

**B.**  
**v.**  
**PCA**

**123rd Session**

**Judgment No. 3729**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. É. B. against the Permanent Court of Arbitration (PCA) on 17 October 2014 and corrected on 11 November 2014, the PCA's reply of 2 February 2015, corrected on 6 March, the complainant's rejoinder of 23 April and the PCA's surrejoinder of 30 May 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the terms on which her appointment was terminated.

The complainant joined the PCA on 10 December 2012 under a one-year fixed-term contract as Assistant to the Secretary-General.

On 17 October 2013 the Secretary-General informed the complainant orally that her contract would be renewed for one year. The Secretary-General called the complainant to another meeting on 18 October, as he had been informed that she had divulged confidential information to another staff member (Ms B.). He asked her whether she had, but the complainant denied having done so. In the days that followed he went

on sick leave and formally assigned his duties to the Deputy Secretary-General, who became Acting Secretary-General.

In November the Secretary-General and the Acting Secretary-General communicated regarding the complainant's situation and it was decided that her contract would be terminated. By a letter of 22 November 2013 the Acting Secretary-General, referring to a discussion held with the complainant on the same day, informed her that her contract starting on 10 December 2013 would be terminated with two months' notice, that is on 9 February 2014. By a letter of 4 December 2013 he clarified that the termination of her contract was "in the interests of the Permanent Court of Arbitration". The letter added that she would not be reporting to work in the period from 7 December 2013 to 9 February 2014.

On 10 January 2014 the complainant requested to be paid a termination indemnity in application of Rule 10.3 of the PCA International Bureau Staff Rules and Directives (hereinafter "PCA Staff Rules"). By a letter of 3 February 2014 the Secretary-General denied this request, on the ground that the applicable rules did not provide for payment of such an indemnity in the case where termination was in the interests of the organisation, adding that "[a]lthough this particular reason is not explicitly mentioned in the [applicable rules] on indemnity for loss of employment, it is analogous with unsatisfactory service", and that the letter of 4 December 2013 "did not mention unsatisfactory service, as [he] did not wish to cause any difficulties for [her] future employment opportunities".

On 28 February 2014 the complainant lodged an appeal against the decision of 3 February 2014, requesting that that decision, as well as that of 22 November 2013, be set aside, and claiming payment of her salary with all benefits and entitlements until the expiry of her contract. With respect to her challenge of the 22 November decision she alleged that as she was not informed of the "real reason for the termination of [her] contract, [she] could not effectively appeal this decision at the time". On 3 March 2014 the complainant filed a corrected appeal.

In its report of 2 July 2014 the Appeal Board found that the complainant only knew of the precise reason for the termination of her contract at the oral proceedings held on 6 May 2014. At this occasion the Secretary-General stated that the complainant's contract was terminated

because he considered that she had irreparably breached his trust, by wrongfully divulging confidential information to another staff member and by denying that she had done so when asked by him. The Appeal Board thus recommended that the PCA consider 6 May as the date of termination and, therefore, that she be paid an additional five months' salary to include the two-month contractual notice.

By a letter of 24 July 2014 the Secretary-General informed the complainant that he had decided to follow the Appeal Board's recommendation and pay her five months of salary, subject to her signing a settlement agreement to waive all her claims against the PCA relating to her employment. On 30 July 2014 the complainant rejected the Secretary-General's proposal. She impugns the decision of 24 July 2014 before the Tribunal.

The complainant asks the Tribunal to quash the decisions of 22 November and 4 December 2013 and the decisions of 3 February and 24 July 2014. She asks that the PCA pay her full salary, including benefits and entitlements, that she would have received had her contract not been terminated, with interest. She claims 10,000 euros in moral damages, as well as costs.

The PCA submits that the complaint is irreceivable because the complainant has not exhausted internal means of redress. On the merits, it asks the Tribunal to dismiss the complaint as unfounded.

## CONSIDERATIONS

1. The complainant commenced employment with the PCA on 10 December 2012 on a one-year contract expiring on 9 December 2013. Her duties included providing secretarial and administrative support to the Secretary-General. The complainant and the Secretary-General met on 17 October 2013. The Secretary-General was then about to go on medical leave for some weeks. During this meeting the complainant was told her contract would be renewed for a year and the Secretary-General commenced to discuss the complainant's performance on the basis that there would be further discussions when he returned from his medical leave in mid-November 2013. The general practice in

the PCA was that if a staff member rendered satisfactory performance during her or his first year she or he would then receive an offer for a five-year employment contract.

2. There was a further meeting between the Secretary-General and the complainant on 18 October 2013. They discussed whether the complainant had told another member of staff, Ms B., that Ms B.'s employment was under review. The complainant denied that she had done so. As it turned out, the Secretary-General did not believe the complainant's denial. Accordingly, the Secretary-General felt the complainant had breached his trust both by revealing confidential information to Ms B. and by denying doing so. On 22 November 2013 the Deputy Secretary-General (then acting as the Secretary-General) wrote to the complainant telling her that the PCA "invokes the two-month notice period for the termination of your employment with the PCA" and that she would be paid her salary through to 9 February 2014. In a further letter dated 4 December 2013, the Deputy Secretary-General informed the complainant that her last day in the office would be 6 December 2013 and that her termination was "in the interests of the [PCA]".

3. On 10 January 2014, the complainant wrote to the Secretary-General saying she was entitled to a termination indemnity under the PCA Staff Rules but this claim was rejected in a letter of 3 February 2014 from the Secretary-General. On 28 February 2014, the complainant lodged an appeal with the PCA Appeal Board. While the covering letter of that date referred only to the request for indemnity payment as the subject matter of the appeal, the accompanying documentation made it clear that the complainant was appealing against both the decision in the letter of 22 November 2013 to terminate her employment on two months' notice as well as the refusal of the request for indemnity payment.

4. In a report dated 2 July 2014, the Appeal Board made two recommendations to the Secretary-General. The second was that the PCA make no indemnity payment to the complainant and this was based on the Appeal Board's conclusion that the basis upon which her contract was terminated was "not of the kind that attracts an indemnity payment

under the OECD Staff Rules". The first recommendation was that the PCA pay the complainant 17,140 euros. The rationale for this recommendation was that it was not until 6 May 2014 (when the Appeal Board conducted oral proceedings in which it heard evidence from both the complainant and the Secretary-General) that the complainant was made aware of the precise reason for the termination of her contract. That is to say, the complainant's contract had not been terminated for unsatisfactory service but rather had been terminated because the Secretary-General considered that the complainant had irreparably breached his trust by telling Ms B. her contractual situation was under review and denying she had done so. The amount of 17,140 euros represented salary for a notional two-month notice period from 6 May 2014 to 6 July 2014 as well as the salary which would have been payable from 9 February 2014 to 6 May 2014 had the complainant remained in employment.

5. In a letter dated 24 July 2014 to the complainant, the Secretary-General indicated he was prepared to accept the recommendation subject to the complainant signing a settlement agreement waiving all claims against the PCA and agreeing to keep the terms of settlement confidential. The complainant wrote to the Secretary-General on 30 July 2014 indicating she was not prepared to waive any of her rights or claims relating to her employment. The decision of 24 July 2014 is the impugned decision in these proceedings.

6. The PCA raises a threshold issue about the receivability of the complaint insofar as it challenges the decision to terminate the complainant's employment. It does so on the basis that the complainant failed to follow a procedural step in the internal appeal process by seeking a review of that decision before lodging the internal appeal as seemingly required by Directive 11.1(ii) of the PCA Staff Rules. Had that point concerning receivability been raised in the internal appeal, it may have had prospects of success in these proceedings before the Tribunal (see, for example, Judgments 1653, consideration 6, 3181, consideration 11, and 3577, considerations 8 and 9). But it was not raised in the internal appeal and, accordingly, cannot now be relied upon for the first time by

the PCA in these proceedings (see, for example, Judgments 2255, considerations 12 and 13, and 3160, consideration 14). Accordingly, the PCA's contention concerning receivability is rejected.

7. In its reply, the PCA set out, in some detail, its account of the events of 17 and 18 October 2013 in which the complainant revealed to Ms B. confidential information concerning her future employment as well as referred to an e-mail communication of 18 November 2013 from the Deputy Secretary-General to the Secretary-General proposing that the complainant be informed that her employment was being terminated in light of her actions with respect to Ms B. The PCA also drew attention to an admission by a legal representative of the complainant in the internal appeal that she would have seen this e-mail. The PCA also detailed in its reply a conversation between the complainant and the Deputy Secretary-General on 22 November 2013 in which the complainant was told that the Secretary-General had lost confidence in her because she had breached his trust and that such a breach was a violation of the PCA Staff Rules as well as her contract of employment and justified the termination of her employment. In her rejoinder, the complainant did not put in issue any specific element of the PCA's account of the events nor were they contradicted in the complainant's account of events in her brief. The complainant does say in her rejoinder that, in effect, because she was not "explicitly disagree[ing] with any statement, suggestion or interpretation" she should not be taken to be agreeing with them, but the complainant provides no proof to the contrary. The Tribunal accepts the PCA's account.

8. In her brief, the complainant advances two arguments. The first is that the recommendation of the Appeal Board to pay her five months of salary was legally flawed. This argument has two elements. The first is that the reason for the termination of her contract was not made clear before or during the oral hearing before the Appeal Board and remained unclear at the time of preparing the brief. Moreover there was a tension between the reason identified by the Appeal Board and revealed in the oral hearing (that the termination was in the interests of the organisation) and the position of the PCA that the complainant was

not entitled to an indemnity payment. The second element of the first argument was that there had not been due process and that, in effect, her dismissal had been arbitrary. The second argument was that the termination of her appointment was unlawful because she had not been provided with the reasons and not given an opportunity to “respond to the charges against [her]”.

9. In her rejoinder the complainant says that the factual account of the PCA of events in October 2013 and subsequently constitute an attempt to obscure the real issue in the case. She asserts that the case is not about whether she had divulged privileged information but rather that it was about procedural flaws concerning the Secretary-General’s decision to dismiss her.

10. In a statement furnished by the PCA in these proceedings, the Deputy Secretary-General set out, in detail, what he told the complainant at the meeting on 22 November 2013. This account is repeated in the PCA’s pleas as part of its evidentiary case. It is not contradicted or challenged by the complainant in her rejoinder beyond the general statement referred to at the conclusion of consideration 7 and a footnote saying that what the Deputy Secretary-General said was “largely based on unreferenced assumptions and interpretations”. However what the Deputy Secretary-General said about the meeting of 22 November 2013 is clear and is important. It was that he told the complainant she had breached the Secretary-General’s trust by disclosing confidential information to another staff member and then by denying that she had done so and he explained to the complainant that her actions violated the PCA Staff Rules and Directives and her contract of employment. He told the complainant her employment would be terminated by invoking the two-month notice period and that this was in the interests of the organisation.

11. It appears that the Appeal Board did not have the benefit of this evidence and, as to what happened at the meeting of 22 November 2013, only had the complainant’s account that, as summarised by the Appeal Board, was cast in more ambiguous and opaque terms. In fact, she had been told on 22 November 2013 of the precise reason for the

termination of her contract. The fact that there was arguably a tension between the PCA's subsequent refusal to pay the complainant an indemnity and the reasons clearly given to her at the meeting of 22 November 2013 is beside the point. It is beside the point insofar as the complainant is arguing in these proceedings that the decision to terminate was unlawful principally because she was not provided with the reasons or given the right to defend herself. Neither is correct. Accordingly the complaint must be dismissed. It is entirely a matter for the PCA whether to adhere to or renew the offer of payment made in the impugned decision but rejected by the complainant.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 24 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ