B. (No. 2)

v.

EFTA

121st Session **Judgment No. 3609**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr V. C. B. against the European Free Trade Association (EFTA) on 10 November 2012 and corrected on 26 January 2013, EFTA's reply of 17 May, the complainant's rejoinder of 21 June and EFTA's surrejoinder of 15 July 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests a decision to withhold his step increase for three months.

The complainant joined EFTA in February 2008 under a three-year fixed-term contract. At the end of his six-month probationary period, his appointment was confirmed, although his supervisor had raised concerns regarding in particular his communication style. The situation deteriorated in early 2009 when the complainant refused to accept a managerial decision, and then wrote an e-mail to the Deputy Secretary-General expressing concern at the poor morale of his supervisors and openly criticising their managerial decisions.

In a note, wrongly dated 9 February, the Deputy Secretary-General summarised the discussion he had in March 2009 with the complainant concerning his performance. He indicated that his step increase, which was due in February, had been withheld because of his attitude, but that it would be granted in May if there were "no developments contradicting this". In the event, the step increase was granted in May, but on 5 June 2009 the Secretary-General notified the complainant that his contract was terminated with immediate effect for serious misconduct; however, his emoluments would be paid until 5 September 2009. The complainant contested that decision before the Advisory Board.

On 7 May 2010, after having received a final decision on his appeal, he filed a complaint with the Tribunal contesting the dismissal decision and arguing that the withholding of his step increase was unlawful. In Judgment 3126, delivered on 4 July 2012, the Tribunal held that the Secretary-General's decision to terminate his contract was lawful and that he was therefore entitled to no relief in that respect. Concerning the withholding of his step increase, it noted that the claim referred to the Advisory Board concerned only the dismissal decision of 5 June 2009 and found that this was therefore the only matter properly before the Tribunal.

On 31 July 2012 the complainant wrote to the Secretary-General stating that he had taken note of the Tribunal's findings in Judgment 3126 and more particularly of the fact that it was not in a position to rule on the decision to withhold his step increase. He argued that the withholding of his step increase was unlawful and claimed the payment of the amount corresponding to the three-month period during which his step increase was withheld. By a letter mistakenly dated 18 July – the correct date is 2 August – the Senior Legal Adviser replied that that decision was justified and that he considered that all issues relating to his employment with EFTA had been settled once and for all. He added that the decision was final. That is the decision the complainant impugns before the Tribunal in his second complaint.

He asks the Tribunal to order that he be paid three months' step increase together with moral damages and costs.

EFTA considers that the complaint is irreceivable as time-barred and, subsidiarily, devoid of merit.

CONSIDERATIONS

1. The complainant, who was relevantly employed by EFTA in February 2008, would have been entitled to the step increase for the period February to April 2009 under Staff Rule 21.3, which states as follows:

> "1. Unless an adverse evaluation is made regarding a staff member's performance of his duties, the staff member shall be awarded a step increase corresponding to a one-step-within-grade salary increase.
>
> 2. A step increase shall take place every twelve months after initial appointment.
>
> […]"

2. Staff Regulation 47.2(a) deals with the right of a staff member to appeal to the Tribunal where she or he finds a final decision by the Secretary-General to be unacceptable, but only where the staff member had previously submitted the matter to the Advisory Board as Staff Regulation 46.2 provides. This reflects the requirements of Article VII, paragraph 2, of the Tribunal's Statute.

3. The complainant was informed in March 2009 that his step increase had been withheld. The Tribunal did not consider the issue of his entitlement to the step increase in Judgment 3126, which was delivered in July 2012, as that issue was not properly before the Tribunal. Staff Regulation 46.2 required the complainant to have submitted the matter to the Advisory Board within ninety days after the final consultations of a Consultative Body pursuant to the provisions of Staff Regulation 45.6 in particular.

4. The complainant now appeals to the Tribunal concerning the withheld step increase on the ground that on 31 July 2012 he wrote to the Secretary-General claiming the payment for the three months during which the step increase was withheld and on 16 August 2012

he received a letter, dated 18 July 2012, from the Senior Legal Adviser, which the Tribunal observes relevantly states as follows:

> "The Association maintains that the decision of March 2009 to temporarily withhold the step increase was justified, and considers all issues relating to [his] employment with EFTA settled once and for all.
>
> This decision is final."

5. This is the letter which the complainant cites to be the impugned decision against which he has appealed to the Tribunal. Clearly, this is not the final decision by which his step increase was temporarily withheld; the final decision is that taken in March 2009. As far as EFTA was concerned, the letter of 18 July 2012 was a final decision that all issues relating to the complainant's employment with it were at an end. It is noteworthy that the complainant then dispatched a letter in response on 17 August 2012 to the Senior Legal Adviser, seeking, among other things, confirmation that his letter of 18 July 2012 was a final decision and asking whether he (the Senior Legal Adviser) was "mandated and [was] authorised within the scope of [his] responsibilities to affirm and take responsibility for this affirmation on behalf of the Secretary-General". The Senior Legal Adviser relevantly replied as follows:

> "I confirm that I was authorised by the Secretary-General to respond to your letter ref. VBEF2-01. He also approved the letter ref. 31317 before it was dispatched."

6. The complainant cannot seek to make the letter of 18 July 2012 the final decision withholding his step increase. The final decision was made in March 2009 and the complainant took no steps then to have it submitted to the Advisory Board within ninety days of the final consultations provided for in Staff Regulation 45. His complaint to the Tribunal is therefore irreceivable as he has failed to exhaust his internal remedies in relation to the operative final decision of March 2009, and he has not appealed from a final decision insofar as he appealed against the letter of 18 July 2012, which merely confirmed the earlier March 2009 decision. His complaint will be accordingly dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 26 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ