Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3131**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Miss A. P. against the World Trade Organization (WTO) on 16 March 2010 and corrected on 23 April, the Organization's reply of 27 May, the complainant's rejoinder of 1 September and the WTO's surrejoinder of 5 October 2010;

Considering Article II, paragraph 5, 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 relevant to this case are set out in Judgment 3010 delivered on 6 July 2011 on the complainant's first complaint. Suffice it to recall that from May 1995 the complainant, who had been employed for three years by the Joint Medical Service of the United Nations, which was administered by the World Health Organization (WHO), worked as a nurse of the WTO Medical Service while she was still employed under a five-year contract with WHO, which was due to expire on 31 May 2006. Having decided to separate from the Joint Medical Service and to form its own Medical Service in January 2004,

the WTO employed her under a two-year fixed-term contract beginning on 1 March 2006.

The complainant's performance evaluation reports for 2006 and 2007 revealed that she "[did] not fully meet performance requirements". Having been informed by a memorandum of 29 February 2008 that her contract would be renewed for one year only, she wrote to the Director-General challenging that decision, and then filed an appeal with the Joint Appeals Board. On 26 November 2008 she was informed that, owing to the restructuring of the Medical Service, her post was being abolished, and her contract would not be renewed beyond its expiration date of 28 February 2009. By a memorandum of 18 February 2009 the Director-General informed her that on the basis of the Board's recommendation on her appeal he had decided to replace her last contract by a two-year contract ending on 28 February 2010. In view of the abolition of her post and the impossibility of deploying her elsewhere, her termination would take effect on 31 May 2009. As the restructured Medical Service was to become operational on 1 March 2009, he had also decided to pay the complainant an indemnity in lieu of notice. She would also receive a termination indemnity in accordance with Staff Rule 111.8.

On 20 March, in a memorandum addressed to the Director-General, the complainant deplored the fact that according to the table in Annex 4 to the WTO Staff Rules her termination indemnity, which was equivalent to nine weeks' net salary, corresponded to a period of service of less than six years. Referring to the language used in Staff Rule 111.8(b), she asserted that she had been in "continuous service with the WTO in pay status" for 14 years since, again according to that Rule, length of service applied "regardless of type of contract". For that reason, she considered that she was entitled to a termination indemnity equivalent to eleven and a half months' net salary. She also pointed out that she had not received the separation grant provided for in Staff Regulation 10.7. In a letter dated 20 April she was informed that the Director-General considered that the amount of her termination indemnity had been calculated correctly, given that she had been employed by the WTO for only three years. He therefore

took the view that the condition set down in Staff Regulation 10.7(b) for the payment of a separation grant, namely separation upon completion of a minimum of ten years of service, had not been fulfilled.

The case was taken to the Joint Appeals Board, which issued its report on 27 November, recommending by a majority that the decision of 20 April should be maintained. However, in a dissenting opinion one member of the Board, in consideration of "all the particular circumstances of the case", recommended that the Administration should pay the complainant "additional monetary compensation […] on the basis of the principle of equity". The complainant impugns the final decision of the Director-General, dated 15 December 2009, confirming the decision of 20 April 2009.

B. The complainant takes the view that as she was a staff member of the Joint Medical Service of the United Nations assigned to the WTO, when the WTO proposed employing her she should have been treated no differently from the staff members of the Interim Commission of the International Trade Organization (the ICITO) when that body ceased to exist and the Secretariat of the WTO was set up on 31 December 1998, given that her factual and legal situation was the same as theirs. However, in calculating the indemnities due to her, the WTO had not taken into account the full duration of her employment, on the basis of which she claims that she was the victim of completely unwarranted discrimination. She also contends that a number of documents showed, if not an express intention on the part of the WTO to ensure the continued employment of the staff of the Joint Medical Service of the United Nations assigned to the WTO by "reassigning" or "transferring" them to the Medical Service of the WTO, at least that the matter was left in doubt, resulting in a misunderstanding on her part. It is regrettable, in her opinion, that the WTO never warned her about this, and did not draw her attention to the fact that the Notice of Personnel Action dated 24 March 2006, which she received after signing her contract, specified that the date on which she began work, for the purpose of determining her contractual rights to indemnities, would be 1 March 2006.

The complainant also asserts that the purpose of Staff Rule 111.8(b) is to make clear that it is the total effective period of a staff member's service which should be taken into account in calculating the termination indemnity. By adopting a "restrictive and artificial" interpretation of that paragraph, the WTO treated her in an especially inequitable manner, failing to take into account the "unique circumstances of [her] case". She argues that the most appropriate interpretation would have been that she was continuously employed and paid by the WTO for 14 years. In these circumstances, she contends that she is entitled to a termination indemnity equivalent to eleven and a half months' net salary, and a separation grant equivalent to one month's net salary, in accordance with Annex 5 to the Staff Rules. Referring to the dissenting opinion by one member of the Joint Appeals Board, she adds that were the Tribunal to find that the applicable provisions did not allow it to reach a decision, it could nevertheless "find in [her] favour on the basis of equity". Lastly, she points out that by paying her only about one sixth of the indemnities to which she was entitled, at a time when her situation was "especially vulnerable and difficult […] in financial terms", the WTO had caused her serious material injury.

The complainant requests the Tribunal to set aside the impugned decision, to fix the amount of her termination indemnity at eleven and a half months of net salary, and to order that she be paid a separation grant. Subsidiarily and "on the basis of equity", she asks it to order the WTO to pay her whatever sum it deems appropriate by way of "additional monetary compensation" for her termination of employment. She also seeks an award of damages for the injury she claims to have suffered, and 5,000 francs in costs.

C. In its reply the defendant states that the comparison drawn by the complainant with the staff of the ICITO is "untenable". The Secretariat of the WTO may well be, in legal terms, "the successor to the ICITO", however there was no legal link between the United Nations Joint Medical Service, "an organ of the WHO", and the Medical Service of the WTO. Concerning the circumstances

in which the complainant signed her contract with the WTO, the defendant submits that it cannot be accused of failing in its duty of care towards her, but rather, that the complainant herself had been negligent, because she did not pay due attention to the Notice of Personnel Action of 24 March 2006.

The defendant also points out that the Statute and Rules of the Tribunal do not expressly provide for it to reach a decision *ex aequo et bono*, and observes that in its Judgment 14 the Tribunal had ruled that "the judge is bound to observe strictly the rules of law and can have recourse to equity only in the event of lack of clarity of the text or silence of the regulations". However, it asserts that Staff Rule 111.8(b) is not in any way obscure, and that in this case it was interpreted according to its terms. It maintains that, as the complainant became a staff member of the WTO only on 1 March 2006, there has been no error in calculating her termination indemnity, and she is not entitled to a separation grant.

D. In her rejoinder the complainant reiterates her arguments, emphasising that a number of communications from the WTO led her to believe that she would be transferred under the same conditions as staff members of the ICITO.

E. In its surrejoinder the defendant maintains its position, arguing that the complainant is alleging wrongful conduct by the WTO to conceal her own want of diligence, in the hope of financial gain.

CONSIDERATIONS

1. The complainant, who was employed by the United Nations Joint Medical Service administered by WHO, had been working for the WTO Medical Service as a nurse since May 1995. When the WTO decided to separate from the Joint Medical Service and to form its own Medical Service from 1 January 2004, she accepted the offer made to her to continue working in the new service. However, under an agreement between the two organisations which remained in force

until 28 February 2006, the complainant remained provisionally in the employ of WHO, her services being made available to the WTO against reimbursement of her salary. From 1 March 2006 she was employed by the WTO under a two-year fixed-term contract.

2. Soon after the establishment of the new Medical Service, differences of opinion arose between the complainant and her first-level supervisor, Dr M. The deteriorating relationship between them is the source of allegations by the complainant of harassment, in another suit now pending before the Tribunal.

3. On 29 February 2008 the complainant was informed by the Director of the Human Resources Division that in the light of her performance evaluation reports in which Dr M. stated that her performance for the years 2006 and 2007 "did not fully meet performance requirements", her contract would be renewed for only one year, i.e. until 28 February 2009. She lodged an internal appeal against this decision on 15 April 2008.

4. In the meantime, the WTO had begun a review of the role and structure of the Medical Service, based on the recommendations of its own Joint Advisory Committee and an audit entrusted to an expert from the *Hôpitaux Universitaires de Genève*. This review resulted in a thorough restructuring of the Medical Service with effect from 1 March 2009, which resulted inter alia in the abolition of the complainant's post.

5. On 18 February 2009 the Director-General made a decision on the appeal lodged by the complainant against the above-mentioned decision of 29 February 2008. In conformity with the recommendation of the Joint Appeals Board, which had found that the performance evaluation reports for 2006 and 2007 were vitiated by procedural errors, he set aside the decision and extended the complainant's contract to two years. However, bearing in mind that her post was to be abolished and that it would be impossible to redeploy her within

the Organization, he also told her that her employment would be terminated with effect from 31 May 2009. Given that the complainant was being paid an indemnity in lieu of the three months' notice which would normally apply, the consequence would be the same as under the previous decision, and her employment would come to an end on 28 February 2009. In her first complaint before the Tribunal, the complainant impugned this new decision.

6. In accordance with both Staff Regulations 10.3(a) and 10.6, the termination would result in the complainant being paid the termination indemnity governed by Staff Rule 111.8. This indemnity was calculated on the basis that the complainant had been employed by the WTO from 1 March 2006 to 28 February 2009, that is, for three years. The amount of the indemnity was accordingly fixed, by reference to Annex 4 of the Staff Rules, at nine weeks of net salary.

7. On 20 March 2009 the complainant requested the Director-General to reconsider the amount of her termination indemnity, and also to pay her a separation grant under Staff Regulation 10.7(b). In her view, the length of service taken into consideration for determining her entitlement to the indemnities in question should have included the previous period during which she had worked at the WTO for the United Nations Joint Medical Service, which would bring the duration of service up to 14 years. As a result, according to the rates set for the termination indemnity the amount of her indemnity should have been the equivalent of eleven and a half months' net salary. Moreover, having more than ten years' service, she would be entitled to a separation grant equivalent to one month's additional net salary.

8. On 20 April her request for reconsideration was dismissed, and the case was subsequently brought to the Joint Appeals Board. In its report, dated 27 November, the Board recommended by a majority that the contested decision should be maintained. On 15 December 2009, in accordance with that recommendation, the Director-General dismissed the complainant's internal appeal.

9. This is the decision now impugned before the Tribunal. The complainant requests the Tribunal to set it aside and also to order payment to her of an additional amount of termination indemnity, as well as a separation grant, in the amounts stated above. Relying on the dissenting opinion of one member of the Joint Appeals Board, she makes a subsidiary claim for an equitable award of "additional monetary compensation" in the light of her personal circumstances. Lastly, she seeks an award of damages for the injury she claims to have suffered, and costs.

10. The Tribunal, however, notes that in its Judgment 3010 delivered on 6 July 2011 it has, in the meantime, ruled on the complainant's first complaint seeking that the termination decision of 18 February 2009 be quashed. While rejecting the complainant's submissions against the decision to abolish her post, and dismissing her arguments on various other points, it decided to set aside the termination decision. It found that the decision was vitiated by the fact that there had been no proper prior consideration of the matter by the Appointment and Promotion Board, as required by Staff Regulation 10.8. Consequently, the Tribunal ordered the WTO to pay the complainant the salary and other benefits she would have received until the regular expiration of her contract, i.e. from 1 March 2009 to 28 February 2010, together with interest. From this amount, however, the payments already made by the Organization as an indemnity in lieu of notice and as a termination indemnity, as well as any net earnings of the complainant during that period, should be deducted. Lastly, it ordered the Organization to pay her moral damages in the amount of 15,000 Swiss francs, and costs in the amount of 6,000 francs.

11. This judgment, which was delivered after the parties to the present proceedings had made their final submissions, has the effect of overturning the facts in the case by depriving it of its main purpose.

12. As the termination decision of 18 February 2009 has been set aside, it cannot by definition produce any legal effects. It follows

that it would make no sense to increase the termination indemnity initially awarded to the complainant, or to order payment to her of a separation grant, nor would there be any legal basis for doing so. Moreover, by ordering payment to the complainant of the whole of the salary she would have received until the regular expiration of her contract, together with interest and moral damages, the Tribunal has fully restored her rights and, by so doing, has made a full determination of the monetary consequences of its decision to set aside the termination decision. It has also taken care to specify that the termination indemnity received by the complainant should be deducted from the salary payments due to her. Evidently, the same would apply to any additional sum awarded by way of this indemnity or as a separation grant, had she received these benefits.

13. It follows from the foregoing that the claims to set aside the impugned decision and to increase the amount of termination indemnity initially paid to the complainant and pay her a separation grant, are redundant.

14. The same finding must follow as concerns the complainant's subsidiary claims seeking the award, on grounds of equity, of "additional monetary compensation" if her entitlement to the benefits otherwise claimed were not upheld. As the complainant has been fully compensated for the consequences of her termination, this is no longer a cause of action.

15. Although the Tribunal is not therefore required to rule upon the lawfulness of the impugned decision, the complainant would nonetheless be able to claim damages if the decision had caused her some identifiable injury.

16. This would be the case, in particular, if she had been the victim of discrimination in relation to other staff members, as she claims to have been. But her arguments on this score, based on a comparison with the treatment given in the past to the staff members

of the ICITO, are irrelevant. It is not disputed that when these staff members were transferred to the Secretariat of the WTO, which replaced the ICITO on 1 January 1999, it was made clear that their employment status would be continuous as between one organisation and the next. However, the circumstances of the complainant's transfer in 2006 from the United Nations Joint Medical Service to the WTO were quite different, if only because the WTO cannot be regarded as the successor to that service. As the complainant was not therefore in the same legal and factual situation as these other staff members, she cannot invoke any violation in her case of the principle of equal treatment.

17. The complainant could however claim damages if, as she also contends, the Organization had failed in its duty of care towards her by giving her to understand, before she was recruited, that her years of service in the Joint Medical Service would be counted as part of her total length of service. But apart from the fact that the complainant, who was then not yet a staff member of the WTO, cannot plead this duty of care before the Tribunal, the written submissions do not show that the information she was given by the Organization was incorrect. Moreover, the Tribunal notes that the Notice of Personnel Action dated 24 March 2006, spelling out the terms of the complainant's employment, expressly stated that the date of beginning employment for the purpose of determining her indemnity entitlements under the contract was 1 March 2006. It was therefore for the complainant, if she considered herself justified in claiming continuity of employment from her previous post, to challenge that decision within the prescribed time limit.

18. Lastly, the complainant asserts that the refusal to grant her the additional sums she was claiming as termination indemnity and separation grant has caused her serious material injury at a time when she had lost most of her income because of her termination.

The Tribunal finds, however, that even if the refusal were unlawful, the complainant has not shown that it caused her any material injury distinct from that which has already been made good by Judgment 3010.

19. The complainant's claim for damages shall therefore be dismissed.

20. Although the other claims submitted in the complaint, which are largely redundant, are not upheld, the Tribunal considers that in the unusual circumstances of this case the complainant is entitled to costs. Given that her employment was terminated unlawfully, she was justified in seeking from the Tribunal some mitigation of the pecuniary consequences of this decision. Whatever the outcome may have been if the Tribunal had had cause to consider the totality of her arguments, to the extent that they cannot be regarded as blatantly vexatious, equity requires that, exceptionally, the complainant should be compensated for part of the costs of the present proceedings, by awarding her the amount of 1,000 Swiss francs.

DECISION

For the above reasons,

1. The Tribunal need not rule upon the claims in the complaint that the impugned decision be set aside and that the complainant be awarded an additional amount of termination indemnity, as well as a separation grant and "additional monetary compensation".
2. The WTO shall pay the complainant the amount of 1,000 Swiss francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 4 May 2012, 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 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet