculate.

124. The FIB is well aware of the difficulties that would entail in trying to reconstruct a reality that has not happened and will not happen again. It observes, in paragraph 65 of the judgement, that even if the appellant had continued in her post from July 1st, 2019, she would not have had an automatic right to remain in that post during the four years of service remaining to obtain the right to a pension; in this case, she would have obtained a contract of indefinite duration but the employer would still have reserved the right to terminate her contract before she reached the right to a pension, in accordance with the legislation in force.

125. The FIB concludes in paragraph 66 of the judgement that it is appropriate to assess the damage suffered *ex æquo et bono* in order to provide a complete solution. In paragraph 67 of the judgement, the FIB indicates that it took into account, in making its assessment, the manifest error of judgement of the EUI, the violations found concerning the infringements of the right to defence, including the right

to be heard, the duty of care, abuse of power and failure to respect the principle of good administration. The FIB takes the violation of the right of the person concerned to be heard particularly seriously. The FIB has determined, for material damage, *ex æquo et bono*, compensation equivalent to 18 months of the appellant's full salary, for the period beginning on July 1st, 2019, and ending on December 31st, 2020, including full pension contributions of 100%. This is not a mathematical calculation of the amount of remuneration which the appellant would have actually received had her contract been renewed, but a fair estimate of the compensation due to AB for the lost opportunity of being recruited with an indeterminate contract.

126. The Board considers that the impossibility of providing an objective criterion to calculate the loss of opportunity suffered by the appellant has been correctly motivated by the FIB, and that the subsidiary recourse to an assessment *ex æquo et bono* is fully justified, taking into account the impossibility of fictitiously reconstructing the appellant's career within the institution (see, by analogy, the Judgement of the General Court of December 16th, 2020, VP/CEDEFOP, T-187/18, EU:T:2020:613, point 200 and the case law cited).

127. For the same reason, the EUI's argument that the damages should be calculated on the basis of the appellant's salary for the period between July 1st, 2019, and October 5th, 2020, cannot be accepted. If the decision not to renew the contract had not been taken in the circumstances described in the judgement, namely, with a manifest error of judgement and in violation of the rights of defence of the person concerned, of the principle of good administration and of the duty of care, there is nothing to suggest that the appellant would have decided to terminate her contract with the EUI on October 5th, 2020. As has already been said, a reconstruction of AB's career within the EUI is not a correct method of assessing the damage, since this could only be based on simplistic assumptions which are uncertain and unverifiable by their very nature. Given that in this case it is not possible to define a method to enable an accurate quantification of the loss of opportunity due to the non-renewal of the interested party's contract, nor the extent of compensation for this damage, it is considered correct that the FIB estimated *ex æquo et bono* the extent of the compensation for material damages.

128. Account must also be taken of the margin of appreciation available to the FIB in the exercise of its unlimited jurisdiction as regards the determination of the compensatory amount.

129. As for immaterial damage, the appellant had claimed compensation equivalent to 10 months' salary in compensation for immaterial damage resulting from the damage to her health, dignity, and professional reputation.

130. The reasons for the FIB's decision concerning immaterial damage can be found in paragraphs 70 to 72 of the contested judgement.

131. The FIB rejects as unfounded the compensation for damage to health given that this has not been justified.

132. For the rest, the FIB has assessed the particular gravity of the case under consideration. It understands, however, that the judgement ordering the annulment of the decision not to renew the appellant's contract constitutes a partial reparation of the damages. Taking into account the circumstances of the case, it considers it appropriate to establish *ex æquo et bono* compensation amounting to € 15,000 as partial compensation for the damage resulting from the attack on the appellant's dignity and her loss of reputation.

133. In these circumstances, it has to be considered that the FIB gave sufficient motivation for its decision by indicating the criteria used to determine the amount of compensation granted to the appellant.

134. According to settled case law, whenever a Court has found existence of damage, it alone has the jurisdiction to assess, within the limits of the claim, the method and extent of compensation for said damage, provided that the Court can exercise its judicial review of the judgements of the General Court, that these are sufficiently motivated and, as regards the assessment of damage, they indicate the criteria taken into account for the purposes of determining the amount reserved (see Judgement of the Court of February 21st, 2008, Commission vs. Girardot, C-348/06, EU:C:2008:107, paragraph 45 and the case law cited).

135. Pursuant to this case law and once the existence of a correct motivation for the judgement has been established, the appellant's request to revise the amount of the compensation, which she considers disproportionate, becomes inadmissible.

136. In view of the foregoing, the argument must be rejected.

ON THE ARGUMENT RELATING TO THE FIB'S DECISION ON COSTS

137. Article 5 of decision nº 8/06 of the High Council of the EUI of December 8th, 2006, established that a plea before the Board cannot relate only to the amount of the costs or to the party ordered to bear them.

138. Since the appellant AB has been unsuccessful in all of the arguments put forward in support of her action, the argument relating to the allocation of costs must therefore be declared inadmissible.

ON COSTS

139. Under Article 33 of the Rules of Procedure, judgements include an order for costs in accordance with Article 2(6) of the Common Provisions. This provision envisages that the EUI shall bear its own costs. However, the Board may condemn a party to pay costs which it considers to have caused the opposing party to bear in an unreasonable or vexatious manner.

140. In the circumstances of the present case, given that the issues examined have raised complex legal questions which have given rise to abundant case law on the subject, each party shall bear its own costs.

For the above reasons,

THE APPEALS BOARD:

1. **Dismisses the appeal**
2. **Orders each of the Parties to bear their own costs.**

MARTA AYLLÓN EUGENIA PREVEDOUROU CHRISTOPHE SCHILTZ

President and Members of the Appeals Board

LUKASZ WIECZERZAK

Secretary of the Appeals Board

Pronounced on May 10th, 2022