

The Administrative Tribunal,

Considering the complaint filed by Ms C.C.R. J.-D. against the International Criminal Court (ICC) on 13 December 2006 and corrected on 17 January 2007, the ICC's reply of 13 April, the complainant's rejoinder of 24 April and the Court's surrejoinder of 23 July 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British national, was born in 1972. She joined the ICC on 1 September 2003 under a three-month General Temporary Assistance contract as a Legal Secretary at level G-4. Her contract was subsequently extended to 31 December 2003. As from 1 January 2004, she accepted a one-year fixed-term appointment at level G-5, step I. Her appointment was subsequently extended for three years, with effect from 1 January 2005. At the time of the complainant's appointment, the ICC determined steps for new staff members recruited from outside the United Nations system by matching their previous salary against the United Nations common system salary scale without reference to employment experience. After a policy change in 2005, steps were determined on the basis of the staff member's employment experience.

On 8 November 2005 the complainant sent an e-mail to a Human Resources Officer in which she challenged her step designation and requested that she receive a higher step within the G-5 level taking into account her years of experience. She met with a Human Resources Assistant on 18 November 2005 and later that same day requested a written explanation of her grading. The Human Resources Assistant replied to the complainant by e-mail on 21 November stating that the Human Resources Section applied the practice which was followed at that time in determining her step-in-grade and that once a contract is signed there is no right to appeal or review the determination. She also explained that the Section had nevertheless looked into questions raised by staff with respect to the calculation of their step designations if the requests had been made within 12 months of the date the staff members had signed their respective contracts. She referred the complainant to Staff Rule 103.21.

By e-mails dated 22 and 23 November 2005 to the Human Resources Assistant and 14 February 2006 to the Chief of the Human Resources Section the complainant further challenged her grading and requested clarification of the practices followed by the Court in determining a staff member's step allocation. The Chief of Human Resources provided "additional clarification" by e-mail on 15 February 2006, stating that the Human Resources Section did not have the authority to change her contract.

On behalf of the complainant a member of the staff representative body requested information from the Chief of Human Resources by e-mails dated 20 March and 21 April 2006. The latter responded on 24 March and 24 April respectively.

Between 2 and 23 May 2006 the complainant and the Chief of Human Resources exchanged a series of e-mails regarding, inter alia, her request to receive an official letter stating the reasons why her request for review of her step allocation had been rejected. By an e-mail of 4 May the Chief of Human Resources stated that his e-mail of 15 February 2006 was sufficient because it contained all the necessary elements of a decision taken by the ICC.

The complainant wrote to the Registrar of the Court on 12 May 2006 asking, in accordance with ICC Staff Rule 111.1(b), for a review of the Human Resources Section's rejection of her request for a review of her step level. He replied on 29 May indicating that, in his opinion, her request was time-barred because it had been submitted almost three months after the decision of 15 February 2006. On 1 June the complainant asked the Registrar to reconsider his decision. He replied in writing on 19 June stating that his decision remained unchanged.

On 23 June 2006 the complainant lodged an appeal with the Appeals Board impugning the Registrar's decision. In

its report dated 13 October 2006 the Board unanimously concluded that the complainant's appeal was admissible. It further recommended that, in the absence of compelling reasons justifying a differentiation in the grading methodology applicable to staff members, the Registrar should review her grading with retroactive effect from the entry into force of the new policy.

By registered letter to the complainant dated 7 November 2006, which enclosed the Board's report, the Registrar provided reasons as to why he was unable to accept the Board's conclusion and recommendations. That is the impugned decision.

B. The complainant submits that when she began work at the Court she had no knowledge of the United Nations grading system. When she signed her fixed-term appointment she did not receive a copy of the ICC Staff Regulations and Provisional Staff Rules. She argues that because she started her fixed-term appointment on 1 January 2004 and the Provisional Staff Rules came into effect on 1 January 2005, it was impossible for her to be aware that she could make a written claim regarding her step allocation within one year of joining the Court. The ICC failed to inform staff and to ensure the transparency of its practices and procedures. As a result, she was deprived of her right to contest errors related to her terms of recruitment.

The complainant disagrees that the e-mail of 15 February 2006 from the Chief of Human Resources was an official final decision. Staff members are entitled to address questions to the Human Resources Section about their contracts, and she did not anticipate that this e-mail would be used as a way to "time-bar potential requests for review of administrative decisions".

She maintains that it was only in October 2005 that she became aware of an ICC notice regarding conditions of employment for General Service staff. The notice stated that a step-in-grade was granted for each additional year of relevant professional experience beyond the number of years required for appointment at that level. She points out that, in addition to meeting the requirements of her position, she has 15 years of relevant professional experience. On her recruitment, her qualifications and experience were overlooked.

The complainant asks the Tribunal to declare that her appeal to the Appeals Board was not time-barred. She requests that her 15 years of professional experience be taken into consideration to determine her step within the G-5 level and that any consequent regrading or payment be given retroactive effect from 7 January 2004, the date she signed her contract.

C. In its reply the ICC contends that the complaint is irreceivable *rationae temporis* and should be dismissed for failure to comply with the mandatory provisions of Staff Rule 111.1(b), which provides that staff members wishing to appeal against an administrative decision shall, within 30 days of notification of the decision, submit a written request for review of the decision to the Secretary of the Appeals Board. It adds that, notwithstanding the finding of the Appeals Board that the complainant's internal appeal was receivable, it may still submit the question of receivability to the Tribunal.

Citing the Tribunal's case law, the Court argues that an administrative decision is a unilateral decision, not necessarily written, which carries direct legal consequences in a precise individual case. The only reasonable inference that can be drawn from the circumstances and the exchange of e-mails is that an administrative decision within the meaning of Staff Rule 111.1(b) was taken and that the complainant was notified of this decision on 18 November 2005 or, at the latest, by 15 February 2006. Consequently, whichever of these dates is taken into account, her request for review was time-barred. In the Court's opinion, the Appeals Board misdirected itself and erred in concluding that the e-mail of 4 May 2006 from the Chief of Human Resources to the complainant was the first clear indication to her that a decision had been made not to grant her request for a review of her step allocation.

Alternatively, the ICC argues that the e-mail responses by the Human Resources Assistant and the Chief of Human Resources should be construed as "implicit communication of an implied administrative decision" not to grant the complainant's request for a change in her step allocation. She was notified of that decision on 18 November 2005 or, at the latest, on 15 February 2006.

On the merits the Court submits that there is no legal basis or justification for the complainant's alleged entitlement to reconsideration of her step determination. Contractual entitlements of staff members are strictly limited to those contained, expressly or by reference, in their letters of appointment. The complainant is obliged to abide by the terms of her contract and she cannot unilaterally seek a contractual change without the Court's consent. The ICC

reserves the right to change its administrative policies but the 2005 change, which occurred subsequent to the complainant's appointment, was not retroactive. It adds that it is not obliged to review her contract after every change in policy, and she bears the full responsibility for her "lapse of vigilance" with respect to how policy changes may have affected her rights.

D. In her rejoinder the complainant reiterates her pleas. She contends that in light of Article 21, paragraph 3, of the Rome Statute of the International Criminal Court her step allocation constituted clear and unequivocal discrimination. She was discriminated against because she had not previously been employed within the United Nations system.

The complainant disagrees with the ICC's analysis of the e-mail exchanges. She contends that none of the replies she received indicated that a final administrative decision had been taken and that she had a right to appeal such a decision.

E. In its surrejoinder the ICC maintains its position. At all material times, the ICC Staff Regulations were in force. These Staff Regulations defined "Staff Rules" as "the relevant Staff Rules of the United Nations". United Nations Staff Rule 103.15 provided the complainant with the right to challenge the alleged incorrect step allocation and the applicable time limits for doing so. When she signed her letter of appointment for her one-year fixed term she acknowledged that she had been made acquainted with the Staff Regulations and Provisional Rules.

The ICC points out that, pursuant to Staff Rule 111.1(a), a staff member's right of appeal is limited to "non-observance of his or her terms of appointment". It considers that it observed all the terms and conditions of the complainant's appointment as contained in her letters of appointment.

The Court disputes the complainant's allegation of discrimination. Referring to the case law, it submits that the non-retroactive change in policy which resulted in differentiation between staff members did not amount to discrimination. Staff members recruited under the new policy are not in the same position as those recruited under the old one.

CONSIDERATIONS

1. The complainant, who holds a post at level G-5, saw a notice in 2005 on the ICC's intranet regarding conditions of employment for General Service staff, which provided in particular that: "[t]he ICC vacancy announcements indicate the net annual salary at the step 1 of the level of the post. A step-in-grade is granted for each additional year of relevant professional experience beyond the number of years required for appointment at that level. Such years of experience are rewarded by additional steps within the grade up to step VI for all levels. In principle, salary increments shall be awarded annually on the basis of satisfactory service. The salary scale for the General Service category is based on seven grades (G-1 to G-7)."

On 8 November 2005 she contacted a Human Resources Officer to challenge her step-in-grade designation and requested that she be graded at a higher step within G-5. However, the Chief of Human Resources wrote an e-mail to her on 15 February 2006 to clarify the situation, concluding that the Human Resources Section did not have the authority to change her contract. In May 2006 the complainant requested "an official letter from ICC addressed to [the complainant] stating the reasons why [her] request for review of the initial determination of [her] step and grade [had] been rejected". The complainant was informed by an e-mail of 4 May 2006, from the Chief of Human Resources, that the e-mail of 15 February 2006 contained all the necessary elements of a decision taken by the Court and that an official letter was not mandatory. After submitting a request for review of the decision not to redetermine her step level, and being denied, the complainant filed an appeal before the Appeals Board on 23 June 2006. The Board found the appeal to be receivable and in its report, dated 13 October 2006, recommended that "the Organisation [establish] an instantly recognizable format of an administrative decision and an unambiguous method of notification of such decision to a staff member", and that the Registrar should review the grading of the complainant with retroactive effect from the entry into force of the new policy. By a letter of 7 November 2006 the Registrar informed the complainant that he was not able to accept the Board's recommendations as he found that the contested decision had been communicated to the complainant by the Administration, first orally on 18 November 2005 and subsequently by e-mail on 21 November 2005, and that it was confirmed by the e-mail of 15 February 2006 from the Chief of Human Resources. He considered that, consequently, her request dated 12 May 2006 was time-barred.

2. The first issues in this case relate to when the ICC's administrative decision was communicated to the complainant and whether she challenged it within 30 days in accordance with the relevant Staff Rules and Regulations. The Tribunal is of the opinion that the decision was officially communicated to the complainant in the e-mail of 4 May 2006 from the Chief of Human Resources. The Tribunal agrees with the finding of the Appeals Board that "[i]t became clear only on 4 May 2006 that an administrative decision was taken". The preceding oral and written communications from various ICC staff members were simply courtesy replies to the questions the complainant posed regarding her assumed right to have her step level reviewed according to the 2005 policy change. In an e-mail of 21 November 2005 a Human Resources Assistant, referring to the meeting of 18 November she had with the complainant, wrote to her as follows: "In addition to our discussion on Friday, I would like to provide you [with] some further information on your request to review your step in grade." The subsequent answers by Human Resources staff are of the same nature. With one exception, the subject of the e-mails, including the one sent by the Chief of Human Resources on 15 February 2006, was "clarification of step". The Chief of Human Resources also used the term "clarification" in the text of his e-mail of 15 February and did not make mention of the possibility of an appeal. These e-mails try to explain, clarify or persuade and there was no communication of a decision until the complainant requested, in an e-mail of 2 May 2006, an official letter from the ICC. Only in the ICC's reply of 4 May 2006 did a decision come to light. Therefore, the request for review of the decision and the internal appeal were both timely made.

3. The next issue is whether the complainant's claim of 8 November 2005 for regrading at a higher step within level G-5, her consequent request for review, and her internal appeal were timely according to Staff Rule 103.21. This rule, which deals with the retroactivity of payments, provides that "[a] staff member who is not paid the salary, allowances or other benefits to which he or she is entitled shall be paid such salary, allowances or other benefits retroactively provided that the staff member makes a written claim within one year of the date on which the staff member should have been paid the salary, allowances or other benefits". The Tribunal considers that the complainant's claim for regrading was submitted in compliance with Staff Rule 103.21, as it was made within one year of the date on which the Court changed its policy regarding the grading of General Service staff recruited from outside the United Nations system. The ICC's evidence before the Appeals Board and this Tribunal is that the change occurred in the second half of 2005 and was not retroactive. Since the complainant made a claim as early as 8 November 2005, that is within one year of the date on which she could claim to be entitled to a higher step, the Tribunal cannot consider her claim to be time-barred.

4. The last issue is whether the new conditions of employment for staff in the General Service category, embodied in the Court's policy change, are applicable to the complainant. The Tribunal is of the opinion that the new conditions are applicable to all staff members who, within one year of the adoption of the new conditions, claimed their application. The contrary interpretation would violate the principle of equal treatment; indeed, there does not appear to be any logical reason for differentiating between existing and future staff members.

5. As a result the impugned decision, dated 7 November 2006, must be annulled and the ICC must take into consideration the complainant's 15 years of professional experience to determine her step within the G-5 level, in accordance with the new conditions of employment for staff in the General Service category with effect from the date on which the new policy came into force.

6. Although costs have not been claimed, the Tribunal considers that an award of costs in the amount of 3,000 euros is appropriate (see Judgment 506, under 8).

DECISION

For the above reasons,

1. The impugned decision of 7 November 2006 is annulled as is the earlier decision of 4 May 2006.
2. The matter is remitted to the ICC for redetermination of the complainant's step in accordance with consideration 5 above.
3. The ICC shall pay her 3,000 euros in costs.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 2 November 2007, Ms Mary G. Gaudron, Presiding Judge for this case, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.