

106th Session

Judgment No. 2785

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. M. against the International Centre for Genetic Engineering and Biotechnology (ICGEB) on 20 October 2007 and corrected on 12 November 2007, the ICGEB's reply dated 21 January 2008, the complainant's rejoinder of 18 March and the Centre's surrejoinder of 23 April 2008;

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. Facts concerning the present case can be found in Judgment 2707, delivered on 6 February 2008, in which the Tribunal ruled on the complainant's first complaint, finding it irreceivable for failure to exhaust internal remedies. Suffice it to recall that the complainant, an Indian national born in 1953, is a former staff member who worked for the ICGEB under a series of contracts for more than 17 years. In January 2006 he was informed that his post was to be

abolished and that, consequently, his contract would not be renewed. In a letter dated 2 March 2006 the Centre offered the complainant 64,824 United States dollars, representing 18 months' net salary, in acknowledgement of his years of service (hereinafter the "offer"). This sum would be paid in two equal instalments, the first upon the expiry of his contract and the second on 30 June 2007. The letter of 2 March referred to the duty of discretion enshrined in Staff Regulation 1.4 and advised the complainant that he should refrain from any action which the ICGEB might reasonably deem to be contrary to its interests or which might adversely affect it. Failure to fulfil his obligations under the ICGEB Staff Rules and Regulations would result in the cancellation of any payments provided for in the offer. In a series of exchanges with the Centre's management, the complainant attempted to negotiate different terms for the offer. On 7 September 2006 the Director-General informed him that the offer was not negotiable and that it was not a "settlement". The complainant accepted the offer on 13 September. He separated from service on 30 September and received the first instalment the following month. On 9 December 2006 he filed his first complaint with the Tribunal.

The Director of Administration and External Relations wrote to the complainant on 20 June 2007 stating that he had forfeited the right to payment under the offer. The reasons for this included the complainant's "violation" of the assurances he had given in order to obtain the offer and his breaches of Staff Regulation 1.4. Consequently, the Centre would not pay the second instalment and it reserved the right to recover the first instalment. In a letter to the Director dated 23 July 2007 the complainant asserted that the ICGEB was attempting to coerce him into withdrawing his complaint and that its refusal to pay the second instalment was a breach of contract. He demanded immediate payment with interest and damages. In the event that the decision would be maintained, he requested that a Joint Appeals Board be established.

By a letter dated 24 August 2007 the Director informed the complainant that his letter of 23 July would be considered a

request for review of the decision of 20 June regarding the offer. On 28 August the complainant acknowledged receipt of the Director's letter.

On 20 September 2007 the Director-General confirmed the decision of 20 June, asserting that it was not an attempt to coerce the complainant into withdrawing his first complaint, but the consequence of the complainant having "destroyed the basis for the payment". He explained that the offer was a goodwill payment in the nature of a gift. Although the offer had lapsed, it had been renewed following the complainant's repeated assurances that he was not interested in conflict with the Centre. The complainant had not fulfilled his obligations under the offer. He had violated Staff Regulation 1.4. In particular, he had contacted the media and made public adverse allegations against the ICGEB. The Director-General informed the complainant that he could further appeal the decision by personally submitting an appeal addressed to the "Chairperson" of the Joint Appeals Board within 60 days of the date of receipt of his letter. That is the impugned decision.

Meanwhile, an Administrative Circular also dated 20 September 2007 informed ICGEB staff members that two staff representatives had been elected to the Board. On 24 September the complainant sent an e-mail to the Director-General requesting the name of the Chairman of the Board and its composition. The Director-General replied on the same day, stating that the Board was being constituted for the first time and that the Chairman would be elected by members of the Board at their first meeting. He assured the complainant that he could address his appeal generically to the "chairman". By an Administrative Circular dated 1 October 2007 staff members were informed of the composition of the Board.

B. The complainant argues that his cause of action first arose on 20 June 2007 and that it was revived on 23 July, 20 September and finally on 24 September when he enquired in an e-mail to the Director-General about the constitution of the Joint Appeals Board.

He asserts that because the Joint Appeals Board was being constituted for the first time, there was no appellate body to examine his grievances. According to him, the ICGEB was clearly taking no steps to expedite the convening of the Board, and he had no remedy except to file his second complaint directly with the Tribunal in order to avoid wasting time. In addition, he objects to the composition of the Board arguing that no Chairman had been appointed at the time when he filed his complaint and that the Director-General displayed bias by nominating two staff members who had stood unsuccessfully for election as staff representatives on the Board.

On the merits he submits that the refusal to pay the second instalment is a breach of contract and that the Centre has acted in bad faith and in violation of the principles of natural justice. The refusal was clearly intended to pressure him into withdrawing his first complaint to the Tribunal. He also submits that he signed the offer after receiving on 7 September 2006 the assurance from the Director-General that it was not a settlement of the matter. He did not waive his right under the Staff Rules and Regulations to file a complaint. The complainant asserts that he has never violated his duty of discretion under Staff Regulation 1.4 and he disputes the Centre's allegation that he took his grievances to the media.

He asks the Tribunal to set aside the "decision of 20 June 2006" and to order the Centre to pay him 32,412 United States dollars, representing the second instalment of the offer. He also asks for an additional 20 per cent of this amount to offset the depreciation of the dollar, and interest at 24 per cent per annum for the delay in remittance of the second instalment. He claims damages in the amount of 100,000 dollars for "harassment, humiliation and mental agony" and 20,000 dollars in costs.

C. In its reply the ICGEB submits that the complaint is not receivable under Article VII of the Tribunal's Statute. The complainant did not pursue the internal appeal process as he was required to do pursuant to Staff Rule 12.02. The Centre points out that

this is the second time he has brought claims directly to the Tribunal, the first time being by the further submissions he filed in his first complaint.

The ICGEB states that it formally started the process of constituting a Joint Appeals Board, including staff elections, on 28 August 2007, the same day that the complainant wrote to acknowledge that the Centre was treating his letter of 23 July as a request for review of an administrative decision. He was twice advised that he could file an appeal by addressing it generically to the “Chairperson” of the Board and his argument that he could not do so without knowing the name of the Chairman is unfounded. The members of the Board and its Secretary were appointed by 28 September 2007 and staff members were informed of this on 1 October. The complainant filed the present complaint with the Tribunal on 20 October 2007, one month prior to the deadline for filing his appeal with the Board. The Centre argues that his attempts to appeal directly to the Tribunal are evidence of his reluctance to submit the matter to a Board comprised of four of his former colleagues. In addition, it characterises his allegations of bias regarding the Director-General’s nominees to the Board as defamatory, unsupported and unjustified.

Subsidiarily, the ICGEB asserts that the offer was not a contract. It was a letter “memorializing” the Director-General’s offer of a gift of a goodwill payment. The offer was based on an understanding, which the Director-General relied upon and the complainant agreed to, that the complainant would not challenge the decision not to renew his contract. The latter gave repeated assurances that he had no intention of pursuing a grievance with the Centre nor did he intend to become adversarial. He agreed that he would not take any other actions which the ICGEB might reasonably deem to be contrary to its interests or that would adversely affect it. It is also based on this understanding that the Director-General renewed the offer to him after it had lapsed. By filing his first complaint with the Tribunal, which included a claim based on the non-renewal of his contract and defamatory charges of

serious misconduct against the Centre, and by breaching his duty of discretion by disclosing these charges to the media, the complainant acted contrary to the understandings upon which the offer was based. Accordingly, the Director-General no longer had a duty to fulfil the offer.

D. In his rejoinder the complainant develops his pleas and rebuts the defendant's arguments. He contends that his complaint is receivable in the absence of any internal appeal body within the ICGEB, and he notes that in Judgment 2707 the Tribunal held that, strictly speaking, the Joint Appeals Board should have been constituted in September 2006. The Centre's instruction to address his appeal to the Chairman was an attempt to harass, humiliate and victimise him. The offer was made in recognition of his 17 years of dedicated service and constituted a binding contract. He did not waive his right to file a complaint before the Tribunal by accepting it, nor did he violate any of its terms. He further argues that the Centre should be ordered to pay exemplary damages for its *mala fides* conduct in breaching its contractual obligations.

E. In its surrejoinder the ICGEB maintains its position in full. It emphasises that the complainant began the internal appeal process with its assistance but he did not submit a written appeal, as required under the Staff Rules. At the time he filed his complaint with the Tribunal he was able to pursue an internal appeal and there had been no undue delay. The Joint Appeals Board was constituted on 28 September 2007 and the fact that its Chairman was not nominated until a later date is of no consequence.

CONSIDERATIONS

1. The complainant is a former staff member of the ICGEB who was separated from service in the circumstances set out in Judgment 2707. On 13 September 2006 he accepted an offer of payment of 18 months' net salary "in acknowledgement of the

17 years of service” he had dedicated to the Centre. Under the terms of the agreement, half of the amount, namely 32,412 United States dollars, was to be transferred to his bank account on 30 September 2006, when his contract expired, and the other half on 30 June 2007. The first instalment was paid but the second was not.

2. On 20 June 2007 the Director of Administration and External Relations informed the complainant that it had been decided not to pay the second instalment for reasons that included “breaches of the continuing duty of discretion under ICGEB Staff Regulation 1.4”. The complainant contested that decision by a letter dated 23 July 2007, which called upon the ICGEB, if it wished to maintain its decision, to establish a Joint Appeals Board “at the earliest” and to indicate its constitution within 15 days. The same Director informed the complainant by letter dated 24 August 2007 that the letter of 23 July would be considered as a request for administrative review, if he so wished, and attached a copy of Staff Rules 12.01 and 12.02 containing the relevant appeal provisions.

3. Having treated the letter of 23 July 2007 as a request for review, the Director-General advised the complainant on 20 September that he confirmed the decision of 20 June. By the same letter, he also advised him that he had 60 days within which to lodge an internal appeal and that it should be addressed to the “Chairperson” of the Joint Appeals Board. The same day, action was taken to constitute the Board, the members and Secretary of which were announced on 1 October 2007.

4. The complainant sent an e-mail to the Director-General on 24 September requesting “details of the recently constituted Joint Appeals Board [...] and the name of the chairman”. He added that he could not “address [his] appeal to the chairman when the chairman ha[d] not yet been appointed”. The Director-General replied the same day stating that the Joint Appeals Board was being constituted for the first time and that the Chairman would be elected at its first meeting.

He assured the complainant that an appeal addressed to the Chairman would be distributed to all members of the Board. Instead of following the course indicated by the Director-General, the complainant filed a complaint with the Tribunal on 20 October 2007, challenging the decision dated 20 September 2007 and seeking the quashing of the decision of 20 June 2006, the latter clearly being a reference to the decision of 20 June 2007.

5. Article VII of the Tribunal's Statute provides that a complaint is not receivable "unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open [...] under the applicable Staff Regulations". The complainant contends that he was entitled to bring his complaint straight to the Tribunal because he "ha[d] no other remedy available". In this regard, he refers to the "non-existence of the Chairman [...] and rules and procedure for [the Joint Appeals Board]". Contrary to what he had been told by the Director-General on 24 September 2007 and contrary, also, to the documents attached to his complaint, he contends that the ICGEB was "taking no steps to expedite the formation of [the Board] and its procedure to receive a Complaint or an Appeal".

6. The Tribunal's case law allows that, in exceptional circumstances, a complainant may proceed directly to the Tribunal: if, for example, an international organisation has failed to provide internal means of redress (see Judgments 873, under 1 and 2, and 1660, under 7 and 8) or the appeals body cannot or will not give a decision within a reasonable time (see Judgments 408, under 1, and 1243, under 16). The question whether a complainant may proceed directly to the Tribunal is necessarily to be determined by reference to circumstances as they exist at the time of filing the complaint.

7. As at 20 October 2007, the date on which the complaint was filed, a Joint Appeals Board had been constituted in accordance with the Staff Rules. The complainant had already been given all information then necessary to file an internal appeal. The fact that

the Board had not then chosen a Chairman is irrelevant. There is no reason to suppose that, if an appeal had been lodged, a Chairman would not have been chosen by the time it came to consider the appeal. Moreover, so long as the Board observed due process – a question to be determined, if necessary, by complaint to the Tribunal – it was not necessary for it to have established rules. Nor is there any reason to suppose that procedural issues, if they arose, would not have been resolved by direction as and when necessary.

8. The complainant unreasonably assumed that his internal appeal could not or would not be dealt with expeditiously by the Joint Appeals Board and, thus, took no steps to lodge an appeal. In these circumstances, there is no merit in his argument that he was entitled to proceed directly to the Tribunal. The complaint is irreceivable.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet