R.

v.

ITER Organization

129th Session **Judgment No. 4218**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms I. R. against the ITER International Fusion Energy Organization (ITER Organization) on 16 January 2018 and corrected on 15 February, the ITER Organization's reply of 29 June, the complainant's rejoinder of 16 August 2018 and the ITER Organization's surrejoinder of 9 January 2019;

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 renew her fixed-term contract.

At the material time, the complainant held a P4 position under a five-year fixed-term contract expiring on 6 January 2018.

On 29 May 2017 the complainant's first and second-level supervisors filed a "Contract Management Form" in which they recommended not to renew her contract on the grounds that evolving business needs required her position to be reviewed and reclassified, and that the new position would be opened to external competition.

As required by paragraph 8.4 of Internal Administrative Circular No. 35 entitled "Renewal of Contracts of Employment" (hereinafter "IAC No. 35"), the complainant met with the Director-General on the same day (29 May 2017) to discuss the renewal of her contract. During that meeting, the Director-General expressed his intention not to renew her contract as her position was to be reclassified to grade P5.

By a letter dated 13 June 2017 the Director-General informed the complainant that, after consideration of the foreseeable needs of the Organization and due to the envisaged changes in the nature and functions of her position, he had decided not to renew her contract beyond its expiration date.

As the complainant's appeal to the Director-General against this decision was rejected on 21 August, she requested mediation in accordance with Article 26.1(d) of the Staff Regulations of the ITER Organization.

In his report of 6 October 2017 the Mediator found that the process was tainted with two flaws. First, the Contract Renewal Job Assessment Committee (CRJAC) had not been consulted, in breach of IAC No. 35. Second, the recommendation contained in the "Contract Management Form" was, in his view, not specific enough for the Director-General to make an informed decision. He recommended that the decision of 13 June 2017 be withdrawn, that the "Contract Management Form" be returned to the complainant's supervisors for reconsideration and revision, that the CRJAC be convened and that a new decision be taken on the renewal of the complainant's contract. In the event that the non-renewal of the complainant's contract was confirmed, the Mediator recommended that she be awarded an indemnity.

Based on these recommendations, the complainant's supervisors were requested to add further details to the "Contract Management Form". They met with the complainant on 13 October and, in the revised form, they recommended not to renew her contract, because in their view she could not fulfil the duties of the new position. The CRJAC was convened and issued its report on 16 October 2017. It assessed the new position at P5 and did not recommend the complainant for it.

By a letter dated 20 October 2017 the Director-General informed the complainant that he had decided to confirm his decision not to renew her contract, but that he would instruct the Human Resources Department (HRD) to make all efforts to support her in finding suitable employment. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order the Organization to renew her contract for five years and to reinstate her in her position or in any other suitable position in view of her qualifications and experience, with retroactive effect from the date of separation, or to order the Organization to pay her a sum equivalent to the salaries and allowances she would have received for a period of five years if her contract had been renewed. If this sum is not at least equivalent to the termination indemnity provided for in the Staff Regulations, she asks the Tribunal to order the Organization to pay her that indemnity along with adequate unemployment benefits. She claims damages for her loss of earning capacity, for any loss of pension benefits, for the prejudice caused to her health and 50,000 euros for moral injury. She seeks costs in the amount of 12,000 euros.

The ITER Organization submits that her complaint should be dismissed as unfounded in its entirety.

CONSIDERATIONS

1. At relevant times, the complainant was employed by the defendant organization under a five-year fixed-term contract expiring on 6 January 2018. By letter dated 13 June 2017 the complainant was informed that the Director-General had decided not to renew her contract. The complainant unsuccessfully appealed against that decision. She was, however, successful in a review of the decision by the Mediator exercising powers under Article 26 of the Staff Regulations in the sense that the Mediator identified in a report dated 6 October 2017 two flaws in the procedures preceding the initial June 2017 decision. Firstly the CRJAC had not been consulted and secondly the recommendation of the complainant's first and second-level supervisors in a "Contract Management Form" was not specific enough for an

informed decision to be made. Steps were taken within the Organization to overcome these flaws and, in due course, a further decision was taken whether to extend the complainant's contract. By letter dated 20 October 2017 the complainant was informed that the Director-General had decided to confirm his decision not to renew her contract. She was also informed that HRD would be instructed to make all efforts to support her in finding suitable employment. It is this decision that is impugned in these proceedings.

2. It is convenient to commence by recalling the approach of the Tribunal to cases in which a complainant challenges a decision not to renew a contract. They were conveniently summarised in Judgment 3586, consideration 6:

> "Firm and consistent precedent has it that an organization enjoys wide discretion in deciding whether or not to extend a fixed-term appointment. The exercise of such discretion is subject to limited review because the Tribunal respects an organization's freedom to determine its own requirements and the career prospects of staff (see, for example, Judgment 1349, under 11). The Tribunal will not substitute its own assessment for that of the organization. A decision in the exercise of this discretion may only be quashed or set aside for unlawfulness or illegality in the sense that it was taken in breach of a rule of form or procedure; or if it is based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 3299, under 6, 2861, under 83, and 2850, under 6). These grounds of review are applicable notwithstanding that the Tribunal has consistently stated, in Judgment 3444, under 3, for example, that an employee who is in the service of an international organization on a fixed-term contract does not have a right to the renewal of the contract when it expires and the complainant's terms of appointment contained a similar provision."

3. The complainant advances seven arguments in support of the general contention that the decision not to renew her contract was legally flawed. The first is that there had been a failure to follow the prescribed process in the phase before the decision of 13 June 2017. The second is that there had been a failure to bring the process in line with applicable requirements after the decision of 13 June 2017. The third is that the reasons for the decision were inadequate. The fourth is that there had been a violation of the requirement for transparency.

The fifth is that there had been a violation of the duty of care and good faith. The sixth argument is that there had been a violation of the complainant's legitimate expectations. The seventh and final argument is that the defendant organization failed to provide the complainant unemployment benefits. The Tribunal addresses each of these arguments in turn.

4. The first argument that there had been a failure to follow the prescribed process in the phase before the decision of 13 June 2017 contains several elements. To the extent that, as a result of the Mediator's report, further steps were taken to rectify the flaws he identified, the fact that the evidence evinces those rectified flaws at an earlier time does not advance the complainant's case. Two of the elements are related. It is said her performance had not been taken into account and her potential ability to perform the duties in the new post was not considered. The defendant organization, in its reply, disputes this. No attempt was made in the rejoinder to provide, with any particularity, evidence supporting these two elements of the argument. Another two elements were procedural in nature. One is that the process to assess whether there should be renewal should commence between ten and nine months before the contract's expiration. The second is that she should have been, but was not, provided with a copy of the "Contract Management Form". The complainant does not establish that either was a procedure which was required to be followed or should have, in the circumstances of this case, been followed. The last element concerns references and referees. It may well be true that they should have been consulted before the decision was made on 13 June 2017 but, as the complainant effectively concedes, they were later consulted. There is no discernible flaw in relation to this aspect of the process.

5. The second argument is that there had been a failure to bring the process in line with applicable requirements after the decision of 13 June 2017 and the third is that the reasons for the decision were inadequate. The premise on which much of these two arguments proceeds, is that the complainant was suitably qualified for the new position and her contract should have been renewed to enable her to

occupy it. This premise invites consideration of her qualifications and suitability. But it is one of the matters the Tribunal, as illustrated by the passage quoted above from Judgment 3586, will not consider. To the extent that the complainant puts in issue the time frame within which a further consideration took place of whether the contract should be renewed, she does not demonstrate that a proper consideration of the position could not have occurred or did not occur. She also contends, as a specific matter, she was not sent a report of a meeting she had with her supervisors on 13 October 2017. No real basis is advanced as to why this was required.

6. The fourth argument is that there had been a violation of the requirement for transparency. The only point of substance raised on this topic is that the complainant was not provided with copies of certain documents before the CRJAC. Copies of those documents have been provided by the defendant organization in its reply. They should have been provided to the complainant at the time they were provided to the CRJAC (see, for example, Judgment 2588, consideration 7). However, in her rejoinder, the complainant failed to demonstrate in any material way that either the failure to provide them at the time or their content tainted the decision-making process leading to the ultimate decision impugned in these proceedings not to renew her contract and thus failed to prove she suffered prejudice (see Judgment 3377, consideration 16). In these circumstances no moral damages should be awarded.

7. The fifth argument is that there had been a violation of the duty of care and good faith. In the letter of 20 October 2017 conveying the impugned decision the Director-General said that he would ask HRD to take certain steps directed to finding other suitable employment for the complainant. The substance of the complainant's analysis of the steps that were taken imputes to those acting on behalf of the defendant organization, bad faith. But other views are open and the complainant certainly has not discharged the onus of establishing bad faith or, as is advanced in the alternative, discrimination against her (see Judgment 4067, consideration 11).

8. The sixth argument was that there had been a violation of the complainant's legitimate expectations. At base, this argument turns on what were seen to be assurances that her contract would be renewed even if only for a short period. But whatever was said did not create a legal right that was defeated by the decision not to renew her contract.

9. The seventh and final argument is that the defendant organization failed to provide the complainant unemployment benefits. No legal foundation obliging the payment of any such benefits has been established.

10. In the result, the complainant has not established any flaw, procedural or otherwise, impacting on the impugned decision and the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ