Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

W.

v.

Energy Charter Conference

126th Session **Judgment No. 4009**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. W. against the Energy Charter Conference on 14 November 2016 and corrected on 22 November 2016, the Conference's reply of 6 February 2017, the complainant's rejoinder of 7 April, the Conference's surrejoinder of 26 May, the complainant's additional submissions of 15 September and the Conference's final comments thereon of 14 November 2017;

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 decision not to extend his fixed-term contract following the abolition of his post, but to give him a Project Staff contract.

At the material time, the complainant, who joined the Energy Charter Secretariat – the secretariat of the Energy Charter Conference – in 1995, had held the post of Head of Administration and Finance since 1 July 1998. His fixed-term contract, which had been extended several times, was due to expire on 30 June 2016.

The Budget Committee, which is made up of one representative of each Signatory to the Energy Charter Treaty, is the body responsible for advising the Conference on matters relating to the financial administration of the Secretariat and which, as such, gives its opinion on the Secretariat budget before it is submitted to the Conference for adoption. On 7 September 2015 the Secretary General presented the Committee with a first version of the draft Secretariat budget for the 2016-2017 biennium, which provided for a restructuring of the Secretariat entailing the abolition of several posts, including that of the complainant.

At the end of the Budget Committee's meeting on 17 September 2015, the Secretariat was asked to prepare a second version of the draft budget. This was submitted to the Budget Committee. At its meeting on 20 October, the Budget Committee decided that it could not adopt a decision until the Secretary General and the Staff Committee reached consensus. They were invited to do so.

In the draft budget for the 2016-2017 biennium which it submitted to the Conference on 17 November 2015, the Secretariat proposed the abolition of several posts, including that of the complainant, at the date of expiry of the incumbent's contract. It explained that in order to bridge the gap until the entry into force of the new establishment table in 2017, a "Project Staff contract" ending on 31 December 2016 would be offered to most of the staff members whose posts were to be abolished. The Conference approved this draft budget on 3 December 2015.

The Secretary General informed the complainant by a letter of 4 December 2015 that the Conference had decided to abolish his post as of 30 June 2016 and that his contract would not therefore be extended beyond that date. However, he offered the complainant a Project Staff contract for the period 1 July to 31 December 2016 with "the same job description" and at the same grade and step. The complainant accepted this offer while making it clear that he reserved the right to challenge this decision.

On 17 December the complainant requested the Secretary General to review the decision of which he had been notified by the letter of 4 December and to extend his fixed-term contract. On 23 December 2015 the Secretary General informed him that as, in his opinion, all the

relevant rules and procedures had been followed correctly and the terms of his contract had been respected, he had decided to maintain the decision not to extend that contract. He noted that the complainant had accepted the Project Staff contract offered to him.

On 21 June 2016 the complainant referred the matter to the Advisory Board and requested a review of the decision not to extend his fixed-term contract and its extension for one year as from 1 July 2016, or the granting of a one-year contract affording him the same rights. In its report of 4 August the Advisory Board, which had heard the complainant on 1 July, stated that as his post had been abolished, it was impossible to extend his fixed-term contract or to award him a contract affording him the same rights. The Board held that the Secretary General had acted within his authority on the basis of the decisions taken at the Conference and in compliance with the applicable procedures. On 16 August 2016 the Secretary General informed the complainant that, in accordance with the Board's advice, he had decided to maintain his decision not to extend the complainant's fixed-term contract. That is the impugned decision.

The complainant asks the Tribunal to set aside this decision and likewise the decisions of 4 and 23 December 2015. He also seeks his reinstatement, with the retroactive reconstruction of his career, in a post matching his profile, and the payment of the remuneration arrears which he considers are due since 1 January 2017. If his reinstatement is impossible, he requests, as compensation for material injury, the payment of a sum equal to the remuneration he would have received between 1 January 2017 and 31 May 2021, the date on which he would have retired, with interest. At all events, he requests moral damages in the amount of 25,000 euros and costs.

The Conference submits that the complaint should be dismissed as unfounded.

CONSIDERATIONS

1. Article 34(3) of the Energy Charter Treaty provides that the Conference shall "appoint the Secretary General and take all decisions necessary for the establishment and functioning of the Secretariat including the structure, staff levels and standard terms of employment of officials and employees". In pursuance of this provision, the Conference creates officials' posts when approving the Secretariat budget to which an establishment table, prepared by the Secretariat, is appended (Staff Regulation 11).

At the material time, the complainant held the position of Head of Administration and Finance, a grade A4 post which was listed in the establishment table.

At its meeting on 3 December 2015 the Conference approved the Secretariat's budget for the 2016-2017 biennium, which included a new establishment table giving effect to a restructuring of the Secretariat entailing the abolition of the complainant's post as of 30 June 2016.

The complainant challenges the decision, taken following the adoption of this budget, not to extend his fixed-term contract but to give him a Project Staff contract.

2. In his written submissions the complainant contends that the Conference's decision was tainted with flaws.

The adoption of an establishment table is a general decision which, according to the case law, cannot be impugned if it requires individual implementing decisions, in which case only the latter may be impugned (see Judgments 3736, under 3, and 3628, under 4, and the case law cited therein). However, the decision not to extend the complainant's fixed-term contract but to offer him a Project Staff contract is an individual decision implementing the amendment of the establishment table and, in support of his claims directed against that decision, the complainant is entitled to challenge the lawfulness of the said amendment, which formed the basis of the decision in question.

3. The complainant contends that the rules concerning consultation of the Staff Committee were breached. In this connection, he submits that the Committee was not properly consulted, that its role was disregarded and that it was allowed too little time to give its opinion.

4. A firm line of precedent has it that a decision concerning the restructuring of an international organisation's services which leads to the abolition of a post is subject to only limited review by the Tribunal. The latter must therefore confine itself to ascertaining whether the decision was taken in accordance with the rules on competence, form or procedure, whether it involves a mistake of fact or of law, whether it constituted abuse of authority, whether it failed to take account of material facts, or whether it draws clearly mistaken conclusions from the evidence (see Judgment 3582, under 6).

5. Since a breach of rules concerning consultation of a staff representative body constitutes a procedural flaw, this plea lies within the scope of review defined above. First, the complainant submits that the Secretary General violated Staff Rule 4.3 by failing to consult the Staff Committee about the proposed restructuring of the Secretariat before submitting the proposal, in particular the first version thereof which formed the basis of the "whole decision-making procedure", to the competent authorities.

The defendant organisation contends that discussions were held with the Staff Committee well before the restructuring proposal was submitted to the Conference for final approval. It states that the Committee was indeed consulted and that its "main ideas" were taken into account.

Staff Rule 4.1 reads in pertinent part:

"(b) The main objectives of the Staff Committee shall be:

(i) to promote co-operation between the Secretariat and the staff as a whole;

[...]

(e) Before making decisions affecting the position of a particular category, of all categories or of a specific group of officials of the Secretariat, the Secretary-General shall consult the Staff Committee."

Staff Rule 4.3 provides that:

> "(a) In pursuance of the main objectives specified in Rule 4.1, the Staff Committee:
>
> (i) shall be bound to give its opinion on proposed amendments to the Staff Regulations or Staff Rules and administrative action proposed by the Secretary-General in furtherance of the Staff Regulations or Staff Rules. [...]"

These provisions make it plain that the Staff Committee's advisory role primarily involves advising the Secretary General. It follows that restructuring proposals must be submitted to the Staff Committee for an opinion before being forwarded to the Conference or the Budget Committee. Indeed, the consultation would be meaningless without this step, the purpose of which is precisely to inform the Secretary General before he adopts a position.

Before the Conference took its decision on 3 December 2015, the Budget Committee twice discussed the restructuring of the Secretariat, namely on 17 September and 20 October 2015.

The first version of the restructuring proposal presented by the Secretary General was sent to the Budget Committee on 7 September 2015 ahead of its meeting on 17 September. The Staff Committee was not consulted about this first version. In a note to the Budget Committee of 17 September 2015, the Staff Committee pointed out that it had not been properly consulted and deplored the planned restructuring.

The submissions in the file show that the Staff Committee, owing to circumstances beyond its control, was unable to meet the deadline agreed with the Secretary General for giving its opinion on the second version of the proposal, which was examined by the Budget Committee at its meeting on 20 October 2015, and that the Secretary General therefore considered on 6 October 2015 that his duty to consult the Staff Committee had been accomplished and sent his second version of the proposal to the Budget Committee without waiting for the Staff Committee's opinion. The latter did in fact send the Budget Committee an alternative draft budget on 7 October 2015. However, the fact that paragraph 9 of the Staff Circular concerning Staff Rule 4.2 at that time permitted the Staff Committee to send a note to the Chairman of the

Budget Committee, as in fact occurred, did not exonerate the Secretary General from his duty to consult the Staff Committee before submitting his proposal to the Budget Committee.

In conclusion, the Secretary General breached Staff Rules 4.1 and 4.3 quoted above. This plea is well founded.

6. The complainant also contends that the Secretary General completely ignored the Staff Committee's role by taking it upon himself to consult staff members directly about his restructuring proposal, and that he brought pressure to bear on them to support it.

The defendant organisation replies that, on the contrary, it was the Staff Committee which tried to force its view on all the staff regardless of the general interest. It adds that the Secretary General consulted the staff by organising town hall meetings and considers that it is not the Staff Committee's role to substitute its own opinion for that of the staff.

The evidence in the file shows that on 23 October 2015 the Staff Committee advised the Secretary General that staff members who so wished should be able to retain their current status. On 28 October the Secretary General replied that while neither version of the restructuring proposal had received unanimous backing from the staff members, there had been majority support, confirmed in writing, for one version. He also took the Staff Committee to task for having misled the members of the Budget Committee by telling them that its alternative draft budget was supported by a majority of the staff. He informed the Staff Committee that he intended to proceed on the basis of the written opinion of the majority of the staff.

Staff Rules 4.1 and 4.3 stipulate that the Secretary General must obtain the Staff Committee's opinion before adopting his position. He is free to follow or to reject that opinion. He may criticise it and explain why he cannot endorse it, but he cannot lawfully consult each staff member individually instead of consulting the properly constituted Staff Committee.

The evidence in the file also shows that town hall meetings were indeed held, but they cannot make up for the lack of a Staff Committee opinion or remedy a flaw relating to its consultation.

This plea is well founded.

7. The complainant also submits that the Staff Committee was twice given a deadline for stating its opinion much shorter than that specified in Staff Rule 4.3(a)(i). The defendant organisation replies that these tight deadlines were given to the Staff Committee when it was consulted in connection with the various draft versions of the restructuring proposal, but not for the proposal that was ultimately submitted to the Conference.

Staff Rule 4.3(a)(i) provides as follows:

> "[...] The Secretary-General shall likewise refer to the Staff Committee any question of a general nature affecting the interests of the staff [...]. In all cases under this paragraph, the Staff Committee shall state its opinion on a matter within 30 days of notice thereof, except that by mutual agreement a shorter or longer period may be decided upon in exceptional cases[.]"

The written submissions show that in a matter as important as an extensive restructuring of the Secretariat, the Secretary General twice set a very tight deadline, much shorter than that provided for in Staff Rule 4.3(a)(i), for the Staff Committee to give its opinion.

On 28 September 2015, in preparation for the second meeting of the Budget Committee on 20 October 2015, the Secretary General submitted to the Staff Committee two options regarding staff members whose posts were to be abolished and expressly asked it to indicate its preference in writing by 30 September 2015, i.e. within two days. As the Staff Committee refused to respond within this time limit, the Secretary General proposed an extension of the deadline to 2 October 2015. However, on 5 October the Staff Committee said that it could not provide its opinion until 7 October because its Chairman had resigned. The Secretary General then informed it on 6 October that since it had not given its opinion within the time limit set, he considered that his duty to consult the Staff Committee had been accomplished. Given that the Staff Committee had been unable to meet the set deadline owing to circumstances beyond its control, it was up to the Secretary General to agree on a new time limit. As he did not do so, Staff Rule 4.3(a)(i) was breached.

Similarly, in preparation for the Conference meeting of 3 December 2015, the Secretary General invited the Staff Committee on 20 October 2015 to inform him of its position in writing by midday on 22 October 2015, in other words within two days. However, the Secretary General had no right under any provision unilaterally to reduce the period for consulting the Staff Committee to two days.

This plea is well founded.

8. In conclusion, as explained in considerations 5 to 7, above, the procedure for consulting the Staff Committee was tainted with several flaws.

The Tribunal recalls that, in keeping with the principle *tu patere legem quam ipse fecisti*, when a text provides for the consultation of a body representing the staff before the adoption of a decision, the competent authority must follow that procedure, otherwise its decision will be unlawful (see, for example, Judgments 3883, under 20, 3671, under 4, and 1488, under 10).

Since the plea that the rules regarding consultation of the Staff Committee were breached is well founded, the deliberations of the Conference on 3 December 2015 were unlawful. The individual decision taken with regard to the complainant on the basis of those deliberations is therefore likewise unlawful. Moreover, this individual decision is also unlawful in other respects.

9. The complainant submits that the decision not to extend his fixed-term contract is in fact a decision to terminate a twenty-year "perennial employment relationship". He contends that his duties, which he performed continuously for over 17 years, were of a permanent nature and that his fixed-term contract "must [...] be redefined" as a contract of indefinite duration. He infers from this that the question of extending his fixed-term contract was, by definition, moot.

The complainant acknowledges that the Staff Regulations and Staff Rules make no provision for employment under a contract of indefinite duration and that Staff Rule 10.1 lays down that "[n]o action by the Secretary-General shall be construed as, or have the effect of, granting

employment for an indefinite period or constituting a permanent appointment". However, in his opinion, this provision contradicts other provisions of the Staff Regulations and Staff Rules. First, he emphasises that the Preamble to the Staff Regulations and Staff Rules provides that it is staff policy to enable officials wherever possible to pursue a career within the Secretariat. Moreover, in his view, Staff Regulation 12(d) requires account to be taken of the need to provide officials with the opportunity to pursue a career within the Secretariat, when considering applications for posts. He also points out that Staff Regulation 23 provides that officials' training and instruction must be taken into consideration for the purposes of promoting their careers. Lastly, the complainant submits that pursuant to Staff Rule 13.1(b), if a post is suppressed, the official may be transferred to a post at the same level that is or may become vacant.

10. As the defendant organisation notes, the complainant's "request" to have his fixed-term contract redefined was not submitted to the Advisory Board. It is true that in his internal appeal the complainant asked only to have his fixed-term contract extended for one year. The Tribunal's case law clearly establishes that a complainant's claims must not exceed in scope the claims submitted during the internal appeal process. However, a complainant is not precluded from advancing new pleas, as the present complainant does, before the Tribunal even if these pleas were not placed before the internal appeal body (see Judgments 3686, under 22, and 2571, under 5). In the instant case, the complainant's submission is receivable as a plea challenging the lawfulness of the decision not to extend his fixed-term contract.

11. The Preamble to the Staff Regulations and Staff Rules has no binding legal force and it refers to the pursuit of a career within the Secretariat "wherever possible". The Staff Regulations requiring account to be taken of the possibility for career advancement at the time of recruitment and in training, and the Staff Rule concerning transfer when a post is abolished, do not preclude the conclusion of fixed-term contracts. Moreover, the Tribunal finds that the organisation is expressly required to conclude fixed-term contracts by Staff Regulation 10(a),

which stipulates that "[o]fficials shall be appointed for a fixed term". Lastly, Staff Rule 10.1 provides that "[n]o action by the Secretary-General shall be construed as, or have the effect of, granting employment for an indefinite period or constituting a permanent appointment".

Indeed, the letter offering the complainant a fixed-term appointment stated: "this offer does not imply that [the contract] will be renewed or converted into another kind of appointment".

The wording of Staff Regulation 10 and Staff Rule 10.1 is clear and must be construed according to the primary rule that unambiguous words must be given their obvious and ordinary meaning (see Judgments 3701, under 4, 3213, under 6, and 1222, under 4).

There is plainly nothing in these provisions which would entitle the complainant to have his fixed-term contract redefined. Nor is there anything in the case law establishing such a right. The complainant is therefore wrong to submit that his fixed-term contract should have been redefined, and the organisation was correct in holding that it was entitled not to extend the complainant's fixed-term contract.

12. The complainant also alleges a breach of Staff Rule 25.1, which requires the Secretary General to consult Senior Management officers before personnel decisions are taken, in particular those regarding termination of employment – a notion which, according to the complainant, must be construed in the broad sense to encompass non-extension of a contract.

The defendant organisation explains that Staff Rule 25.1 applies only when a contract is terminated prior to its expiry, and not when it is not extended. It contends that Senior Management officers were consulted about the decision not to extend the complainant's fixed-term contract, as "discussions" took place during management meetings attended by a large number of participants, including Senior Management officers.

13. Staff Rule 25.1 reads:

> "The Secretary-General shall consult with Senior Management officers including the Deputy Secretary-General and Directors before personnel decisions are taken in accordance with Staff Regulations and Staff Rules,

> in particular regarding appointments, probation, promotion, advancement, disciplinary actions, termination of employment.
>
> Conclusions shall be recorded in writing."

Whereas the Staff Committee is responsible for giving its opinion on matters of general concern to the staff (Staff Rule 4.1(e)), Senior Management officers have to give their opinion on issues concerning individual staff members (Staff Rule 25.1).

Contrary to the defendant organisation's submissions, Staff Rule 25.1 does apply in this case, as it requires Senior Management officers to give their opinion on all issues concerning individual staff members. Termination of employment is mentioned only as an example, and the non-extension of a contract also falls within the scope of this provision. In addition, this rule required Senior Management officers to give their opinion on the granting of a Project Staff contract to the complainant.

The submissions in the file certainly show that the general issue of the budget and personnel management was raised at various management meetings during which the Secretary General summarised progress on this subject. These general explanations did not give rise to an opinion. However, in any case, these discussions cannot replace an opinion of Senior Management officers on the complainant's personal situation. In accordance with the principle *tu patere legem quam ipse fecisti*, the Secretary General had to abide by Staff Rule 25.1 and consult Senior Management officers about the non-extension of the complainant's contract and the proposal to give him a Project Staff contract. Furthermore, their conclusions should have been recorded in writing, in accordance with that provision.

This plea is well founded.

14. The complainant contends that the decision to give him a Project Staff contract has no legal basis and was taken *ultra vires*, since his employment relationship after 1 July 2016 plainly could not be described as a Project Staff contract. He submits that no provision is made for this kind of appointment in the Staff Regulations and Staff Rules, and that the Secretary General thus created a new category of staff, which is normally within the competence of the Conference.

The defendant organisation replies that this plea was not raised during the internal proceedings.

As stated in consideration 10, above, the Tribunal considers that a complainant may advance a new plea before the Tribunal, even if it was not placed before the internal appeal body. In the instant case, the complainant's submission is receivable as one of his pleas challenging the lawfulness of the decision to grant him a Project Staff contract.

The defendant organisation explains that Project Staff contracts should really be regarded as temporary contracts within the meaning of Staff Rule 1.2. The complainant's contention regarding lack of a legal basis is therefore groundless.

15. The complainant further submits that his employment relationship after 1 July 2016 could not be termed a Project Staff contract because his duties, which remained the same, could not be subsumed under the notion of a project, nor could they be viewed as short-term.

The Tribunal notes that according to the terms of the letter of 4 December 2015, the Secretary General offered the complainant a six-month Project Staff contract, with "the same job description" and at the same grade and step. In other words, the complainant continued to perform the same duties with the same remuneration. The only differences between the contract under which he was employed and that which was offered to him, were their name and duration. As the complainant had been employed since 1998 as Head of Administration and Finance under a fixed-term contract, the Secretary General could not offer him a temporary contract to continue performing exactly the same work as he was performing under a fixed-term contract without contravening the spirit of the applicable texts (see Judgment 2708, under 10).

The defendant organisation explains that as the complainant's post had been abolished, he could no longer be retained under a fixed-term contract. However, as the Tribunal has consistently held, although job abolitions may arise from a restructuring, they must be justified by real needs and not be immediately followed by the creation of equivalent posts (see Judgments 3422, under 2, and 2156, under 8). In this case,

the purpose of offering the complainant a Project Staff contract was to keep him in his post for a further six months. This could not, however, involve distorting the notion of a temporary contract.

This plea is well founded.

16. It follows from the foregoing that the Secretary General's decision of 4 December 2015 not to extend the complainant's fixed-term contract and to offer him a six-month Project Staff contract is unlawful. For this reason, the decisions of 23 December 2015 and 16 August 2016 confirming it are likewise unlawful. These three decisions must therefore be set aside, without there being any need to examine the other pleas regarding them.

Nonetheless, in the circumstances of this case, there are no grounds for ordering the complainant's reinstatement, given the amount of time that has passed, and bearing in mind the fact that, as already stated, the complainant did not hold a contract of indefinite duration and that the organisation is facing financial difficulties.

17. The complainant is, however, entitled to an award of damages. When assessing these damages, account will be taken of the fact that, although he had been in the Secretariat's service since 1 November 1995, he had held a fixed-term contract and thus did not have any right to have it extended until he reached retirement age. Account will also be taken of the fact that, after his fixed-term contract was not extended, he continued for a period of six months to earn the same amount of salary as he had previously received. In view of all the circumstances of the case, the Tribunal considers that the various forms of injury suffered by the complainant may be fairly redressed by awarding him compensation assessed *ex aequo et bono* at 60,000 euros.

18. As the complainant succeeds, he is also entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The Secretary General's decision of 16 August 2016 and those of 4 and 23 December 2015 are set aside.
2. The Energy Charter Conference shall pay the complainant 60,000 euros in compensation under all heads.
3. The Energy Charter Conference shall also pay him costs in the amount of 5,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 26 April 2018, 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 26 June 2018.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ