

NINETY-SEVENTH SESSION

Judgment No. 2354

The Administrative Tribunal,

Considering the third complaint filed by Mr H. B. against the Customs Co-operation Council (CCC), also known as the World Customs Organization (WCO), on 16 June 2003 and corrected on 15 July, the Organization's reply of 20 October 2003, the complainant's rejoinder of 24 January 2004 and the Organization's surrejoinder of 15 April 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. Staff Regulation 12(a) provides:

“The Secretary General may, after consulting the appropriate advisory body, terminate the appointment of an official :

(i) [...]

(ii) if the post of the official is suppressed [...] and there is no vacant post for which the Secretary General considers that the official has the necessary qualifications;

[...]”

The complainant, a French national born in 1947, joined the CCC in September 1975 as a translator at grade L2 and was assigned to the French section of the Translation Service. He was promoted to L3 in 1978. From January 2001, following an audit report, the Secretary General initiated restructuring measures to increase the productivity and efficiency of the Secretariat's support services and, starting in August, he gradually transferred the translators to the directorates that mainly used their services. As a result, the complainant was transferred to the Compliance and Facilitation Directorate with effect from 1 November 2001.

In a memorandum of 26 November 2001 to the Chairman of the Staff Committee, the Head of the Division of Administration and Personnel explained that, as part of the ongoing restructuring of the Secretariat, the posts of the complainant and of one of his colleagues would be suppressed and he asked the Committee for its opinion. When the Chairman of the Committee requested further details, the Head of Administration and Personnel sent him a memorandum on 30 November 2001, informing him that the choice of which posts were to be suppressed in the above-mentioned Directorate had been made by the Secretary General on the basis of “objective criteria”. That same day, the Chairman of the Staff Committee sent a memorandum to the Head of Administration and Personnel, stating that the Staff Committee had raised some concerns but had not called into question the legitimacy of the planned measures. Also on that day, the Secretary General wrote to the complainant to inform him that his post was being suppressed and that his appointment would be terminated on 30 March 2002.

On 19 December 2001 the complainant asked the Secretary General to cancel that decision. The Secretary General replied, in a letter of 21 January 2002, that he saw no reason to cancel his decision. On 27 February 2002 the complainant requested that the matter be referred to the Appeals Board. In a letter of 17 March 2003, which constitutes the impugned decision, the Secretary General sent the complainant a copy of the Board's recommendation and informed him that, since the Board had been unable “either to justify or to validate his

grievances”, his appeal was dismissed.

B. The complainant begins by denouncing a breach of the provisions of Staff Rule 29.3 and of the obligation to substantiate adverse decisions insofar as he was not informed of the grounds for the Appeals Board’s recommendation.

He also argues that Staff Regulation 12(b) was breached to the extent that the grounds for the suppression of his post did not “meet” the Staff Committee’s reservations, that the decision of 30 November 2001 did not give the specific grounds for suppressing his post. These were supplied only in December 2002 in the Secretary General’s reply to his appeal, and he was not informed of the aforesaid Committee’s opinion when he was sent the decision in question.

The complainant also alleges that the provisions of Staff Regulation 12(a), Staff Rule 12.1(a) and Staff Circular No. 142 were breached in that the Secretary General did not take account of the Staff Committee’s opinion before terminating his appointment. Moreover, that opinion was flawed, because the Committee was not sufficiently informed of the grounds for the proposed decision, and because a conflict of interests arose, since the colleague with whom the complainant “competed directly” for the survival of his post, Ms D., was a member of that Committee.

In the complainant’s view, the provisions of Staff Regulations 10 and 12(a) were breached because his budget post had not been suppressed at the time the decision to terminate his appointment was taken, or had been abolished by a non-competent authority, since, in his view, the Secretary General did not have the power to abolish his post on his authority alone.

The complainant contends that the Secretary General did not sufficiently consider the possibility of transferring him to other posts in the Secretariat, despite the fact that vacancies to which he might have been reassigned already existed or were expected before long.

He also argues that the disputed decisions are based on mistakes of fact, or overlook material facts or draw clearly wrong conclusions from the evidence.

Lastly, he pleads abuse of authority, on the grounds that the decision to suppress his budget post was based on a desire to get rid of an “unwanted official” or, at the very least, on a clearly mistaken assessment of his professional qualities. According to him, the “chief reason” for the impugned decision was his allegedly insufficient output and not a need to reduce staff. He refers to various indications that it is the Secretary General’s hostility towards him which constitutes the real ground for the termination of his appointment.

The complainant requests that the Tribunal, prior to judgment, order the disclosure of the full text of the Appeals Board’s report. He also requests the quashing of the decisions of 30 November 2001 and 17 March 2003, and claims reinstatement. Subsidiarily, in compensation for the harm done to his career, he claims an amount equivalent to ten years’ pay, plus the difference between the terminal allowance he received and the one he would have been paid if his career with the Organization had been allowed to continue until he reached the age of 65. He claims 25,000 euros for moral injury and additional compensation for the harm caused by the excessive delay of the procedure before the Appeals Board and the late notification of the grounds for the impugned decisions, the opinion of the Staff Committee and the Appeals Board’s report. Lastly, he claims costs.

C. In its reply the Organization endeavours to demonstrate that the complainant was perfectly aware, before appealing to the Tribunal, of the reasons why his appointment was terminated. While pointing out that, according to Staff Rule 29.3, only the recommendation of the Appeals Board need be transmitted to the appellant, the Organization produces the Board’s report in full as an appendix to its reply. It adds that disclosing that report has not caused any delay and that the complainant is wrong to claim damages on that count.

The Organization denies that the Staff Committee ever expressed reservations regarding the suppression of the complainant’s post. Moreover, the Secretary General was not bound by the Committee’s opinion. Also, the decision of 30 November 2001 was more than adequately substantiated with regard to the suppression of the complainant’s post, since it indicated that the measure was part of the reorganisation of the Secretariat’s support staff. The defendant recognises, however, that it had been thought preferable, for the complainant’s sake, not to mention the fact that the suppression of his post was due to his output being “clearly sub-standard”, although he was given that

reason verbally on several occasions, especially in the course of his interview with the Secretary General on 7 December 2001.

The defendant denies that the Secretary General did not take account of the Staff Committee's opinion and considers that the Committee was consulted in compliance with the normal procedure. It stresses that it had no means of influencing either the Committee's composition or its mode of operation.

It explains that the suppression of posts lies within the Secretary General's authority so long as it does not lead to any additional budgetary expenditure.

The Organization maintains that it made considerable efforts to reassign the complainant and notes that he did not follow up its offer of freelance translation work.

The defendant recalls, moreover, that in reorganising the Translation Service, the Secretary General exercised his discretionary authority, which is subject to only limited review by the Tribunal, and that a decision taken within that authority cannot be set aside unless it is tainted by a blatant error of assessment, which is not the case here.

Lastly, the Organization "categorically and formally" denies the complainant's accusation of misuse of authority.

D. In his rejoinder the complainant reiterates all his pleas. He maintains he was not informed of the specific grounds for the suppression of his post on 7 December 2001, which detracted from the validity of the appeal procedure. According to him, the report of the Appeals Board lacks any "real substance".

The complainant contends that the Staff Committee's opinion is flawed and that the Secretary General has not shown that he took account of that opinion. He objects to the "casual" manner in which his case was handled, considering that the Staff Committee's concerns were ignored. In his view, the composition of the Committee was flawed, the Organization itself having produced evidence of a conflict of interests.

He asserts that the Organization is to blame for the flawed procedure before the Committee, insofar as it did not inform the latter of the exact reasons why his post was being suppressed.

E. In its surrejoinder the defendant presses its pleas. It argues that it was in its interest to suppress the complainant's post and that his appointment was terminated on the basis of objective criteria. In its view, the complainant contradicts himself by asserting that the Staff Committee's opinion is flawed whilst relying on the Committee's alleged objections to the disputed measures.

CONSIDERATIONS

1. After working in the Translation Service at grade L3, the complainant was transferred, as a translator, to the Compliance and Facilitation Directorate with effect from 1 November 2001.

2. In a memorandum of 26 November 2001 the Head of Administration and Personnel reminded the Chairman of the Staff Committee that a reorganisation of the support services of the WCO's Secretariat, aimed at improving efficiency and rationalising resources, was under way and that, as part of the ongoing restructuring of translation activities and in view of the increasing use of freelance translators, the complainant's post and that of one of his colleagues would be suppressed. The Head of Administration and Personnel asked the Committee to give its opinion on the matter before the end of the month.

On 30 November 2001 the Head of Administration and Personnel sent the Chairman of the Staff Committee a memorandum explaining, in response to the latter's request for further information regarding the restructuring, that the post suppressions contemplated by the Secretary General were based on a desire to make financial savings, the Finance Committee and the Council having recently urged him to streamline the Secretariat; that in future only one permanent translator would serve each unit of the Secretariat; and that the choice of which posts were to be suppressed in the Compliance and Facilitation Directorate had been made by the Secretary General on the basis of objective criteria, with the result that two posts including the complainant's would be suppressed, while Ms D. would be kept on as a permanent translator. The Head of Administration and Personnel pointed out that the restructuring of the Secretariat lay within the sole responsibility of the Secretary General, who did not require the advice of any Committee within the Organization.

That same day, the Chairman of the Staff Committee wrote a memorandum to the Head of Administration and Personnel, which was drafted in relevant part as follows:

“The Staff Committee notes the fact that the suppression of two translator posts, [including that of the complainant], has been decided on the basis of objective criteria.

In that respect, the [Staff Committee] considers that it could under no circumstances oppose decisions taken as part of the financial management of the Secretariat. It therefore does not wish to call into question the legitimacy of the measures planned by the Administration.

[The Staff Committee] wishes to express its concern, however, regarding the potential impact the planned reduction in the number of translators on the quality of the documents produced by the Secretariat. It believes appropriate measures should be considered [...].

In addition [the Staff Committee] asks the Administration to look into every possibility of helping the officials concerned to find equivalent employment suited to their qualifications with other establishments as rapidly as possible.”

Also on 30 November 2001 the Secretary General notified the complainant that his appointment was being terminated under the terms of Staff Regulation 12.

3. The complainant then initiated an internal appeal procedure. The matter was referred to the Appeals Board, which met on 9 January 2003. In the report it submitted to the Secretary General, the Board concluded that:

“the Secretary General’s decision of 30 November 2001 to suppress [the complainant’s] budget post and, as a consequence, to terminate his appointment as from 30 March 2002, was taken in accordance with the required procedures and in a lawful manner [and] the Secretary General has complied both in form and in substance with the terms of the appointment and the relevant provisions of the WCO’s Staff Regulations”.

In a letter of 17 March 2003 the Secretary General informed the complainant that he had decided to dismiss his appeal. That is the impugned decision.

4. The complainant puts forward seven pleas, among which the Tribunal shall examine in particular those concerning the breach, on the one hand, of the provisions of Staff Regulation 12(a), Staff Rule 12.1(a) and Staff Circular No. 142 and, on the other, of Staff Regulation 12(b).

Breach of the provisions of Staff Regulation 12(a), Staff Rule 12.1(a) and Staff Circular No.142

5. In the second subsection of his third plea, the complainant contends that the Staff Committee’s opinion was flawed because the Committee did not have sufficient information regarding the general reasons for the proposed decision and, in particular, because it was not informed at all regarding the specific reasons.

To this the defendant replies that the Staff Committee had been consulted by the Head of Administration and Personnel, who had indicated very clearly what objectives were being pursued with the measure and who, at the Committee’s request, had immediately sent it further details, which were sufficient to enable it to endorse the disputed measure in an informed manner.

6. The provisions referred to by the complainant read as follows:

Staff Regulation 12(a):

“The Secretary General may, after consulting the appropriate advisory body, terminate the appointment of an official [...].”

Staff Rule 12.1(a):

“The appropriate advisory body shall be consulted by the Secretary General before he/she terminates the

appointment of an official.”

Staff Circular No. 142:

“The appropriate advisory body to be consulted under (a) of [Rule 12.1] is the Administration Committee in the case of an official in category A and the Staff Committee in all other categories. [...]”

According to these provisions, the Secretary General was obliged to consult the Staff Committee before terminating the complainant’s appointment.

The Tribunal considers that this obligation to consult – which must not be seen as just an unnecessary formality, even though the Secretary General is not bound by the opinion of the advisory body – is not fulfilled unless the advisory body is in such a position that it can give an opinion independently and in full knowledge of the facts, which implies that it must be provided with all the information it needs, and especially the real reasons for the proposed measure, so that it can express an objective opinion.

7. In the case in hand, the reason for terminating the complainant’s appointment was the suppression of his post. The Staff Committee therefore had to be given the information it needed to assess on the one hand the reasons for the need to reduce the number of translators in general and, on the other, the specific reasons for suppressing the post of the complainant, who was not the only translator at the Compliance and Facilitation Directorate.

While it emerges from the submissions that the general reasons for reducing the number of translators had been brought to the attention of the Staff Committee, it has not been established that the latter had been given the specific reasons for suppressing the complainant’s post, rather than that of another official of the same grade and in the same Directorate, prior to delivering its opinion. On the contrary, in response to the Staff Committee’s request for additional information, it had simply been replied, without any further details, that the post suppressions contemplated by the Secretary General were based on a desire to make financial savings following pressure by the Finance Committee and the Organization’s Council to streamline the Secretariat; that in future only one permanent translator would be retained in each unit; and that the choice of which posts were to be suppressed in the Compliance and Facilitation Directorate had been made by the Secretary General on the basis of objective criteria. In the comments he submitted to the Appeals Board, the Secretary General explained that the “objective criteria”, on which he had based his decision to suppress the complainant’s post and terminate his appointment rather than suppress the post of another official, were the quality and competence of the staff involved, their integrity, the duration of their service, their efficiency and their output, and that it was “the complainant’s clearly lower output compared with that of the other official concerned which explained and justified, in all objectivity, the impugned decision [...]. The lower output of the complainant therefore constituted an objective criterion justifying the suppression of that budget post rather than that of Ms D.”.

Thus, while the Staff Committee, before delivering its opinion, had indeed received information concerning the plan to reduce the number of translators in general terms, it had not been told what had guided the specific choice to suppress the complainant’s post and to terminate his appointment. In the Tribunal’s view, this lack of precise information concerning the specific reason for the decision to suppress the complainant’s post in particular and to terminate his appointment invalidated the consultation provided for in Regulation 12(a) and Rule 12.1(a), which is tantamount to saying that no consultation took place. The second subsection of the complainant’s third plea therefore succeeds.

Breach of Staff Regulation 12(b)

8. In the second subsection of his second plea, the complainant contends that the decision of 30 November 2001 did not give the specific reasons for the suppression of his post.

According to the defendant, that decision was abundantly clear regarding the reasons for suppressing the complainant’s post. In its view, the wording of the decision showed clearly that it was aimed at facilitating the “reorganisation of support staff in the WCO’s Secretariat” and that it had been envisaged in the light of “the increased use” of freelance translators. These reasons, it maintains, had been explained in detail to the complainant by the Secretary General in the course of the interview on 7 December 2001.

The defendant justifies the lack of specific reasons for suppressing the complainant’s post by the fact that the

Secretary General had thought it preferable, in the complainant's own interest, not to spell out the fact that his post was being suppressed on account of the quality of his services and, more specifically, of his sub-standard output. The complainant would undoubtedly have objected, quite understandably, to that reason being expressly mentioned in the letter terminating his appointment, which he might need to produce when applying for a new job. Lastly, the Organization asserts, without showing any evidence, that this reason had been notified verbally to the complainant on several occasions, and in particular in the course of his interview with the Secretary General on 7 December 2001 – which the complainant denies – and it contends that in any event the latter was kept clearly informed of all the reasons during the internal procedure, the effect of which, in accordance with the Tribunal's case law, is to make good any breach of the right to be informed (see Judgment 1815).

9. According to Staff Regulation 12(b):

“The termination of an appointment by the Secretary General shall be notified in writing to the official concerned, with a statement of the grounds for such termination [...].”

The Secretary General's decision of 30 November 2001 terminating the complainant's appointment reads in relevant part as follows:

“[...] in the light of successive external audits, the support services at the WCO Secretariat are currently being reorganised. The reorganisation is intended to achieve greater efficiency and rationalisation of the Secretariat's resources and is based on the premise that an international organisation must move with the times and that no institution is immune to change.

I hereby inform you that, as part of the ongoing restructuring of the WCO's translation capability and a move towards greater use of [freelance] translators, your L3 post as translator at the WCO will be suppressed. The appropriate advisory body has been consulted and has expressed its opinion.

I have looked very carefully at the possibilities of transferring you internally within the Secretariat at the same grade. Unfortunately, in view of the very specialised nature of your qualifications, no suitable post is currently vacant or likely to become vacant in the near future. I have no other choice, therefore, than to terminate your appointment with the WCO.

You should consider this letter as the notification of the termination of your appointment, in accordance with Staff Regulation 12. The period of notice in your case is four months, in accordance with Staff Rule 12.1(c);

your appointment with the WCO will therefore terminate on 30 March 2002. In accordance with Staff Rule 12.1(d), I should like to inform you that you are entitled to cease work at least one month before that date.

I shall make every possible effort to find you alternative employment outside the Organization. To that end, I have asked the Head of Administration and Personnel to get in touch with other international organisations and I shall keep you informed of any results.

In accordance with Staff Rule 18.10, you will be paid an indemnity for loss of employment.”

The Tribunal notes that, in breach of the provisions of Regulation 12(b), the decision of 30 November 2001 does not give all the grounds for the termination of the complainant's appointment, in particular those which were specific to the suppression of his post.

However, as the defendant points out, according to the Tribunal's case law (see Judgment 1817, under 6), where little or no explanation has been forthcoming, the omission may be repaired in the course of appeal proceedings, provided that the staff member is given his full say. In the case in hand, however, not only did the Secretary General fail to abide satisfactorily by the terms of Regulation 12(b), which expressly obliges him to state the grounds for the termination of an appointment, but the complainant's right to be heard cannot even be considered to have been respected, considering that he was not given a chance to reply in writing to the defendant's written comments to the Appeals Board, in which, according to the submissions, the specific grounds justifying the termination of his appointment were indicated for the first time.

The Tribunal therefore considers that the provisions of Regulation 12(b) were breached.

10. In the light of the above, the decisions which the complainant asks the Tribunal to set aside must be held unlawful, which obviates the need to consider his other pleas or, as the complainant requests, to order disclosure of the full text of the Appeals Board's report – which would now serve no purpose – or to hear witnesses.

11. The complainant requests that he be reinstated or, failing that, in compensation for the harm done to his career, that he be awarded an amount equivalent to all the financial and other benefits to which he would have been directly or indirectly entitled had he kept his L3 job after 31 March 2002; he sets that amount at ten years' salary plus the difference between the terminal allowance he received and the one he would have been paid had his career with the Organization been allowed to continue until he reached the age of 65.

He requests that the defendant be ordered to pay him the sum of 25,000 euros in compensation for moral injury and a further amount, to be decided by the Tribunal, in compensation for injury arising from the excessive delay of the procedure before the Appeals Board.

In the particular circumstances of this case, the Tribunal does not consider the reinstatement of the complainant to be appropriate. However, availing itself of its powers under Article VIII of its Statute, and in view of the unlawful actions of the Organization, it shall order the latter to pay the complainant, in compensation for injury under all heads, an amount equivalent to two years' salary and allowances, without deducting the terminal allowance he has already received. The claim for compensation for the injury arising from the excessive delay of the internal appeal procedure is deemed by the Tribunal to be unjustified.

12. As the complainant succeeds in the main, he is entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The Organization shall pay the complainant an amount calculated as indicated under 11 above in compensation for injury under all heads.
2. It shall also pay him the sum of 3,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet