*Registry's translation,
the French text alone
being authoritative.*

112th Session **Judgment No. 3068**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. K. against the Technical Centre for Agricultural and Rural Cooperation (CTA) on 13 January 2010 and corrected on 17 February, the Centre's reply of 14 May, corrected on 2 September, the complainant's rejoinder of 12 October and the CTA's surrejoinder of 9 December 2010;

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 Cameroonian national born in 1972, joined the CTA on 15 April 2009 as a programme and computer systems coordinator. His appointment for an indefinite period of time was subject to the satisfactory completion of an initial trial period of six months' duration.

Three meetings were held on 15 July 2009. The first, which the complainant attended, was a meeting to present new software. The second, which was convened at the request of the Director of the CTA,

was not attended by the complainant. Its purpose was to take stock of his performance and to prepare for the third meeting. During the latter, the complainant was informed that, in the wake of a technical incident on 13 July, the Director had expressed doubts about his professional capabilities. He was also asked to provide a progress report for the period April-June 2009. On 17 July the complainant submitted a report covering the period April to mid-July 2009, and on 4 August he submitted another covering the second half of July. On 6 August he had an interview with the Head of the Administration and Human Resources Department during which his professional conduct was discussed. The latter made a record of their talks in a "note for the file" which mentioned "[p]rofessional shortcomings" and an "inability to communicate". On the following day the Director of the Centre informed the complainant orally that he had decided to terminate his contract with immediate effect, as his service since the beginning of his appointment had been deemed unsatisfactory.

On 7 September 2009, relying on Article 66 of the Staff Regulations of the CTA, the complainant sent the Director "an appeal requesting the cancellation" of the decision to dismiss him, which he considered to be "entirely unfounded", and asking the Director to send him a copy of the decision, which he had not yet received. By a letter of 14 September the Head of the Administration and Human Resources Department replied that the Centre had taken due note of the complainant's letter of 7 September and reminded him that on 13 August he had signed a final account statement. He appended to this letter the decision in question, dated 7 August 2009, in which the Director informed the complainant that his trial period was being ended with "immediate departure". It was stated that this decision was based inter alia on the Staff Regulations of the CTA, the interviews which the complainant had had with the head of the above-mentioned department, especially on 6 August, and the unsatisfactory nature of his service.

On 29 September the complainant wrote to the ACP-EC Committee of Ambassadors to request a "preliminary attempt at conciliation" in his dispute with the Centre regarding the termination of his employment contract. Having received no reply to this request,

on 20 November 2009 he sent a letter to the Chairman of the Executive Board of the Centre, entitled "Appeal requesting the cancellation of the CTA's decision". In this letter, he not only stated that he sought conciliation, but also requested the cancellation of the decision of 7 August and his reinstatement.

By a letter of 8 February 2010 the Director informed the complainant that there was no reason to entertain his appeal of 20 November 2009, because the Executive Board was not a judicial body and because, even if the letter of 20 November were to be regarded as a request for the appointment of a conciliator, it would be "inadmissible" as the complainant had not previously lodged an internal complaint within the meaning of Article 66(2).

In his complaint form the complainant states that he is challenging the implied decision to reject his request of 20 November 2009.

B. The complainant considers, first, that the Centre did not comply with Article 24(2) and (3) of the Staff Regulations, because he was not notified, at once and in writing, of the decision to dismiss him and the decision does not rest on any genuine and sufficient grounds. He asserts that he was never informed about any targets and therefore of the criteria for assessing his performance and that, during his trial period, he received no warning that his service was unsatisfactory or that he might lose his job, nor any assessment report. He also complains that his right to be heard was not respected and that the Centre acted in breach of the Tribunal's case law and of general principles of law by failing to offer him a chance to improve. Moreover, he submits that his dismissal was wrongful since the Director – according to the explanations which he provided on 7 August 2009 – based his decision on information from persons who, in his view, were not in a position to judge his work.

Second, the complainant contends that the decision which was sent to him on 14 September 2009 had been backdated to 7 August 2009 and that the reasons it contains differ from those supplied by the Director at the meeting of 7 August 2009. In his opinion, this betrays the Centre's bad faith. He also states that the decision is based on documents and

facts which are incorrect, or which have been invented in an attempt to justify the decision to terminate his contract. Lastly, he submits that his dismissal undermined his dignity and damaged his professional reputation.

He requests the cancellation of the impugned decision and his reinstatement, plus the payment of the salary and allowances which he considers are due to him since his dismissal. Failing this, he claims damages for material injury in an amount equivalent to five years' salary, allowances and benefits. He also claims various amounts in compensation, including 40,000 euros for the moral injury which he considers he has suffered, and costs in the amount of 5,000 euros.

C. In its reply the Centre contends that the complaint is irreceivable, because the complainant did not lodge an internal complaint against the dismissal decision of 7 August 2009, as he was required to do under Article 66(2) of the Staff Regulations. Although he described his letter of 7 September 2009 as "an appeal requesting the cancellation" of the decision, it did not constitute a complaint within the meaning of Article 66. By directly requesting conciliation, the complainant "skipped" a pre-litigation phase and therefore failed to respect the requirements of Article 67 of the Staff Regulations.

On the merits and subsidiarily, the Centre submits that the dismissal decision was in accordance with Article 24 of the Staff Regulations. Indeed, although there was some delay due to the summer holidays, a written version of this decision, summarising the grounds for dismissal which were explained in detail during the meeting of 7 August 2009, was sent to the complainant on 14 September 2009. The defendant adds that the decision in question, based on Article 35(a) of the Staff Regulations, is lawful. It holds that the complainant did not prove that he had the requisite qualifications for his post. Moreover, he received several warnings about the quality of his service. In addition, he had well-defined targets: his duties were

described in the job announcement for his post and two detailed lists of tasks were sent to him on 27 May and 10 June 2009. Lastly, the Centre maintains that the complainant's right to be heard has not been breached, because during the meetings of 6 and 7 August 2009 he had an opportunity to express his viewpoint on the "professional shortcomings and poor interpersonal skills" for which he was criticised. It also denies that it undermined his dignity.

The Centre asks that the complainant be ordered to pay it costs.

D. In his rejoinder the complainant asserts that his complaint is receivable, since his letter of 7 September 2009 was a complaint within the meaning of Article 66 of the Staff Regulations. As the CTA had not replied within the two-month time limit laid down in paragraph 2 of that article, he was entitled to consider that silence as an implied rejection and to file an appeal under Article 67.

On the merits, he states that his ability had never been questioned before the technical incident on 13 July 2009 and he maintains that he had "neither the means, nor the opportunity" to improve his performance. He contends that, in deciding to terminate his contract during his trial period, the Director breached Article 29 of the Staff Regulations, which, as he understands it, offered the Director this possibility only at the end of the said period.

E. In its surrejoinder the Centre maintains that the complaint is irreceivable and submits that Article 35(a) of the Staff Regulations authorises dismissal during a trial period subject to compliance with the conditions laid down in Article 29(2) of the Regulations.

CONSIDERATIONS

1. The complainant was recruited by the CTA as a programme and computer systems coordinator from 15 April 2009. His appointment for an indefinite period of time was subject to an initial trial period of six months' duration.

2. His superiors found from the first weeks of his employment by the Centre that his performance did not meet the requirements of his post.

3. As in the Centre's opinion the efforts made to remedy this situation had proved fruitless, the Head of the Administration and Human Resources Department emphasised, in a "note for the file" drawn up on 6 August 2009 with a view to assessing the complainant's merit at the end of the first half of his trial period, that he displayed "[p]rofessional shortcomings" and an "inability to communicate".

4. On 7 August the complainant was called to a meeting with the Director of the Centre, during which the latter announced that he had decided to cut short the complainant's trial period and therefore to terminate his appointment as from that same day.

5. The complainant then sought to challenge this decision through the internal appeal procedures provided for in Articles 66 and 67 of the Staff Regulations of the CTA. The provisions in question establish two successive procedures which the staff member must use before referring a case to the Tribunal. Under Article 66(2) staff members who intend to challenge a decision adversely affecting them must submit a "complaint" to the Director of the Centre within a period of two months. A "complaint" is defined as "a written document requesting that an amicable solution be found to the dispute in question". In the event of a decision rejecting the complaint, which may be implied where the Director has not notified his decision to the staff member concerned within a period of two months, Article 67 provides that a conciliation procedure must be initiated in accordance with the provisions of Annex IV to the Staff Regulations. Pursuant to Article 4(3) of this annex, the staff member must then send the Executive Board a request for the appointment of a conciliator, whom the Board must appoint within 45 days. The conciliator thus appointed must propose the terms of a "just and objective settlement of the dispute" after examining the written submissions of both parties, in

accordance with the procedure laid down in Article 4 and after "a fair hearing of […] the parties", each of whom "may be represented or assisted by an agent of his choice".

6. On 7 September 2009 the complainant sent the Director of the Centre a letter in order to lodge an "appeal requesting the cancellation of the decision to dismiss [him]" of 7 August 2009, "under Article 66 of the Staff Regulations of the CTA", on the grounds that this decision "appear[ed] to [him] to be utterly unfounded". As he had not yet received the written version of this decision, he also requested that it be sent to him.

7. On 14 September the Head of the Administration and Human Resources Department replied – without expressly stating an opinion on whether the appeal was well founded, but implying that he regarded it as groundless – that the Centre had "take[n] due note of the content of [the complainant's] letter of 7 September". He enclosed a copy of the written version of the decision of 7 August.

8. On 20 November 2009, that is after the expiry of the two-month time limit following the lodging of a complaint mentioned in Article 66(2) of the Staff Regulations, the complainant, acting on the basis of Article 67 and of Annex IV, sent the Executive Board a letter aimed at having his dispute with the Centre resolved by conciliation. Although it was not expressly presented as such, this letter was plainly a request for the appointment of a conciliator, formulated on the basis of Article 4(3) of the annex. It should be noted that this step had been preceded by the sending on 29 September 2009 of a letter having the same purpose, which had wrongly been addressed to the ACP-EC Committee of Ambassadors, which did not have the authority to entertain such a request. Although this earlier letter was premature in view of the above-mentioned time limit, as a matter of principle the Centre ought to have regarded it as a request to refer the matter to the Executive Board and ought therefore to have forwarded it to that body. However, as this issue has no influence on the outcome of the dispute, in order to simplify matters the Tribunal will treat the request

submitted by the complainant on 20 November 2009 as that to which reference must be made here.

9. Since no conciliator was appointed by the Executive Board within the 45-day period stipulated in Article 4(3) of Annex IV, on 13 January 2010 the complainant filed a complaint with the Tribunal, challenging the implied decision to reject his request for the opening of a conciliation procedure.

10. By a letter of 8 February 2010 the Director of the CTA informed the complainant that he "consider[ed] that there [was] no reason to grant [his] request for conciliation". In his opinion, this request was in fact "inadmissible" because the complainant "ha[d] not [previously] lodged a complaint within the meaning of Article 66(2)" of the Staff Regulations of the CTA. In view of this express rejection in the course of the proceedings, which has thus replaced the implied decision initially impugned before the Tribunal, the present complaint should be deemed to be directed against this new decision.

11. The complainant seeks the setting aside of the decision in question and also asks the Tribunal to order his reinstatement in his post or, failing this, to order the Centre to pay him a sum equivalent to five years' pay by way of material damages. He also claims various amounts in compensation, including 40,000 euros for moral injury.

12. The Centre argues that the complaint is irreceivable. It develops the reasoning set out in its letter of 8 February 2010 by submitting that, as the complainant did not, in its opinion, file an internal complaint against the decision of 7 August 2009, and as he could not therefore request the opening of a conciliation procedure, he did not exhaust the internal means of redress available to CTA staff. The Centre infers from this that the present complaint is irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal.

13. The Tribunal will not, however, accept this argument.

14. In support of its contention that the letter of 7 September 2009 did not constitute a complaint within the meaning of Article 66(2) of the Staff Regulations, the Centre submits that the complainant, who indicated in that letter that he was lodging "an appeal requesting the cancellation" of the disputed decision, did not put forward any legal or factual argument to underpin his challenge.

15. However, neither the fact that the complainant employed the word "appeal" instead of the correct term "complaint" which appears in Article 66, nor the fact that he stated that this appeal sought the "cancellation" of the said decision, whereas the wording of this article refers more broadly to finding an "amicable solution", prevents the characterisation of the letter in question as a complaint, particularly because the complainant had taken care to state explicitly in this letter that he wished to avail himself of the provisions of Article 66 and had sent the letter to the Director of the Centre, who was the competent authority for examining the complaint.

16. Moreover, the fact that only very brief grounds were set out in the complaint in question did not entitle the authority to which it had been submitted to refuse to treat it as such, nor did it render the complaint inadmissible. Contrary to the CTA's submissions, there is no general rule of procedure which requires internal appeals submitted by the staff of international organisations to be formally accompanied by an explicit statement of legal or factual grounds. According to the Tribunal's case law, for a letter addressed to an organisation to constitute an appeal, it is sufficient that the person concerned clearly expresses therein his or her intention to challenge the decision adversely affecting him or her and that the request thus formulated can be granted in some meaningful way (see Judgments 461, under 3, 1172, under 7, and 2572, under 9). The grounds for such appeals therefore have to be stated only when the provisions of the staff rules and regulations governing them expressly require this. Article 66(2) of the Staff Regulations of the CTA states only that a complaint submitted by a staff member must take the form of a "written document"; it does not stipulate that the staff member concerned must

specify the legal or factual grounds on which he or she intends to rely. In addition, the statement in the complainant's letter that he considered the decision to terminate his appointment to be "utterly unfounded" did in fact give the Centre enough information for it to be able to grasp the substance of his complaint, bearing in mind the nature of and reasons behind that decision. It was clear that, in essence, the complainant thus meant to call into question the assessment of his professional merit during his trial period. In any case, if the Centre felt that the complaint did not contain sufficient details for it to be able to examine the complaint and, as it says in its written submissions, to explain properly the reasons for its rejection, it was up to the Centre to ask the complainant for additional information.

17. Nor is there any merit in the Centre's argument that the complainant ought to have filed a new complaint after he had received the written version of the decision of 7 August 2009. As he had not received that decision by 7 September, the complainant had challenged it on the sole basis of the oral communication thereof, and he was by no means obliged to lodge a second complaint against it once he had taken cognizance of the written version. Indeed, it is singularly inappropriate that the Centre should rely on this argument since, under Article 24(2) of the Staff Regulations, it has to communicate in writing any decision relating to a specific individual "at once" and, in this case, it failed to honour this obligation. Moreover, the Tribunal notes that the reason put forward by the defendant to explain this failure, namely the slackening of the Centre's activity over the summer holidays, cannot be regarded as valid in view of the gravity for a staff member of having his or her appointment terminated and the fact that, in this case, there was nothing which obliged the CTA to take this decision – before the complainant had even completed his trial period – during the holiday period.

18. It follows that the complainant did lodge an internal complaint against the decision of 7 August 2009 and that this complaint was undeniably admissible. Although the letter of 14 September 2009 – which, moreover, did not come from the Director

himself, who was the only authority competent to issue a decision on such a complaint – did not constitute a formal reply, the complaint was in any case implicitly rejected upon the expiry of the two-month period provided for in Article 66(2) of the Staff Regulations. The impugned decision of 8 February 2010 therefore wrongly rejected as "inadmissible" the complainant's request for the appointment of a conciliator. The same conclusion would have been reached even if the complaint of 7 September 2009 had itself been inadmissible since, pursuant to Article 67 of the Staff Regulations and Annex IV thereto, a conciliation procedure may be initiated whenever a complaint submitted within the requisite time limit is rejected, irrespective of the grounds for its rejection. In addition, the Tribunal notes that the decision of 8 February 2010 was not taken by the competent authority since, according to Article 4(3) of the above-mentioned annex, it was up to the Executive Board and not the Director of the Centre to decide on the request to appoint a conciliator.

19. The foregoing considerations lead the Tribunal not only to dismiss the Centre's objection to receivability and to find that the impugned decision was unlawful, but also to note that the complainant has been unduly deprived of the benefit of the conciliation procedure for which provision is made in the Staff Regulations of the CTA.

20. It should be recalled that, as the Tribunal's case law has long emphasised, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. Consequently, save in cases where the staff member concerned forgoes the lodging of an internal appeal, an official should not in principle be denied the possibility of having the decision which he or she challenges effectively reviewed by the competent appeal body (see, for example, on this point, Judgment 2781, under 15).

21. Hence, when it appears that a complainant has been unlawfully denied the benefit of his or her right to an internal appeal, the Tribunal often decides – in some instances on its own initiative – to

refer the case back to the organisation rather than examine its merits. A further consideration justifying this solution is that it is, of course, quite possible that a review of the impugned decision by internal appeal bodies will suffice to settle the dispute definitively. The Tribunal has already had occasion to refer cases back to an organisation, with a view to their being submitted to the competent appeal body, in a variety of circumstances similar to those of the instant case. In one case, the executive head of an organisation had not forwarded to the appeal body an appeal which he had misinterpreted (see Judgment 1007); in another, an appeal lodged with the competent body had wrongly been dismissed as being time-barred (see the above-mentioned Judgment 2781). This course of action is also frequently taken in cases where, even though a complainant's internal appeal has been examined by the competent body, the Tribunal finds that this did not occur under satisfactory conditions, because not all the evidence was borne in mind, for example, or because of a procedural flaw, and it is therefore desirable that the matter should be resubmitted to the appeal body (see, for example, Judgments 999, 2341, 2370, 2424 or 2530).

22. In the present case, the need for such referral is highlighted by the fact that, in view of the nature of the challenge raised by the complainant and the characteristics of the internal appeal procedure which would normally have been available to him, a complaint filed with the Tribunal does not offer him the possibility of such an extensive review of the impugned decision as would be provided by the said procedure.

23. Indeed, the crux of this dispute lies in the complainant's challenging of the assessment of his performance during his trial period, which led to the termination of his appointment. However, according to firm precedent, the Tribunal exercises only a limited power of review over such a decision. This decision will therefore be set aside, inter alia, if it was taken in breach of some rule of form or procedure, if it rests on a mistake of fact or of law, or if it stems from an abuse of authority (see, for example, Judgments 987,

under 2, 1817, under 5, or 2715, under 5). But so far as concerns the assessment of an official's merits, unless the Tribunal finds that clearly wrong conclusions have been drawn from the evidence, it will not substitute its own opinion for that of the executive head of the organisation. In an internal appeal procedure, especially in a conciliation procedure such as that for which provision is made in this case, there is on the contrary nothing to prevent a complainant from challenging the performance assessment and perhaps even obtaining a different one.

24. Furthermore, the very purpose of a conciliation procedure, which is to endeavour to resolve a dispute between the parties amicably, implies that the conciliator may have to take account of considerations of fairness or advisability. In this respect, such a procedure is fundamentally different from proceedings before the Tribunal, whose task is plainly not to explore possible settlements between the parties and which essentially gives a ruling in law. Thus, the internal appeal available to the complainant potentially offers him, for the same reason, greater advantages than those which he may expect to receive in proceedings before a judicial body.

25. It follows that the decision of the Director of the CTA of 8 February 2010 must be set aside and that the Tribunal will refer the case back to the Centre in order that the conciliation procedure for which provision is made in Article 67 of the Staff Regulations and in Annex IV thereto may be held. For the purpose of applying Article 4 of the annex, the request for the appointment of a conciliator, to which reference is made in paragraph 3, shall be that submitted on 20 November 2009, so that the complainant need not repeat this step, and the 45-day period within which the Executive Board must make this appointment, under the terms of the same paragraph, shall begin on the date on which this judgment is delivered.

26. The unjustified refusal to hold this conciliation procedure after the submission of the request of 20 November 2009 has delayed the final settlement of this dispute, no matter what solution may be

found to it in due course. This decision has therefore itself caused the complainant injury for which fair redress may be given by ordering the Centre to pay him compensation in the amount of 2,000 euros.

27. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 1,000 euros.

28. The CTA submitted a counterclaim that the complainant should be ordered to pay it costs. It is plain from the foregoing that this counterclaim must be dismissed.

DECISION

For the above reasons,

1. The decision of the Director of the CTA of 8 February 2010 rejecting the complainant's request for the appointment of a conciliator is set aside.
2. The case is referred back to the CTA in order that a conciliation procedure may be held as indicated under 25, above.
3. The Centre shall pay the complainant 2,000 euros as compensation for the injury caused by the delay in finally settling the case.
4. It shall also pay him costs in the amount of 1,000 euros.
5. The complainant's other claims are dismissed, as is the Centre's counterclaim.

In witness of this judgment, adopted on 10 November 2011, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet