

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

P.-V. d. M.

v.

ICC

132nd Session

Judgment No. 4405

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms G. P.-V. d. M. against the International Criminal Court (ICC) on 3 April 2018 and corrected on 11 May, the ICC's reply of 5 November 2018 (following a stay of proceedings granted by the President of the Tribunal at the parties' request), the complainant's rejoinder of 27 February 2019 and the ICC's surrejoinder of 11 June 2019;

Considering the email of 6 January 2020 from the complainant's counsel informing the Registrar of the Tribunal of Ms P.-V. d. M.'s death on 28 October 2019 and her successors' decision to pursue the proceedings;

Considering Articles II, paragraphs 5 and 6(a), and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

The complainant challenges the decisions to abolish her post and terminate her fixed-term appointment.

At the material time, the complainant – who had experienced health problems since September 2015 causing her frequent absence on sick leave – was employed as an administrative assistant at grade G-6 in the Secretariat of the Trust Fund for Victims, under a fixed-term appointment due to expire on 31 January 2020.

By a letter of 1 February 2017 the complainant was informed that, as a result of a reorganisation of the ICC Registry known as the *ReVision* Project, her post would be abolished and her appointment would terminate as of 31 May 2017, in accordance with Staff Regulation 9.1(b)(i), Staff Rule 109.2 and paragraph 9 of the “Principles and Procedures Applicable to Decisions Arising from the *ReVision* Project” contained in Information Circular ICC/INF/2014/011 Rev.1 (hereinafter “the Principles and Procedures”) of 13 June 2015. The ICC Registrar explained to her that it had been decided to change the structure of the Trust Fund for Victims and, as a result, her position was no longer required; a new position of administrative assistant at grade G-5 had been created instead. She was advised that two options were open to her. The first option was to accept an enhanced agreed separation package, in which case her departure from the ICC would take the form of a separation by mutual agreement. Alternatively, she could apply as an internal candidate for newly created positions arising as a result of the *ReVision* Project, in which case her applications would receive priority consideration as provided for in the Principles and Procedures. In the event that she was interviewed for any position as a priority candidate, she would forfeit the option of accepting the enhanced agreed separation package.

Following the letter of 1 February, the complainant applied as an internal candidate with priority consideration for a grade P-2 position within the Trust Fund for Victims which had arisen as a direct result of the *ReVision* Project. The recruitment procedure took place and, on 29 May 2017, she was notified that she had not been selected for the position. According to her, she was formally notified of the termination of her appointment due to the rejection of her application on 31 May 2017.

On 5 June 2017 the separation date was extended to 14 June and the complainant received a termination indemnity. Her request to postpone this new date until her sick leave entitlement was exhausted was rejected.

On 25 June 2017 the complainant requested a review of the “administrative decision of termination of appointment notified on 31 May”, seeking the reversal of that decision and the cancellation of the outcome of the selection process for the grade P-2 post. Should her request be dismissed, she reserved the right to seek redress for moral and material injury and an award of punitive damages for “inhuman treatment”. In his reply of 25 July, the Registrar replied that her

“request for review” of the decisions to abolish her post and terminate her appointment was irreceivable *ratione temporis* and he confirmed the decision not to appoint her to the post for which she had applied.

On 22 August 2017 the complainant filed an appeal with the Appeals Board, requesting it, in particular, to declare her appeal receivable and to recommend the reversal of the “decision to terminate her appointment” of 31 May and her reclassification in the newly created grade G-5 post of administrative assistant or her promotion to the grade P-2 post for which she had applied. In the alternative, she requested financial compensation for the loss of opportunity that she considered she had suffered on account of her failure to be appointed to the latter post. On 19 October she received the sum of 10,071.58 euros, corresponding to 50.5 days of sick leave with full pay.

In the report which it delivered on 7 December 2017, the Appeals Board considered that the appeal in fact sought to challenge two different decisions: the decision of 1 February 2017 informing the complainant of the abolition of her post and the termination of her appointment, and the decision of 29 May notifying her that she had not been selected. In respect of the first decision, the Board found that the appeal – which should have been submitted by 6 March 2017 – was receivable in view of exceptional circumstances beyond the complainant’s control; as far as the second decision was concerned, the time limits had been complied with. On the merits, as no material error had been established, it recommended that the appeal be dismissed. By a letter of 4 January 2018, which constitutes the impugned decision, the Registrar informed the complainant that he accepted that recommendation.

The complainant asks the Tribunal to set aside the impugned decision and/or to replace the termination of her appointment with a promotion to the grade P-2 post for which she had applied. In the alternative, she seeks financial compensation for the alleged loss of opportunity in an amount equal to two years’ salary at P-2 level, and also compensation for loss of earnings from the date of her “termination of appointment” until the expiry date of her contract (31 January 2020) or until the date of her “reinstatement” under the first claim, with interest. In her rejoinder, she increases this amount and claims the equivalent of four years’ salary. Lastly, she claims compensation for moral injury in the amount of 150,000 euros, without prejudice to the additional amounts that she reserves the right to claim in a disciplinary procedure

that she has brought against the Registrar, and an award of costs of 5,000 euros.

The ICC requests that the complaint be dismissed. It accepts that it may be held liable for an error of law, but submits that the amounts claimed by the complainant are unreasonable in relation to the injury and are not sufficiently justified. The Court considers a total amount of 76,486.70 euros to be reasonable compensation for her injury.

CONSIDERATIONS

1. The complainant impugns the decision of 4 January 2018 by which the Registrar of the ICC dismissed her appeal seeking, first, the reversal of the “administrative decision of termination notified on 31 May 2017” abolishing her post and terminating her fixed-term appointment and, second, her reclassification in the newly created grade G-5 post of administrative assistant or her promotion to the grade P-2 post for which she had applied.

2. The Tribunal draws attention to its settled case law under which decisions concerning restructuring within an international organisation, including the abolition of posts, may be taken at the discretion of the executive head of the organisation and are consequently subject to only limited review. Accordingly, the Tribunal will ascertain whether such decisions are taken in accordance with the relevant rules on competence, form or procedure, whether they rest upon a mistake of fact or of law or whether they constituted abuse of authority. The Tribunal will not rule on the appropriateness of a restructuring or of decisions relating to it and it will not substitute the organisation’s view with its own (see, for example, Judgments 4004, consideration 2, 4180, consideration 3, and the case law cited therein).

3. At the ICC, separation from service is governed by the Staff Regulations and Staff Rules of the Court. Staff Regulation 9.1 grants the Registrar (or the Prosecutor, as the case may be) discretionary authority to terminate a staff member’s appointment prior to the expiration of the staff member’s contract. The Regulation lists the grounds on which an appointment may be terminated and relevantly includes, under paragraph 1(b)(i), “[i]f the necessities for the service require the abolition of the post or reduction of the staff”.

In exercising the discretionary authority conferred by this provision, the Registrar must comply with the relevant statutory provisions and the case law.

4. As regards the disputed abolition of post, the complainant submits that the Principles and Procedures were unlawfully promulgated by the issuance of an Information Circular rather than by a Presidential Directive or an Administrative Instruction. She infers that the impugned decision and the related decisions are affected by an error of law.

5. When invited to give detailed consideration to the same question in Judgment 3907, delivered in public on 24 January 2018, the Tribunal found, in consideration 26, that “pursuant to the Presidential Directive [ICC/PRES/D/G/2003/001 of 9 December 2003], the Principles and Procedures [Applicable to Decisions arising from the *ReVision* Project] should have been promulgated by an Administrative Instruction or, arguably, by a Presidential Directive. As the promulgation of the Principles and Procedures by Information Circular was in violation of the Presidential Directive, they were without legal foundation and are, therefore, unlawful as are the decisions taken pursuant to the Principles and Procedures. It follows that the decisions to abolish the complainant’s position and to terminate the complainant’s appointment were also unlawful and will be set aside.”

6. The Tribunal considers that, in accordance with that case law, and as the ICC itself acknowledges in its submissions, the decision to abolish the complainant’s post is unlawful since the Principles and Procedures on which it rested were promulgated in breach of the provisions of the Presidential Directive of 9 December 2003.

Consequently, the decision to terminate the complainant’s appointment, which was based on the abolition of her position, is without legal foundation and is therefore also unlawful.

7. It follows from the foregoing that the impugned decision of 4 January 2018, and the decisions to abolish the complainant’s position and terminate her appointment, must be set aside.

8. The complainant did not seek to be reinstated in the grade G-6 position which she had held. Regardless of the fact that she died in the course of proceedings, the Tribunal notes that, under its case law, reinstatement of a staff member who held a fixed-term contract is ordered only in exceptional cases (see, for example, Judgments 1317, consideration 38, and 3353, consideration 35). In a similar case involving the same organisation and another staff member, the Tribunal found that it was not appropriate to order the complainant's reinstatement after his appointment had expired (see Judgment 3908, consideration 21). In this case, it would therefore have been inappropriate in any event to reinstate the complainant in her position.

9. Nor was the complainant entitled to seek reinstatement in a grade P-2 position, as she asked in her complaint, since that request, submitted in connection with the disputed abolition of post and the subsequent termination of her appointment is, in fact, rendered moot by the setting aside of those decisions.

10. On the other hand, the complainant is entitled to compensation for the material injury caused to her by the aforementioned decisions set aside by the Tribunal. She will therefore be awarded, under this head, a lump sum calculated on the basis of her gross salary and the allowances which she would have received until her death, during the term of her contract, on 28 October 2019 and the sum of the contributions which the Court would have paid, in the same period, to the United Nations Joint Staff Pension Fund, less the amount of any indemnities the complainant received on the termination of her appointment.

In the light of the evidence, the Tribunal considers that the material injury suffered by the complainant will be fairly redressed by setting the amount of this lump sum at 160,000 euros.

Interest will not be payable on this sum.

11. The complainant also claims 150,000 euros in moral damages.

Plainly, the unlawfulness of the abolition of the complainant's position and the subsequent termination of her appointment caused her moral injury. That injury was, in this case, compounded by the complainant's distressing situation following her separation from service, which took place while she was receiving extensive medical treatment of which the ICC had been informed. It was also compounded

by the fact that the Court, which has itself acknowledged that it failed in its duty of care in this respect, did not make every effort to “explore with the complainant other employment options before prior to [her] separation”.

In these circumstances, the Tribunal considers that fair redress for all the moral injury suffered by the complainant will be made by awarding her compensation in the amount of 40,000 euros.

12. As she succeeds for the most part, the complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The decision of the Registrar of the ICC of 4 January 2018, and the decisions to abolish the complainant’s post and to terminate her appointment, are set aside.
2. The ICC shall pay the complainant’s successors 160,000 euros in material damages.
3. The Court shall pay those successors 40,000 euros in moral damages.
4. It shall also pay them 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 17 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN GIUSEPPE BARBAGALLO FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ