

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session

Judgment No. 3238

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms M.-J. C., Ms P. D., Mr M. F., Ms C. G. and Ms D. K. against the Centre for the Development of Enterprise (CDE) on 12 January 2011 and corrected on 31 March, the Centre's reply of 4 July, the complainants' rejoinder of 22 September and the CDE's surrejoinder of 23 December 2011;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants joined the Centre for the Development of Industry, which later became the CDE, between 1978 and 1993. At the material time, they all held contracts for an indefinite period of time.

The CDE is an institution jointly administered by the African, Caribbean and Pacific Group of States (ACP) and the European Union (EU). In 2007 a study on the future of the Centre was conducted at the initiative of the European Commission. On the basis of the conclusions

of the study, a joint ACP-EU task force was set up to discuss, in particular, the reorganisation of the CDE. At the same time, the Centre produced a strategy document setting out new priorities for its work and drew up a budget for the year 2009 which included a planned staff reduction at Headquarters.

In June 2009 the ACP-EU Committee of Ambassadors adopted a revised budget proposal for 2009 which specifically concerned the Centre's "internal restructuring". The proposal made it plain that the purpose of the "budget amendments" was to pave the way for future operations to be largely decentralised to the Centre's regional offices and that only a "minimum complement" of core staff would be retained at Headquarters. The abolition of 18 posts was therefore proposed. In order to carry out this restructuring efficiently, the Centre decided to commission an organisational review from a firm of human resources consultants. The latter assessed each staff member's competencies in order "to obtain a clearer grasp of what [was] involved in the CDE's restructuring".

By letters of 2 December 2009 the Director of the Centre informed the complainants that, following an Executive Board meeting on the restructuring of the CDE, which had been held on that same date, their posts had been abolished. As they were exempted from having to serve a period of notice, they received compensation for redundancy in accordance with Article 34 of the Staff Regulations of the CDE. On 27 January 2010 the complainants jointly submitted an internal complaint, under Article 66(2) of the Regulations, in which they contended that the procedure leading to their dismissal was tainted with flaws. In particular, they denounced a lack of transparency and they asked to be sent a copy of all the documents related to their personal skills assessment and those related to the Centre's restructuring. On 26 March the Director ad interim replied that their internal complaint was unfounded and that the decisions to make them redundant therefore stood. On 12 May the complainants requested the opening of a conciliation procedure under Article 67(1) of the Staff Regulations and Annex IV thereto. On 14 December 2010, after several meetings, the Centre made them a conciliation proposal:

as a recruitment procedure to fill several posts was due to be held, it offered to pay them a sum equivalent to eight months' gross salary if they applied for one or more of these posts without success, or if they did not apply.

In his report of 11 January 2011 the conciliator found that the dismissal procedure was tainted with flaws, mainly because it was apparent that the CDE had failed in its duty to try to redeploy the complainants. For this reason, he considered the proposal of 14 December 2010 to be "reasonable and balanced". As the complainants had refused it, he decided to close the conciliation procedure without reaching a settlement. In their complaint forms the complainants indicate that they are impugning the implied rejection of their request for conciliation of 12 May 2010.

B. The complainants explain that they did not accept the conciliation proposal of 14 December 2010, chiefly on account of their age, their seniority and their service records with the CDE. Four of them submit that, in breach of Article 3 of the Staff Regulations, the Executive Board did not approve the Director's decision to terminate their contract. In addition, pursuant to the first paragraph of that article, it was up to the Executive Board to decide on the termination of the contract of one of them, because he held a level 2.B post. They argue that the Board decided only to abolish their posts, but not to terminate their contracts.

In addition, they submit that the restructuring process was carried out in a completely opaque manner. They say that they were never informed of the potential repercussions of that process on their contractual relationship. They also consider that the reason stated in support of the decisions of 2 December 2009 – namely the abolition of their posts – was incorrect, because the duties they were performing have been retained or allocated to other posts.

Subsidiarily, the complainants contend that, in breach of the Tribunal's case law, their contract was terminated without the Centre contemplating their reassignment to vacant posts, and they consider that it prevented them from applying for jobs "retained in the new

structure”. In their opinion, the restructuring of the CDE involved an obvious error of judgement because the process began before the joint ACP-EU task force had completed its work.

The complainants request the setting aside of the decisions of 2 December 2009 and that of 26 March 2010, their reinstatement in a post matching their skills and the reconstruction of their career. They ask the Tribunal at least to order the CDE to take a new decision after having examined with each of them the possibilities of reassigning them. Failing this, each of the complainants claims material damages comprising a sum equivalent to the respective salary which they would have received until retirement age and a sum corresponding to the respective contributions which the CDE would have had to pay to the *Office national belge des pensions* (Belgian National Pension Fund) until they took retirement. They explain that these sums must be accompanied by 8 per cent interest per annum for late payment. Each of them claims compensation in the amount of 10,000 euros for the moral injury caused inter alia by their “on-the-spot” dismissal, as well as costs. Lastly, they request “access” to a list of documents which they had already asked the Executive Board to produce on 12 May 2010.

C. In its reply the Centre asserts that, in accordance with Article 3 of the Staff Regulations, the Director, who was the sole authority competent for doing so, terminated the complainants’ contracts after the Executive Board had approved the “draft decisions” which he had submitted to it.

The Centre contends that the complainants’ duties made them “particularly well placed” to know the “central features of the restructuring”. In its opinion, there is no doubt that they knew that some activities would no longer be carried out at Headquarters since they would be decentralised to regional offices. In addition, it states that it had informed all staff members of the revised budget proposal for 2009 in an explanatory note of 27 March 2009 which made it clear that the restructuring would entail the abolition of posts and the possible termination of contracts.

The Centre describes the individual situation of each complainant in an endeavour to show that the duties they were performing have been delocalised, allotted to another post or distributed among several staff members. It explains that it examined the possibilities of reassigning the complainants to other duties, but that their respective profiles did not match any vacant post. Vacancy notices had, however, been published before their contract was terminated and there was nothing to prevent them from applying. Moreover, during the conciliation procedure, it had been suggested that they should apply for three posts and they had been informed that another post might become vacant in the longer term. The Centre maintains that the restructuring began while the joint ACP-EU task force was still deliberating because those deliberations had taken too long and in September 2009 the European Commission had urged it to bring the process to an end.

The Centre submits that the complainants cannot be reinstated, because the duties they were performing no longer exist. It considers that their claim for material damages is unfounded insofar as they are asking to be paid the salary which they would have received until retirement age and a sum equivalent to the respective contributions which the CDE would have had to pay to the *Office national belge des pensions* until they took retirement, because Article 6(2) of the Staff Regulations states that the duration of an indefinite contract does not imply permanent employment.

The Centre asks the Tribunal to order the complainants to pay its costs.

D. In their rejoinder the complainants reiterate their arguments. They admit that they were aware that the restructuring process might involve the abolition of some posts, but argue that the abolition of a post does not automatically entail the termination of a contract. They also state that the revised budget proposal for 2009 and the explanatory note of 27 March 2009 were never communicated to the CDE staff or the Staff Committee.

E. In its surrejoinder the Centre maintains its position. It points out that in 2009 the European Commission had demanded a reduction of almost 50 per cent in the CDE's running costs. It considers that it would have been difficult to achieve this target if it had retained all of its officials. Lastly, it asserts that the explanatory note of 27 March 2009 was addressed to all staff members as well as the ACP-EU Committee of Ambassadors.

CONSIDERATIONS

1. The complainants were recruited between 1978 and 1993 by the Centre for the Development of Industry, which later became the Centre for the Development of Enterprise (CDE). They performed various duties and, as of 1 March 2007 or, in one case, 1 March 2008, they were each given a contract for an indefinite period of time. At the time of the facts giving rise to this dispute they were working at levels of responsibility consistent with their respective grades in the Administration Department, or the Operations Management Department, or for the Centre's Executive Board.

2. By letters of 2 December 2009 the Director of the CDE informed them that at an Executive Board meeting held on the same date, concerning the Centre's restructuring, a decision had been taken to abolish their post. These letters, which in substance indicated that their appointment was consequently terminated, explained that they would receive compensation for redundancy in accordance with Article 34 of the Centre's Staff Regulations and that they were also exempted from having to serve their period of notice.

3. The adoption of the plan to restructure the CDE, which entailed the abolition of the complainants' posts, led to the termination on the same date of 11 other staff members' contracts and – leaving aside the contemporaneous dismissal of another staff member for unsatisfactory service – thus affected a total of no less than 16 staff members, or almost half of the staff complement of the organisation's

Headquarters. In Judgment 3169, delivered on 6 February 2013, the Tribunal has already had occasion to rule on the complaint filed by one of the other staff members who was dismissed as part of the implementation of this plan.

4. The restructuring in question was the culmination of a review process which had been under way since 2006 and which had been carried out at the request of the Member States of the European Union, the African, Caribbean and Pacific Group of States and the European Commission with a view to reducing the CDE's running costs and improving its efficiency. At that point, the Centre's closure was being contemplated unless a thorough reform was rapidly undertaken. Moreover, the European Commission had decided in December 2008 that the disbursement of the budgetary appropriations earmarked for the CDE for 2009 would be partly conditional on the approval by the Centre's Executive Board of a progress report on the restructuring. Apart from the abolition of posts, the strategy was to decentralise the Centre's operational activities by transferring them to its regional offices and to restrict the functions performed at Headquarters correspondingly to specific managerial or supervisory tasks. It also involved achieving a satisfactory match between staff members' profiles and their job content – some of which had therefore been redefined. To this end the Centre decided to call on the assistance of a firm of human resources consultants.

5. On 27 January 2010 the complainants challenged their dismissal by jointly submitting an internal complaint under Article 66(2) of the CDE Staff Regulations. The Director ad interim decided to reject this internal complaint on 26 March 2010. It is that decision, insofar as it concerns each of them, which must now be deemed to be impugned in the complaints filed by the complainants after the conciliation procedure for which provision is made in Article 67(1) of the said Regulations, which had proved to be successful for other staff members made redundant in the same circumstances, had failed. In addition to the setting aside of the decisions of 2 December 2009 and

consequently that of 26 March 2010, the complainants principally ask to be reinstated in the CDE or, subsidiarily, that the Centre be ordered to pay the total amount of the salary and other financial benefits of all kinds which they would have received until they reached retirement age. They also claim moral damages and costs.

6. Since the complaints challenge dismissals that occurred in the same circumstances and rest on submissions which are, for the most part, identical, it is appropriate that they be joined in order that they may form the subject of a single judgment.

7. Precedent has it that in order to achieve greater efficiency or to make budgetary savings international organisations may undertake restructuring entailing the redefinition of posts and staff reductions (see, for example, Judgments 2156, under 8, or 2510, under 10). However, each and every individual decision adopted in the context of such restructuring must respect all the pertinent legal rules and in particular the fundamental rights of the staff concerned (see, for example, Judgments 1614, under 3, or 2907, under 13).

8. The Tribunal will not accept the plea that the decisions to dismiss the complainants were not taken by the competent authority because they were not approved by the Executive Board. Article 3(1) of the Centre's Staff Regulations states that "[t]he Executive Board shall be responsible for approving, on proposals from the Director, the [...] termination of staff contracts". It is therefore somewhat surprising that the Centre appears to argue in its submissions that in this case it was incumbent upon the Executive Board to approve only the post abolitions proposed by the Director, and not the dismissal decisions themselves. It is clear from the wording of the above-mentioned provision that the Board's competence extends to approving the termination of staff members' contracts. However, the excerpt from the minutes of the Executive Board's meeting on 2 December 2009 shows that it had approved a "[l]ist of staff leaving the CDE", which specified which staff members would have to work during their

period of notice. This proves that the Board did decide, not only on the abolition of the posts in question, but also on the dismissals. As a result, this plea has no factual basis.

9. Nevertheless, the mere fact that the Executive Board dealt with the legally distinct decisions of abolishing a post and dismissing the post holder at one same meeting tends to substantiate the complainants' other plea, namely that before their contracts were terminated no attempt was made to see if they could be reassigned to another job within the CDE.

10. The Tribunal's case law has consistently upheld the principle that an international organisation may not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him or her alternative employment (see, for example, Judgments 269, under 2, 1745, under 7, or 2207, under 9). As a result, when an organisation has to abolish a post held by a staff member who, like the complainants in the instant case, holds a contract for an indefinite period of time, it has a duty to do all that it can to reassign that person as a matter of priority to another post matching his or her abilities and grade. Furthermore, if the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned so agrees, to try to place him or her in duties at a lower grade and to widen its search accordingly (see Judgments 1782, under 11, or 2830, under 9).

11. Despite the CDE's denials on this point, it clearly failed in its duties prior to the disputed dismissals. In this connection, the Tribunal cannot fail to note that both the decisions of 2 December 2009 terminating the complainants' appointment and that of 26 March 2010 rejecting their collective internal complaint against these measures, were couched in terms suggesting that their dismissal was a purely automatic consequence of the abolition of their post and did not mention any attempt to find a post to which they might possibly have

been reassigned. In addition, it must be found that the evidence produced by the Centre contains no indication that any such search was actually made.

12. The CDE tries to argue that, in the months prior to the adoption of the restructuring plan, it advertised a number of jobs which might have been suitable for some of the complainants. But at that point in time, they had not been informed of their possible dismissal and therefore had no particular reason to apply for any of those posts. The Centre's allegations that, given the information in their possession as a result of their respective duties, the complainants could not have been unaware that their jobs were going to be abolished, are not tenable, because they are based on mere supposition. In addition, it must be pointed out that, although the most up-to-date sources of information available at the time, namely the Centre's revised budget proposal for 2009 and the explanatory note thereto, gave some indication of the staff reduction being contemplated, they were not precise enough to enable staff members to identify the specific posts which were definitely to be abolished. At all events, in law the publication of an invitation for applications does not equate with a formal proposal to assign the complainants to a new position, issued specifically in order to comply with the duty to give priority to reassigning staff members holding a contract for an indefinite period of time.

13. The Centre also contends that, during the conciliation procedure, it offered the complainants the possibility of applying for four vacant posts, some of which matched their abilities. However, this event, which occurred after the impugned decisions had been adopted, cannot have any bearing on the assessment of the lawfulness of those decisions, and the complainants ought to have received such suggestions before their dismissal. Furthermore, apart from the fact that the complainants have convincingly explained in their submissions why they thought that they should decline the offer in question, the Tribunal will not draw any consequences from

this refusal, because Annex IV to the CDE Staff Regulations, which sets out the rules governing the conciliation procedure, specifies in Article 4(11) that when a dispute which has not been resolved by those means is referred to the Tribunal, “nothing that has transpired in connection with the proceedings before the conciliator shall in any way affect the legal rights of any of the parties to the Tribunal”.

14. It is quite possible that, owing to the scale of the programme to abolish posts in connection with its restructuring, the CDE was unable to offer other posts to the complainants at the time of the disputed dismissals. But the Tribunal agrees with the opinion expressed on this matter by the conciliator in his report and concludes from the foregoing considerations that the Centre has not discharged the burden of proving that it endeavoured to fulfil its duty to make the necessary efforts in that respect (see the above-mentioned Judgment 2830, under 9). This breach of a fundamental right of the complainants, which may probably be ascribed to undue haste in carrying out the restructuring in question, therefore taints the impugned decisions with unlawfulness.

15. Moreover, the complainants’ contention that their dismissal breached the right which every international civil servant possesses, to be heard before any unfavourable decision concerning him or her is adopted, is also correct.

16. As the Tribunal has often stated in its case law, by virtue of the contractual relationship between an organisation and its personnel and the trust that therefore prevails between them, the Administration has a duty to inform the staff member concerned of its intention to dismiss him or her in order to enable that person to plead his or her cause (see, for example, Judgments 1082, under 18, or 1484, under 8).

17. In submitting that it did fulfil that duty in this case, the CDE confines itself to the statement that “the complainants were aware of the central features of the restructuring”. It refers in this connection to

the circulation of an explanatory note on the revised budget proposal for 2009 and to the consultation of the Staff Committee with regard to the drafting of a new internal rule, and it again pleads that the complainants could not have been unaware of the imminent abolition of their posts. Quite apart from what has already been said earlier on the latter point, the Centre does not thus show that it directly and clearly informed the complainants, as was its duty, that they were about to be dismissed, in order to give them an opportunity to comment.

18. It follows from the foregoing that the above-mentioned decision of the Director of the CDE of 26 March 2010 and those of 2 December 2009 terminating the complainants' contracts must be set aside, without there being any need to consider the complainants' other pleas or to order the disclosure of the documents which they request.

19. In view of the nature and length of the complainants' appointments, the Tribunal will order the CDE to reinstate them in the Centre, to the full extent possible, as from the date on which their dismissal took effect, i.e. 4 December 2009, with all the legal consequences that this entails.

20. However, if the CDE considers, in view of its staff complement and budgetary resources, that it cannot actually reinstate the complainants, it shall have to pay them material damages for their unlawful removal from their posts. In this connection, the complainants have no grounds for claiming the payment of all the emoluments which they would have received until they reached retirement age because, although their contracts were concluded for an indefinite period of time, they did not guarantee them an appointment with the Centre until the end of their careers, having regard to the latter's very difficult financial situation. The CDE will, however, be ordered to pay the complainants the equivalent of the salary and allowances of all kinds which they would have received had

their contract remained in force for a period of five years as from 4 December 2009 – or, as appropriate, until they reached retirement age, if this would have occurred prior to the expiry of that period – less the compensation they received on dismissal and any remuneration they may have received during this period. The Centre must also pay the complainants the equivalent of the contributions to pension, provident or social security schemes which it would have had to bear during the same period. All these sums shall bear interest at the rate of 5 per cent per annum as from the date on which they fell due until their date of payment.

21. The complainants also contend that the circumstances in which their dismissal occurred caused them serious moral injury. These submissions are well founded. On the one hand, the lack of information before the termination of their appointments and of any effort on the part of the CDE to reassign them to another post were an affront to their dignity. On the other hand and above all, the complainants contend, without being contradicted in any way by the Centre, that their dismissal took effect “on the spot” and that they were immediately “denied access to the CDE offices”. The complainants’ treatment was, in the Tribunal’s opinion, brutal and unnecessarily humiliating. It was all the more shocking in the instant case because it was meted out to long-serving staff members with recognised professional merit. In view of these considerations, the Tribunal is of the opinion that the moral injury the Centre has caused the complainants will be fairly compensated by an award of 7,500 euros in damages.

22. As the complainants succeed for the most part, they are entitled to costs, which the Tribunal sets for each of them at 2,000 euros.

23. The CDE has entered the counterclaim that the complainants should be ordered to pay costs. It follows from the foregoing that this claim must obviously be dismissed.

DECISION

For the above reasons,

1. The decision of the Director of the CDE of 26 March 2010 and those of 2 December 2009 terminating the complainants' appointments are set aside.
2. The complainants shall be reinstated in the Centre to the full extent possible as from 4 December 2009, with all the legal consequences that this entails.
3. If the Centre considers that such reinstatement is impossible, it shall pay the complainants material damages and the interest thereupon calculated as indicated in consideration 20, above.
4. At all events, the Centre shall pay each complainant moral damages in the amount of 7,500 euros.
5. It shall also pay each of them 2,000 euros in costs.
6. The complainants' remaining claims are dismissed, as is the Centre's counterclaim.

In witness of this judgment, adopted on 26 April 2013, 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 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet