

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**C.-P.**

*v.*

**ITER Organization**

**126th Session**

**Judgment No. 3990**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms F. C.-P. against the ITER International Fusion Energy Organization (ITER Organization) on 18 October 2016, the ITER Organization's reply of 30 January 2017, the complainant's rejoinder of 23 May, corrected on 12 June, the ITER Organization's surrejoinder of 26 October, the complainant's further statement of 6 December 2017 and the ITER Organization's final submissions of 26 February 2018;

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 challenges the decisions to terminate her fixed-term contract and to refuse to pay her the termination indemnity.

In November 2007 the complainant was seconded from the French Alternative Energies and Atomic Energy Commission (CEA) to serve as Head of the Human Resources Division of the ITER Organization. Her fixed-term contract was extended several times, the last extension being for five years up to 31 December 2017. Following a reorganisation, the Human Resources Department (HRD) was created and the

complainant was appointed Head of HRD in June 2015 with all other conditions of her contract remaining unchanged.

In November 2015 the ITER Council established the ITER Council Working Group on the Independent Review of the Updated Long-Term Schedule and Human Resources (ICRG) that was in charge of reviewing human resources organisation and procedures. The complainant participated in the review process and received a copy of the ICRG's report on 16 April 2016. The final version of the report was issued on 25 April 2016. The ICRG recommended in particular that management consider making changes within HRD and to the human resources policies and procedures. Two days later the ITER Council met and requested the Director-General to, inter alia, take the necessary measures to implement the ICRG's recommendations and to report on the progress made at its next meeting in November 2016.

On 2 May 2016 the Director-General and the Head of Cabinet held a meeting with HRD staff to inform them of the outcome of the ICRG review. At the end of the meeting, the complainant was asked to stay in the room. She was informed by the Director-General and the Head of Cabinet that her contract was terminated, seemingly due to a change in the nature or functions of her post, and that she would be paid a lump sum in lieu of the six-month notice period. She was asked to collect her personal belongings and to leave the office straightaway. In the afternoon the Director-General informed all staff that he had decided to make a change in the leadership of HRD and that the complainant had "stepped down this morning". He added that pending her replacement the Head of Cabinet would be Acting Head of HRD.

On 3 May 2016 the complainant received a letter dated 2 May 2016 by which the Director-General notified her that her contract was terminated pursuant to Article 6.3(a)(i) of the Staff Regulations, that is to say because of a "change in the nature or functions pertaining to [her] post", and that she was entitled to the payment of a sum in lieu of the six-month notice period. Her last day of employment was 2 May 2016. An exchange of emails ensued between the Head of Cabinet and the complainant concerning the personal belongings she had left in her office and the Organization's property still in her possession.

On 23 June 2016 the complainant lodged an internal appeal against the decisions to terminate her contract and not to pay her the termination indemnity. She alleged that there was no change in the nature or functions of her post and that the termination decision was a hidden sanction. She also alleged abuse of authority, breach of due process, breach of the principle of good faith, breach of privacy, discrimination and harassment. She claimed material, moral and exemplary damages and asked that her allegations of harassment be investigated by an “independent outside panel”. She sought consequential damages in relation to the costs she had incurred and would incur pursuant to her unlawful termination with respect to “health insurance and other expenses”. She also sought the removal and destruction of any adverse material concerning her and the reimbursement of her legal fees.

By a letter of 25 July 2016, the Director-General informed her that all her claims were denied. He explained that the termination decision had been taken because of a change in the nature or functions pertaining to her post and that he would not change his decision concerning the payment of the termination indemnity. He rejected her allegations that the manner in which she was informed of the decision to terminate her contract constituted harassment as defined in the Code of Conduct. That is the impugned decision.

On 3 October 2016 the complainant returned to work at the CEA.

The complainant asks the Tribunal to order the production of a document entitled “Confidential Report of ICRG HR Subgroup Audit Chair”. She requests the award of material damages in an amount equivalent to the salaries, benefits and emoluments to which she would have been entitled from the date of her separation to the date of expiry of her contract on 31 December 2017, together with interest. She also claims an amount equivalent to the “loss in value of expected pension benefits during [her] retirement years” together with an amount equivalent to five years’ salary and emoluments for loss of a valuable opportunity to have her contract extended. In the event that the Tribunal finds the termination decision lawful, she seeks material damages in an amount equivalent to the termination indemnity. She also claims moral damages, exemplary damages and costs. She further requests the Tribunal

to order the Organization to publish the Tribunal's judgment on its website and to communicate it, via email, to all staff members. She seeks the removal and destruction of any adverse material concerning her that may be in the Organization's files. Lastly, she claims reimbursement of any amount that she may be required to pay as national tax on the amount awarded by the Tribunal in the present case.

The Organization asks the Tribunal to dismiss the complaint as partly irreceivable for failure to exhaust internal means of redress and otherwise unfounded. It asserts that the document the complainant requests does not exist. In its final submissions, the Organization contests the receivability of the further statement submitted by the complainant and asks that the permission to file it be "revoked". It also asks the Tribunal to order the complainant to pay to it 4,000 euros in costs for responding to the further statement.

#### CONSIDERATIONS

1. On 2 May 2016 the complainant was informed orally by the Director-General of the ITER Organization that her contract was terminated with immediate effect. The contract was due to expire on 31 December 2017. The complainant then held the position of Head of HRD within the Organization. In a letter dated the same day but received by the complainant on 3 May 2016, the Director-General set out the reason for the termination:

"I have decided to terminate your contract, pursuant to Article 6.3 (a) (i) of the Staff Regulations [...]. The reason for this termination is the change in the nature or functions pertaining to your post, as the missions and responsibilities of the Human Resources Department, in particular the way to implement the ITER Organization HR policies in an international environment, will be largely reviewed based, among other facts, on the outcome of the audit report to the ITER Council."

2. The provision of the Staff Regulations referred to in this letter provided:

“6.3 Termination of Contracts of Employment

Contracts of employment may be terminated by the ITER Organization or by the staff member:

- (a) by the ITER Organization:
  - (i) with six months’ notice:
    - as a result of the suppression of the budgeted post occupied by the staff member;
    - **through a change in the nature or functions pertaining to the post, or**
    - through medical unfitness for the position, certified by the occupational health doctors approved by the Director-General for this purpose [...]” (Emphasis added.)

3. The complainant lodged an internal appeal against the decision to terminate her contract. The Staff Regulations provided the appeal was to be dealt with by the Director-General. In his decision on the appeal, he “maintain[ed] [his] decisions” and informed the complainant of his decision by letter dated 25 July 2016. This is the decision impugned in these proceedings.

4. The context in which the decision communicated on 2 May 2016 and maintained in July 2016 was taken may be summarised briefly as follows. It is unnecessary to detail events leading to the ITER Council establishing in November 2015 the ICRG which was to report to the Council by the end of April 2016 at the latest on staffing and other issues. Its final report was issued on 25 April 2016. It recommended changes within HRD and the human resources policies and procedures to meet what were perceived to be appropriate objectives and outcomes. Amongst other things, the number of staff was to increase significantly. On 27 April 2016, the report was considered by the ITER Council. The Council “[r]equested the Director-General to prepare an action plan and take necessary measures to implement the ICRG’s recommendations for the improvement of Risk Management and Human Resources management, and that he report on the progress of this at [a future meeting of the Council]”. There is no material before the Tribunal to suggest that between the time this decision was made by the Council and the decision made by the Director-General, less than one week later,

to terminate the complainant's contract, any formal decision was taken about the role and job description of the Head of HRD and how it would differ from the role then being undertaken by the complainant and her job description.

5. It is important to note in the extract of the letter of 2 May 2016 quoted in consideration 1, above, that there is no particularisation of the "change in the nature or functions pertaining to [the complainant's] post". In this respect, the letter is expressed in the most general terms. Indeed the letter makes relatively clear that what precisely were to be the specific changes to HRD was something to be considered in the future. The letter says the relevant matters "will be largely reviewed", the language of the future.

6. In her brief the complainant advances five arguments directly challenging the decision to terminate her contract. Other arguments address collateral issues. The first of those five arguments is that the decision involved a breach of Article 6.3(a)(i) of the Staff Regulations. The second is that there had been a breach of due process. The third is that there had been an abuse or misuse of authority. The fourth is that the decision was based on gender discrimination. The fifth, compendiously, is that there had been a breach of good faith and mutual trust, a breach of privacy and confidentiality, defamation and the decision constituted a hidden sanction.

7. It is convenient to address the first argument at the outset. Central to that argument is the scope and purpose of Article 6.3(a)(i) of the Staff Regulations. The provision serves two purposes. They are, in a sense, diametrically opposed. The first is to create a mechanism that enables the Organization to withdraw from a contractual arrangement it has with a particular staff member by terminating the contract before its expiry in specified circumstances. The second purpose, which derives from the specification of the circumstances, is to offer a measure of protection to staff members by identifying, and thus limiting, when a contract can be terminated prematurely. Accordingly, the existence of the specified circumstances at the time of termination is important in

establishing the right of the Organization to terminate the contract and in removing the protection otherwise afforded to a staff member under a contract that is still in force. In relation to the second bullet point of Article 6.3(a)(i), on which the Director-General relied in this case, the specified circumstances have three elements, the last two in the alternative. The first element is that there has to have been a change. The protective effect of the article would be substantially illusory if it applied to future, proposed or possible change. The change has to have occurred at the time of termination, as the second element, to the nature of the post or, as the third element, to the functions of the post. It is improbable that the expression “pertaining to” means anything other than “of”. The expression “nature [of] the post” is somewhat vague though the expression “functions [of] the post” is clearer. However what they both address are changed characteristics of the post itself and given that the power to terminate is enlivened by Article 6.3(a)(i), the change cannot be trivial and must be material.

8. There is nothing the Organization points to as a circumstance existing at the time the decision was made to terminate the complainant’s contract (no later than 2 May 2016) which establishes that a change had by then occurred to the nature of the complainant’s post or the functions of that post. What the Director-General relied on as revealed in his letter of 25 July 2016 was that the complainant’s profile did not fit the position as it may change. The complainant, as the Director-General perceived it, did not have an international profile or a multicultural approach. The Organization contends, in its reply, that at the meeting of 2 May 2016 the Director-General said to the complainant that her position

“had to be redefined to meet the urgent needs of the [Organization]; that the incumbent was to have a much more international profile and a different approach to staff relations and management within international organizations; that [the complainant’s] profile did not fit the position; that this redefinition was essential for the design and implementation of enhanced human resources policies to attract and retain high qualified and well-motivated staff from all the Members; that the [Organization] needed someone with a multicultural approach, based on extensive international experience and exposure in a successful international human resources function, and a solid understanding and experience of the expatriation situation in order to better address international staff expectations.”

These matters do not manifest or evidence a change in the functions of the post, and only in the most general and tangential way could they be said to manifest or evidence a change in the nature of the post. They are statements of aspiration or intention only. But given the grave consequences on a staff member if Article 6.3(a)(i) of the Staff Regulations is invoked, something more concrete than aspirational statements is required. Ordinarily that would involve a considered assessment of existing functions and the clear formulation and articulation of new functions that, as a matter of common practice, would be reflected in writing in a new duties and responsibilities statement or job description. It would be in those circumstances that a decision-maker could confidently be satisfied that the circumstances identified in the second bullet point of Article 6.3(a)(i) had arisen and the staff member concerned could understand why her or his contract was being terminated and her or his contract was ending prematurely. But, in the present case, the complainant's post had not, at the time of the termination on 2 May 2016, undergone change even if, as happened, later in May 2016 a vacancy announcement was published setting out differently expressed purposes for the position of Head of HRD and differently expressed major duties and responsibilities.

9. What the Director-General was really saying at the time of the meeting on 2 May 2016 was that the complainant was not the type of person he wanted to fill the post of Head of HRD into the future. This is insufficient to attract the operation of Article 6.3(a)(i) of the Staff Regulations relied on as authorising the termination. The termination of the complainant's contract was not authorised by that provision. Accordingly the termination was unlawful. The impugned decision and the termination decision of 2 May 2016 should be set aside.

10. It is unnecessary to consider the other bases on which the complainant argues the decision to terminate was unlawful. This leads to a consideration of the damages payable to the complainant. She was a comparatively long-serving member of staff of the Organization, having commenced employment with the Organization in November 2007. In her brief, the complainant said her performance was always

satisfactory or better, citing financial awards she had received in 2014 and 2015 for extraordinary performance and notable achievements, respectively, and the fact that she had received, atypically, yearly step increments in the years 2011 to 2014 in view of her extremely good performance. These matters are not disputed by the ITER Organization in its pleas.

11. At the time of the termination of the complainant's contract, it had approximately a year and a half to run. The complainant was working at the Organization effectively on secondment from the CEA and recommenced employment with the CEA on 3 October 2016.

12. The complainant received no forewarning of the impending termination of her contract. She was, in substance, given no opportunity to argue against a decision to terminate her contract summarily (see, for example, Judgment 3169, consideration 16). In addition, the Head of Cabinet acted in the position of Head of HRD for several months following the termination of the complainant's contract. There was no obvious and compelling reason why this should have been so, nor was there an obvious and compelling reason why the complainant could not have served out her notice (see, for example, Judgment 1616, consideration 5), even assuming the termination had been lawful.

13. In an email communication to all staff on 2 May 2016, the Director-General said the complainant had "stepped down this morning". This statement clearly implies that the termination was in some way agreed to or at least acquiesced in by the complainant. This is false and, the Tribunal infers, was deliberately false in order to put a gloss on what in fact had happened, most favourable to the Administration.

14. In the foregoing circumstances, the complainant is entitled to moral damages which are assessed in the sum of 70,000 euros. The Tribunal does not accept this is a case in which exemplary damages, as sought by the complainant, are warranted. The complainant does not seek reinstatement, nor will it be ordered by the Tribunal. However, she is entitled to material damages, though in relation to some relevant

considerations there is a dearth of evidence. The Tribunal's assessment includes a consideration of the difference (on the pleas, the Organization does not contest there was a reduction in her earnings) between what she would have earned if her contract had not been terminated prematurely and the income she earned after taking up employment with the CEA some months later. Some allowance, however, should be made to the fact that the Organization may have been able, in due course, to lawfully terminate the complainant's contract under Article 6.3(a)(i) of the Staff Regulations. Another factor in the mix when assessing material damages is the complainant's lost opportunity to secure further employment with the Organization after the expiry of her contract in December 2017 and the loss of potential pension benefits. The Tribunal assesses, globally, those material damages in the sum of 40,000 euros.

15. Finally, four further matters raised in the pleas of the parties should be briefly addressed. The complainant sought the production of a specified document. The Organization denies the document exists. Irrespective, the complainant has succeeded without the document and its production is unnecessary.

16. The second matter concerns a further statement made by the complainant under Article 9, paragraph 6, of the Tribunal's Rules after the surrejoinder had been filed by the Organization. The Organization argues it is entitled to its costs for responding to this further statement and, more fundamentally, the permission to file the statement should be revoked. The Organization argues the request to make it was not in a proper form and involved the President of the Tribunal being misled about the basis on which the request was founded. The subject matter of the further statement concerned the failure of the Organization to pay a termination indemnity. In view of the Tribunal's finding that the termination was unlawful, no issue arises about a termination indemnity. The subject matter is moot. In addition, the Tribunal is not satisfied a special costs order for responding to the complainant's further statement should be made.

17. The third matter concerns a contention of the complainant that the Director-General failed to open an investigation into an allegation of harassment. The Organization contends this claim is irreceivable. But as the complainant made clear in her rejoinder, the alleged “harassment” arises from the circumstances in which her contract was terminated. These matters have been taken into account in assessing moral damages for the unlawful termination.

18. The fourth matter involves a request of the complainant that the Tribunal order the Organization to publish a statement concerning these proceedings. The Tribunal rejects this request.

19. The complainant is entitled to costs assessed in the sum of 8,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision of 25 July 2016 and the termination decision of 2 May 2016 are set aside.
2. The ITER Organization shall pay the complainant 70,000 euros moral damages.
3. The ITER Organization shall pay the complainant 40,000 euros material damages.
4. The ITER Organization shall pay the complainant 8,000 euros costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 3 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ