Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

d. O. M.

v.

OTIF

125th Session **Judgment No. 3909**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. T. d. O. M. against the Intergovernmental Organisation for International Carriage by Rail (OTIF) on 19 April 2016 and corrected on 2 June, OTIF's reply of 7 September, the complainant's rejoinder of 21 October 2016 and OTIF's surrejoinder of 30 January 2017;

Considering Article II, paragraph 5, 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 challenges the non-renewal of his temporary appointment.

The complainant was appointed to the post of Head of the Legal Service of OTIF at the grade of counsellor with effect from 1 May 2013 for a renewable period of three years. At the time of his appointment, the Staff Regulations of 1 January 2012 were applicable. In that version, the last sentence of Article 32, paragraph 1, which concerned temporary appointments and decisions to renew such contracts, to offer permanent appointments or to separate staff members from service, contained a reference to Article 26, which provided that counsellors were appointed

by the Administrative Committee. That sentence was deleted when the new Staff Regulations entered into force on 1 July 2014.

On 4 November 2014 the complainant received a warning letter requesting him to make an effort to improve the quality of his work. On 29 April 2015 he was advised of the Secretary General's decision not to renew his contract beyond the date of its expiry, 30 April 2016. That decision referred explicitly to Article 32, paragraph 1, of the 2012 version of the Staff Regulations, which provided for a longer notice period than the 2014 version.

On 29 May 2015 the complainant requested a review of the decision of 29 April, arguing that the Administrative Committee, as the body responsible for his appointment, had sole authority to decide that his appointment would not be renewed. The Secretary General replied on 30 June 2015. He maintained his decision not to renew the complainant's appointment and told him that, since neither the Convention concerning International Carriage by Rail nor the Staff Regulations designated the Administrative Committee as the authority competent to deal with the non-renewal of a temporary appointment, the applicable provision was Article 3, paragraph 1, of the Staff Regulations, which stipulates that "[t]he Secretary General shall settle all matters that are not the reserve of the Committee". The longer notice period he had been granted was intended to allow him "a more convenient timeframe" in which to make his arrangements.

On 24 July 2015 the complainant lodged an appeal with the Administrative Committee against the decisions of 29 April and 30 June 2015, which he requested be set aside. He also sought the adoption of a new decision renewing his contract for eight months, until 31 December 2016.

The appeal was considered on 20 January 2016 at the 124th Session of the Administrative Committee. Having heard the complainant, the Committee dismissed the appeal, finding that the deletion of the last sentence of Article 32, paragraph 1, meant that the decision not to renew a contract of employment was now "disconnected" from the appointment procedures and hence the Secretary General was competent to take decisions of that kind. That is the impugned decision.

The complainant filed his complaint with the Tribunal on 19 April 2016, asking the Tribunal to set aside the decision of 29 April 2015, confirmed on 30 June 2015, and the impugned decision, and to award him exemplary damages for moral and professional injury assessed at 116,860.80 Swiss francs, which is equivalent to the remuneration that he would have received had his contract been extended until 31 December 2016. He further requests that OTIF be ordered to disclose a number of documents relating to his case and the recordings of the discussions on his appeal to the Administrative Committee.

OTIF asks the Tribunal to dismiss the complaint. It does not consider that the complainant has suffered any injury given that he was re-employed by his national government when his contract of employment expired and he received the indemnities due on his separation from service. It provides the documents that the complainant requested and states that the audio recordings have been erased.

CONSIDERATIONS

1. The complainant seeks the setting aside of the decision of the Administrative Committee of 20 January 2016 dismissing his internal appeal.

2. In his complaint and rejoinder, the complainant requests that OTIF be ordered to disclose the preparatory document drawn up by the Secretary General for the members of the Administrative Committee containing his proposal for a decision on the internal appeal, the opinion which the external legal adviser provided to the Secretary General following the filing of the appeal, the final minutes of the 124th Session of the Administrative Committee and the recordings of the discussions on the appeal. The Tribunal considers that the complainant's request has become moot since, save for the audio recordings which have been erased, the requested items have been provided.

3. In the complainant's view, he has been denied the right of defence and due process insofar as the file presented to the Administrative Committee included documents which were, in his view, irrelevant to

his appeal (and in some cases untruthful), the sole purpose of which was to falsify the internal appeal procedure. Those documents included the warning letter which the Secretary General sent to him on 4 November 2014, his responses to that letter and the minutes of the appraisal interview held on 26 January 2015. The complainant points out that in the internal appeal proceedings the Administrative Committee only had to determine whether the Secretary General was competent to decide not to renew his appointment and therefore only documents relevant to that issue should have been submitted to it.

4. In his internal appeal of 24 July 2015 the complainant asked the Administrative Committee to find the decisions taken by the Secretary General "null and void" and, subsidiarily, to set them aside. He also asked the Administrative Committee to take a new decision "renewing the contract of employment for a term of [eight] months, until 31 December 2016".

Apart from the question of compliance with the notice period, the decision of the Administrative Committee impugned before the Tribunal is confined to the legal issue of the Secretary General's authority to take the decision not to renew the complainant's contract. It was on this basis that the internal appeal was dismissed. The Administrative Committee did not rule on the advisability of renewing the complainant's contract of employment. Therefore it had no reason to examine the documents to which the complainant objects, and there is nothing to indicate that it did so. The stated reasons for the impugned decision bear no relation to the documents disputed by the complainant, who fails to show how they influenced the impugned decision.

5. The complainant alleges a further breach of his right to due process caused, inter alia, by the following circumstances: the Secretary General and the external legal adviser addressed the meeting beforehand in his absence; the Secretary General and other members of the OTIF Secretariat were present at the meeting of the Committee, despite his express request that they leave the room; the Chairwoman cut his oral submissions short; and, lastly, the external legal adviser took part in the Committee's deliberations.

6. The presence of the Secretary General and Secretariat staff at the meeting of the Committee is not in itself open to criticism: it is perfectly normal that the Secretary General, whose decisions were being challenged, was given an opportunity to put his case. As far as the time allotted to the complainant is concerned, the Organisation points out that the Administrative Committee's agenda allowed him 30 minutes, which he overran by far.

However, the Tribunal notes that after the internal appeal was filed, the Secretary General consulted an external legal adviser and took his opinion into consideration in the preparatory document containing the proposal for a decision drawn up for the members of the Administrative Committee. As the minutes show, the external legal adviser addressed the Administrative Committee to endorse the Secretary General's position at the beginning of the meeting in the complainant's absence, and he went on to take part in the Committee's deliberations.

The external legal adviser was directly involved in the proposal for a decision which the Secretary General submitted to the Administrative Committee in the aim of having his decisions, which were the subject of the internal appeal, confirmed. By authorising the external legal adviser to speak in support of the Secretary General's case, which he had helped to develop, during the meeting of the Administrative Committee when the complainant was absent, and by authorising him to take part in the deliberations of the body considering an internal appeal against the decisions of the Secretary General, the Organisation breached the right to due process (see, for example, Judgments 3421, under 3, and 3648, under 10). This is particularly so given that when he was heard by the Committee, the complainant did not have any written documents stating the position of the external legal adviser. The opinion provided by the external legal adviser to the Secretary General after the complainant filed his internal appeal was supplied by the Organisation only as an annex to its reply before the Tribunal, and the preparatory document containing the proposal for a decision drawn up by the Secretary General for the members of the Administrative Committee was disclosed only as an annex to its surrejoinder.

More fundamentally, the Tribunal further observes that, in the instant case, where decisions of the Secretary General were being challenged before the Administrative Committee, the Secretary General prepared the Committee's decision by writing a note followed by a proposal for a decision. It is true that according to Article 5, paragraph 2(c), of the Rules of Procedure of the Administrative Committee, the Secretary General is to "mak[e] written proposals, accompanied by summaries, on the matters included on the Committee's agenda". However, this provision cannot be applied when the Administrative Committee hears an appeal against a decision of the Secretary General, as in the present case, since that would constitute a breach of the right to due process.

It ensues from the foregoing that the decision of the Administrative Committee of 20 January 2016 dismissing the complainant's internal appeal must be set aside.

7. In principle, given that the complainant's internal appeal was not lawfully considered, the Tribunal should remit the case to the Organisation for the Administrative Committee to take a lawful decision. However, the complainant's submissions before the Tribunal concerning the decisions of 29 April and 30 June 2015 are essentially confined to two pleas, namely that the Secretary General had no authority to take the aforementioned decisions and that his acquired rights were breached. Since these pleas raise only questions of law, the Tribunal will rule on their merits itself for the sake of procedural economy.

8. The complainant's letter of appointment dated 21 March 2013 states:

> "Your initial appointment will be for a period of three years, which may be renewed (cf. Art. 32, [paragraph] 2 S[taff] R[egulations]). This appointment will terminate automatically, without notice, on 30 April 2016 (cf. Article 47 S[taff] R[egulations]). If your appointment is not renewed, you will be advised in good time."

The decision to appoint the complainant was taken by the Administrative Committee in accordance with the version of the Staff Regulations which had been in force since 1 January 2012. Article 32, paragraph 1, thereof, which dealt with temporary appointments and

renewals, referred to Article 26, paragraph 1, which stated that "[t]he First Counsellor, Counsellors and Assistant Counsellors shall be appointed by the [Administrative] Committee on the basis of proposals by the Secretary General".

9. The complainant alleges that the decision not to renew his appointment was taken by an official who lacked authority. He considers that under Article 26 of the Staff Regulations in force when he was appointed, the Administrative Committee and not the Secretary General had the authority to decide whether to renew his contract of employment.

10. In the new Staff Regulations in force since 1 July 2014, the reference to the provisions of Article 26 has been deleted and Article 3, paragraph 1, provides: "[t]he Secretary General shall settle all matters that are not the reserve of the Committee". Article 65, paragraph 2, of the new Regulations specifies that, as of their entry into force (on 1 July 2014), "the Staff Regulations of the Secretariat dated 1 January 2012 shall be repealed". It does not stipulate any transitional provisions, except in respect of insurance against the financial consequences of age, disability and death.

The Secretary General correctly applied the staff regulations that were in force at the time when he took his decisions. They therefore came within the scope of his competence.

The plea that the Secretary General lacked authority to take the aforementioned decisions is hence unfounded.

11. The complainant accepts that the terms of appointment of staff members may be amended throughout their career if they hold a permanent employment contract, but not if they hold a temporary contract, as he did. He contends that the amendment of the Staff Regulations breached his acquired rights and that the former Article 26, which vested the Administrative Committee with the authority to make and renew appointments, protected the Organisation's senior officials, ensuring a degree of independence from the Secretary General and shielding them against her or his arbitrary decision-making.

12. As the Tribunal pointed out in Judgment 3876, consideration 7, international organisations' staff members are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions, irrespective of whether the staff member's appointment is permanent or temporary, as in the complainant's case.

The Tribunal has consistently held that the position is of course different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must therefore relate to a fundamental and essential term of employment within the meaning of Judgment 832 (see, for example, Judgments 2089, 2682, 2986 or 3135).

In the present case, the Tribunal notes that the complainant's letter of appointment stated that his appointment would terminate automatically, without notice, on 30 April 2016. The amendment of the Staff Regulations had no direct effect on the complainant's legal situation during his appointment. The complainant did not have a right to renewal of his contract of employment (see Judgment 3444, under 3), but the Staff Regulations provided for that possibility. The removal of such a possibility would have breached his acquired rights, but that is not what happened in this case. The possibility for the contract to be renewed is still explicitly specified in the new Regulations. Only the authority competent to take the decision changed: while under the 2012 Regulations the Administrative Committee could renew an appointment "on the basis of proposals by the Secretary General" (see Article 26, paragraph 1, of

the 2012 Regulations), the 2014 Regulations grant that competence to the Secretary General, although they allow any staff member to appeal against any administrative decision of the Secretary General to the Administrative Committee, as occurred in this case. In the Tribunal's view, it can be concluded from the foregoing that the amendment of the Regulations did not have an impact on a fundamental and essential term of employment such as to affect adversely the balance of contractual obligations.

The plea that the complainant's acquired rights were breached is hence without merit.

13. Lastly, the complainant seeks compensation for the moral and professional injury which he claims to have suffered, corresponding to the remuneration that he would have received had his contract been extended until 31 December 2016, as he requested in his appeal to the Administrative Committee, and amounting to 116,860.80 Swiss francs.

As stated above, the decisions of 29 April and 30 June 2015 were taken lawfully. The complainant is therefore not entitled to material damages for the non-renewal of his temporary contract of employment.

However, the Tribunal considers that it is appropriate to award the complainant the sum of 10,000 Swiss francs in moral damages for the flaws noted under consideration 6, above, affecting the examination of his internal appeal.

14. As the complainant succeeds in part, he is also entitled to costs, which the Tribunal sets at 1,000 Swiss francs.

DECISION

For the above reasons,

1. The decision of the Administrative Committee of 20 January 2016 dismissing the complainant's internal appeal is set aside.

2. OTIF shall pay the complainant moral damages in the amount of 10,000 Swiss francs.

3. It shall also pay him costs in the amount of 1,000 Swiss francs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ