

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C. D. E.

v.

CDE

125th Session

Judgment No. 3900

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. M. C. D. E. against the Centre for the Development of Enterprise (CDE) on 15 July 2016 and corrected on 5 August, the CDE's reply of 26 December 2016, the complainant's rejoinder of 14 April 2017 and the CDE's surrejoinder of 31 July 2017;

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

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

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

The complainant challenges the decision to terminate her contract owing to the closure of the CDE and the terms and conditions of that termination.

The CDE was an institution jointly administered by the African, Caribbean and Pacific Group of States (ACP) and the European Union (EU) under the Cotonou Agreement, a partnership agreement concluded for a period of 20 years as from 1 March 2000. It had a mandate to support the implementation of private-sector development strategies in the ACP countries, in accordance with Annex III of the aforementioned Agreement concerning institutional support and the role of the CDE.

In June 2014 the ACP-EU Council of Ministers decided to proceed with the orderly closure of the CDE, the amendment of Annex III to the Cotonou Agreement and the setting-up of a “light support structure to adequately respond to the needs of the ACP private sector and safeguard the CDE’s gains and best practices”. On 20 January 2015 the Director-Curator of the CDE, who had been appointed in order to implement a closure plan and to manage the CDE during the process leading to its closure, began to prepare the aforementioned plan. The latter, which envisaged the finalisation of the winding-up of the CDE by 31 December 2016, was approved in June 2015.

The complainant, who was recruited in 2001, was employed as an assistant. Since 1 March 2007 she had held a contract for an indefinite period of time concluded “within the framework of [the above-mentioned] Annex III”. She was informed by a letter of 30 June 2015 from the Director-Curator that her contract would be terminated on 31 March 2016 and that, in accordance with Article 34, paragraph 5, of the Staff Regulations of the Centre, she would be entitled to the indemnity due in the event of the closure of the CDE which was, in her case, equal to 12 months’ basic salary. In addition, the proposal was made that by 18 September 2015 she should enter into a settlement agreement under which the CDE would accept to pay “indemnities exceeding the obligations of the CDE under the Staff Regulations by far”. The complainant would have to agree to “renounce [her] right to introduce any claim whatsoever against the CDE”. This agreement concerning the “termination of employment” provided for the payment of a “termination indemnity”, the maintenance of social security coverage for a period of 26 months as from the termination of service and the payment of a lump sum in respect of travel and relocation costs. If the complainant did not agree to sign the agreement, as was the case, it was explained that the CDE would merely pay her the indemnities stipulated in the Staff Regulations, but would offer her outplacement assistance in the first quarter of 2016.

Furthermore, as she had not received any step increase since January 2009, it was proposed that the complainant should sign another agreement granting three steps as of 1 January 2016 and that she should

be paid compensation for the “loss of the possibility to receive a step increase during the period prior to 31 December 2015” and a sum of 225 euros as compensation for the legal costs incurred during the conciliation procedure between the Director-Curator and the Staff Committee concerning the matter of a step increase. The complainant signed this second agreement on 18 September 2015 and in so doing waived her “right to introduce any action whatsoever regarding the application of the remuneration scales [...] against the CDE”. At the end of 2015, the CDE Executive Board approved a conditional agreement providing for the payment of an additional indemnity in respect of a step increase. In the complainant’s case, the gross amount of this indemnity was to be 2,678.11 euros. As she did not wish to waive her right of appeal in this matter, she refused to sign the latter agreement which was to take the form of an addendum to the agreement which she had signed on 18 September.

In the meantime, on 28 August 2015, the complainant along with several of her colleagues had filed an internal complaint, addressed to the Director-Curator, seeking the cancellation of the decision of 30 June and the award of damages. The Director-Curator dismissed this joint internal complaint on 29 October. On 26 November 2015 the complainant requested the appointment of a conciliator in pursuance of the pertinent provisions of the Staff Regulations. In his report, delivered on 21 April 2016, the conciliator found that there was “no possibility of objectively arriving at a settlement of the dispute”. Ultimately almost all of the staff members signed the settlement agreement proposed to them. However, on 15 July 2016, the complainant filed a complaint with the Tribunal in which she impugned the “decision” of 21 April 2016.

The complainant principally seeks her reinstatement in the CDE or, failing that, the payment of an indemnity equal to the remuneration she would have received until March 2020 if her contract had not been terminated, less the sums she received owing to the closure of the CDE. Subsidiarily, she requests the payment of an indemnity equal to 36 months’ remuneration owing to the loss of a job opportunity in the light structure. Quite subsidiarily, she requests the payment of an indemnity equal to that received by her colleagues who waived their

right of appeal. In each case, she asks that the CDE be ordered to pay the corresponding social security contributions. Extremely subsidiarily, she asks that the CDE pay these contributions and those to the pension fund on the closure indemnity which she received. She also requests the payment of 2,678.11 euros in backpay for the step increase and 225 euros for the legal costs incurred during the conciliation procedure concerning the step increase, reimbursement of her relocation costs and the award of an indemnity of 15,000 euros for moral injury, interest at the rate of 5 per cent per annum for late payment on all the sums which she considers are due to her and, lastly, costs in the amount of 15,000 euros.

In its reply, the CDE submits that the complaint is irreceivable with regard to the claims which are not directly related to the impugned decision and in respect of which the complainant has not exhausted internal means of redress and that, moreover, it is unfounded. The CDE also states that 225 euros have already been paid to cover legal costs.

In her rejoinder, the complainant withdraws her claim to the payment of 225 euros as she acknowledges that she received the sum in question in the course of proceedings.

In its surrejoinder, the CDE maintains its position.

CONSIDERATIONS

1. The complainant challenges the termination of her employment on the grounds that it is a breach of the amendment to her contract of 21 December 2006 which stipulated, as far as its duration was concerned, that “[i]t shall enter into force on 1 March 2007 and shall be for an indefinite period of time within the framework of Annex III to the Cotonou Agreement. It is understood that any amendment to this Annex III shall have a direct effect on this contract.”

The complainant concedes that on 19 and 20 June 2014 the ACP-EU Council of Ministers, having announced its intention to proceed with the orderly closing of the CDE and the amendment of Annex III, granted “a delegation of powers to the ACP-EU Committee of Ambassadors to take this matter forward with a view to adopt the

necessary decisions, including the relevant amendment to Annex III of the Cotonou Agreement”. She is of the opinion that Annex III has not been amended and that it would not therefore be possible to terminate her contract, because its termination would not fall into any of the categories provided for in Article 34 of the Staff Regulations of the Centre, which states:

“Apart from cessation on death, employment shall cease:

1. at the end of the period of notice following resignation by the staff member. [...];
2. at the end of the period of notice following notification by the Centre;
The length of the period of notice shall be one month for each completed year of service, subject to a minimum of three months and a maximum of nine months. [...];
3. at the end of the month in which the staff member reaches the age of 65 years.
4. In the interest of the efficient working of the Centre, a staff member’s contract may be terminated in the case of incompetence or unsatisfactory service during the course of employment, in accordance with Article 55.
5. In the event of the closure of the Centre, due notably to the lack of funding, a staff member shall receive compensation of one month’s gross basic salary per completed year of service, up to a maximum of twelve months. Such calculation shall be based on the staff member’s last gross basic monthly salary.
6. In the event of redundancy of a post, the staff member concerned shall receive notice as provided for in paragraph 2 and shall receive compensation as defined in paragraph 5.”

2. It is true that Annex III to the Cotonou Agreement had not been amended when the complainant’s contract was terminated. It was not amended until 12 July 2016 by Decision No. 3/2016 of the ACP-EU Committee of Ambassadors which confirmed the closure of the CDE.

It must, however, be noted that the complainant’s contract was concluded for an indefinite period of time and that the clause stating that “any amendment to this Annex III shall have a direct effect on this contract” offers only one possibility which, far from excluding the conditions for termination set forth in Article 34 of the Staff Regulations,

comes within them. Article 34, paragraph 2, allows the Centre to end a staff member's employment subject to a period of notice.

Article 34, paragraph 2, applies in the instant case, since the Centre was in the situation for which provision is made in paragraph 5 of that article. In the Joint Declaration adopted at its 39th Session held on 19 and 20 June 2014 in Nairobi, Kenya, the ACP-EU Council of Ministers decided to proceed with the closure of the CDE and granted a delegation of powers to the ACP-EU Committee of Ambassadors to adopt any decision necessary to that end. By its Decision No. 4/2014, the Committee authorised the Executive Board of the CDE to take, with immediate effect, all appropriate measures to prepare for the closure of the CDE and added that the closure plan must envisage the finalisation of the winding-up of the CDE by 31 December 2016. With that timeline in mind, a Director-Curator was appointed. After negotiations with the Staff Committee, she drew up a closure plan which was adopted by the Executive Board at its meeting on 29 and 30 June 2015. In pursuance of this closure plan, the complainant was informed of the termination of her contract by a letter of 30 June 2015. The termination of her contract was therefore decided on account of the Centre's closure and, for that reason, Article 34, paragraphs 2 and 5, of the Staff Regulations were rightly applied.

The complainant's plea that there was a breach of her contract and of the Staff Regulations is therefore unfounded.

3. The complainant relies on a breach of the duty of care which, in her opinion, requires an international organisation to terminate an employment contract in the event of redundancy only as a last resort and which obliges it first to try to find alternatives other than termination.

4. As the Tribunal has consistently held, "[w]hen an organisation has to abolish a position occupied by a staff member holding a continuous appointment, 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." (See Judgment 3755, under 6.) This possibility must be explored before a decision is taken to abolish a post (see

Judgments 2294, under 9, 3169, under 10 and 13, and 3238, under 13) and it is up to the organisation to prove that it has made every possible effort to reassign the staff member (see Judgments 2830, under 9, 3169, under 14, 3238, under 14, and 3755, under 19).

The decision to terminate the complainant's contract was taken during the process of closing the CDE, which had to be wound up by 31 December 2016 in accordance with Decision No. 4/2014 of the ACP-EU Committee of Ambassadors. As the institution was on the point of ceasing to exist, there could be no question of reassigning the complainant to another post within it. The Centre cannot therefore be criticised for not exploring that avenue.

5. In her written submissions, the complainant essentially accuses the Centre of failing to support her in obtaining, as a matter of priority, a position in the new structure which, she contends, was to replace the CDE. In her view, her request to be redeployed in this new structure lay at the root of the action taken by the Director-Curator to delay its creation or to put in place another kind of structure.

6. A steady line of precedent has it that “[w]hile it is true that international organisations have the right to restructure their operations, abolish posts if necessary and consequently terminate the appointment of their staff members who are affected by the planned restructuring (see Judgment 1854, under 10), they cannot simply terminate their appointment – at least not if they hold an appointment of indeterminate duration – without first taking suitable steps to find them alternative employment (see, for example, Judgments 269, under 2, 1745, under 7, 2207, under 9, and 3238, under 10).” (See Judgment 3755, under 6, and also Judgment 3169, under 10.) Only when reassignment proves impracticable may it have recourse to the *ultima ratio* measure of terminating their appointment (see Judgment 2830, under 8(a)).

Although this precedent concerns redeployment within the same organisation, it may be extended to the situation where an organisation is closed and replaced with a structure mandated to do all or part of the work of the organisation which has been wound up. In this case, it is

incumbent upon the organisation which is being wound up to examine whether some or all of its staff members can be absorbed by the new structure.

7. In this connection, it should be remembered that the Joint Declaration adopted by the ACP-EU Council of Ministers at its session on 19 and 20 June 2014 in Nairobi envisaged, after the closure of the CDE, the setting-up of a light support structure to adequately respond to the needs of the ACP private sector and safeguard the CDE's achievements and best practices. One of the parties to the Agreement, the ACP Council of Ministers, also issued a resolution on 29 May 2015 calling for concomitance between the orderly closure of the CDE and the establishment of the light support structure for the ACP private sector.

At the meeting of the Executive Board on 29 and 30 June 2015, the Director-Curator opposed the aforementioned resolution and drew attention to the need not to conflate the new light structure and the CDE. The minutes of the meeting show that after this statement:

“The ACP Secretariat confirms having understood that the warning that one should avoid the staff members could argue the light structure would be some kind of continuation of the tasks performed by the CDE under the Cotonou Agreement as it currently is applicable. It is thus important to have a clear ‘cut-off’ point between the closure of the CDE and the moment the light structure will become operational.

The Director-Curator adds that it could in this regard be examined to have the light structure based outside the European Union, or at least outside Belgium, in order to emphasise the difference between the CDE and the light structure.”

At the meeting of the Executive Board on 24 and 25 September 2015, the Director-Curator repeated that “there is a risk that the existence of ‘some kind of structure’ will be used by the two staff members that did not sign the settlement agreement with the CDE [to argue] that there is indeed a continuation of the activity of the CDE”. With reference to certain transfers (for example of the FAST software and staff know-how) to ACP members, the Director-Curator added: “we need to be VERY careful about going into that direction. When is there a ‘transfer of undertaking’? If we institutionalize the transfer of

the assets and know-how of the CDE, there is a higher risk of people claiming that there is a ‘transfer of undertaking’.”

In its reply, the Centre contends that the Director-Curator’s position was explained by the fact that the new structure would not have any staff and that it would therefore be impossible to transfer CDE staff members to it.

However, when the statements in question were made to the Executive Board, i.e. in June and September 2015, no decision had yet been taken on the staffing of the new structure. It was not until 11 November 2015 that the nature of the new structure was outlined in a “concept note” of the ACP Group, which indicated that the light structure would not be an international organisation. It would comprise a Brussels-based Coordinating Unit composed of experts who would not have the status of staff members of the ACP Secretariat or of the European Commission and whose contracts would be limited to the duration of the programme on which they were working. In a letter of 15 December 2016 the European Commission also stated that the new structure would not employ paid staff, but would find service providers through a call to tender.

8. It is clear from the evidence in the file that the Director-Curator preferred the option of terminating contracts, admittedly while offering a reasonable settlement, to transferring some staff members to the new light structure. Although when she chose this course of action, no decision had been taken on whether the new structure which was to succeed the CDE would have its own staff, the Director-Curator was adamant that it was vital to ensure that the setting-up of the new light structure could not be termed a “transfer of undertaking” in order to forestall the risk of staff members of the CDE relying, rightly or wrongly, on the rules relating to the transfer of undertaking (see the minutes of the Executive Board’s meetings on 29 and 30 June 2015 and 24 and 25 September 2015) which might have opened up certain options to them.

By refusing to contemplate the slightest possibility of CDE staff members being employed in the new structure, and by even going so far as to oppose that option at a time when the nature of the new structure was still undefined, the Director-Curator breached the duty of care which an international organisation owes to its staff.

The complainant's plea is therefore well founded.

9. The complainant holds that the CDE committed an obvious error of judgment and/or an abuse of process insofar as it contributed to the delay in setting up the light structure.

The parties' most recent submissions show that this light structure has still not come into being and that the parties to the negotiations have not yet agreed on its exact nature. The establishment of the new structure and determination of its nature do not lie within the competence of the CDE. It cannot therefore be held responsible for the delay in setting up this new structure.

The complainant's plea has no merit.

10. Lastly, subsidiarily, the complainant relies on a breach of the principle of equality in that the CDE restricted the entitlement to enhanced indemnities to staff members who agreed to sign the settlement agreement concerning these indemnities, which contained a clause on the renunciation of claims. She also contends that the award only of the indemnities provided for in the Staff Regulations – which were considerably lower – to staff members who refused to sign the agreement is tantamount to retaliation which would constitute an abuse of authority.

11. It must first be emphasised that a steady line of precedent has it that the Tribunal encourages the settlement of disputes by agreement (see Judgments 1847, under 11, 1924, under 10, 2091, under 13, and 2220, under 6). As recently stated in Judgment 3731, under 7, “[i]t is now almost universally recognised that the settlement of legal disputes is, in many cases, a preferable outcome than the full ventilation of legal and factual issues in contested litigation to be resolved by the

adjudication of a court of justice. Some cases, by their very nature, will take that path. However, many others are more appropriately resolved by discussion and agreement. The parties control the terms of an agreed outcome even if, as is almost always the case, it involves some reciprocated compromise. There appears to be a regrettable attitude amongst some parties before the Tribunal, both individual complainants and defendant organisations alike, not to entertain the possibility of settlement by agreement. It should be otherwise.”

12. With regard to the alleged breach of the principle of equality, reference must be made to the Tribunal’s consistent precedent that “the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 1990, under 7, 2194, under 6(a), 2313, under 5, or 3029, under 14).” (See Judgment 3787, under 3.)

The Tribunal is of the opinion that staff members who signed an agreement are in different legal situation to that of their colleagues, which justifies the difference in treatment to which the complainant objects (see Judgments 1934, under 7, and 1980, under 7). She therefore has no valid grounds for relying on a breach of the principle of equal treatment.

The plea that this principle has been breached cannot therefore be accepted.

13. The allegation that awarding an indemnity higher than that provided for in the Staff Regulations only to staff members who were prepared to sign the settlement agreement and who renounced any right of appeal constitutes an abuse of authority is tantamount to saying that an agreement containing a waiver of the right of any action or appeal would be flawed. This is, however, inconsistent with the case law of the Tribunal which recalled in Judgment 3867, under 5, that “in the context of a settlement, as is the case here, the infringement of an official’s right to appeal or file a complaint is not unlawful. On the contrary, it is

entirely acceptable for an official to waive such rights in return for the benefits gained from the settlement. This is, furthermore, common practice in the context of separation agreements, as here". Naturally, as the same judgment makes clear, the agreement must make provision for benefits over and above those stemming from the applicable staff regulations, otherwise this would amount to improper pressure brought to bear on the official in return for nothing but the organisation's honouring of its own duties (see Judgment 2715, under 13; see also Judgment 3091, under 13). In the instant case, Article 34, paragraph 5, of the Staff Regulations provides that a staff member is entitled to compensation equal to one month's gross salary per completed year of service, up to a maximum of 12 months. The settlement agreement proposed to the complainant was much more favourable, since it provided for the payment of an indemnity equal to 26 months' salary and therefore went far beyond the CDE's legal obligations.

The plea that there was an abuse of authority must therefore be dismissed.

14. What was said above applies *mutatis mutandis* to the "addendum to the settlement agreement concerning the application of the remuneration scales" which the complainant refused to sign. The Tribunal notes in particular that Article 48 of the Staff Regulations provides for the possibility, but not the obligation, to adjust remuneration on a yearly basis. The proposal contained in the settlement agreement in question was hence more favourable to the complainant. For this reason, without there being any need to rule on the objection to receivability raised by the Centre, the Tribunal considers that the sum of 2,678.11 euros mentioned in the addendum is not due, since it does not stem from a legal obligation but from a settlement proposal, which does not breach the principle of equal treatment or constitute an abuse of authority, and which the complainant refused to sign.

15. As stated in consideration 8, above, the CDE failed to honour its duty of care to the complainant insofar as the Director-Curator dismissed and even forcefully opposed any possibility of the complainant

holding a post in the new light structure which was to some extent to succeed the CDE. The Tribunal must therefore determine the amount of the damages to be paid to the complainant in compensation for the injury which she suffered on account of the above-mentioned breach. In view of the CDE's closure, the Tribunal cannot grant the complainant's request that she be reinstated in her former post.

When assessing the injury suffered by the complainant, it is necessary to bear in mind the fact that, after lengthy negotiations, a reasonable settlement was proposed to the whole of the staff. However, the complainant refused to sign it, unlike almost all of the other staff members. In these circumstances, the Tribunal considers that the injury in question may be fairly redressed by awarding the complainant damages for injury under all heads equal to:

- the indemnities for which provision was made in the settlement agreement concerning the termination of employment, which the Director-Curator had offered her, i.e. the termination indemnity (123,416 euros, representing 26 months' salary) to which reference is made in Article 2 and the sum of 5,000 euros for travel and relocation costs to which reference is made in Article 4, less the amount of the closure indemnity equal to 12 months' salary which the complainant has already received;
- the premium for which provision is made in Article 3 of the agreement, representing 26 months of social security coverage which should have been paid to the government agency or insurance companies administering the social security schemes if the complainant had accepted the agreement offered to her.

The sum due to the complainant shall be accompanied by interest for late payment of 5 per cent per annum as from the date when the complainant's contract ended, i.e. 1 April 2016, until the date of final payment.

As the complainant has succeeded in part, she is also entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The CDE shall pay the complainant damages calculated as indicated in consideration 15, above, in compensation for all the injury which she has suffered.
2. The CDE shall also pay the complainant costs in the amount of 5,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 14 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 December 2017.

(Signed)

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

YVES KREINS

DRAŽEN PETROVIĆ