

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

105th Session

Judgment No. 2735

The Administrative Tribunal,

Considering the complaint filed by Mr F. S. against the Agency for International Trade Information and Cooperation (AITIC) on 24 May 2007 and corrected on 5 June, the Agency's reply of 10 September, the complainant's rejoinder of 26 November 2007 and AITIC's surrejoinder of 5 February 2008;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Senegalese national born in 1956, was working for the Permanent Mission of the Republic of Senegal to the United Nations Office and other international organisations in Geneva when he was recruited by AITIC, on 27 January 2003, as an Associate Officer on a two- year renewable contract. On 24 June he was seconded to the Agency by the Senegalese authorities for five years as from 1 January 2003. In April 2004 AITIC, which until then had been an association registered under Swiss law, became an intergovernmental organisation. In order to solve the legal complications connected with the transfer of its staff, it was decided that all contracts should end on 31 December 2004 and that new ones should be concluded as from 1 January 2005. On 28 January the complainant accepted a new contract which was due to end on 31 December 2005 at the latest; he was then taken on as a "Trade Affairs Officer".

On 30 May 2005 the complainant applied for the post of Deputy Executive Director, but he was not selected. His performance was also evaluated in 2005; at that juncture the Executive Director expressed some criticisms about him. The complainant's contract was not extended after 31 December 2005. On 18 January 2006 he lodged an appeal with the Chairman of the Executive Board against the Executive Director's decision not to extend his contract. The Board upheld this decision on 15 January 2007. The Board's decision, which is presently impugned, was conveyed to the complainant by its Chairman in a letter of 22 February 2007.

B. The complainant submits that the Rules of Procedure for the Executive Board of AITIC have been flouted because the decision of 15 January 2007 was taken at the end of a written procedure for which no provision is made in Rule 27, or indeed in Articles 8 and 10 of the Agreement of 9 December 2002 establishing the Agency for International Trade Information and Cooperation as an intergovernmental organisation. He further contends that some Board members were not consulted during the procedure culminating in the decision in question.

Moreover, the complainant asserts that the evaluation procedure was not conducted correctly and he relies in particular on a breach of Staff Regulation 22. He claims that his right to a hearing was denied at the evaluation interview on 26 October 2005, because he was not given an opportunity to comment in writing on the Executive Director's evaluation. He alleges that, as he refused to sign that evaluation, the Executive Director then amended it. The complainant adds that he was unable to see the final version of the evaluation until March 2006, in other words long after his separation from service.

The complainant also alleges that the notice period of "two months before the end of a month" stipulated in his contract was not observed, since he was advised orally of the decision not to extend his contract at a meeting on 17 November 2005 and the decision was confirmed in an e-mail of 6 December, whereas it is clear from the Tribunal's case law that formal notice must be given of a decision not to extend a contract.

Lastly, the complainant states that the Executive Board ignored the fact that the decision not to extend his contract

was improper. He considers that the Executive Director showed personal prejudice against him as from the date on which he applied for the post of Deputy Executive Director. He quotes several examples which purport to show that the criticisms concerning his alleged lack of professionalism were “entirely fabricated”.

The complainant requests the removal of the evaluation of 26 October 2005 from his permanent record, the quashing of the decision of 15 January 2007 and at least two years’ net salary, i.e. 238,908 Swiss francs, as redress for the material injury suffered. He also claims 50,000 francs for moral injury and a further award for costs.

C. In its reply AITIC points out that express provision is made for the written decision-making procedure in Rule 8.3 of the Rules of Procedure for the Executive Board, which lays down that “[i]n the intervals between the meetings of the Executive Board, any of its members or the Executive Director may propose a decision in writing” and that “[s]uch a decision shall be deemed to have been adopted by the Executive Board if all its members have accepted it in writing”. It contends that this procedure was followed in the present case and that all Board members were consulted.

Relying on the case law, the Agency draws attention to the fact that the Tribunal may not replace the Executive Director’s opinion of the complainant’s performance or fitness for international service with its own assessment. It submits that the Executive Director exercised her discretion properly and it endeavours to show that the complainant was not deprived of his right to a hearing. It emphasises that Staff Regulation 22 does not stipulate that any comments the official might wish to make regarding his or her evaluation must be submitted in writing. In its opinion, the complainant’s performance proved to be inadequate as soon as he took up his duties and especially in 2005. The Executive Director regularly took the complainant to task for his insufficient knowledge, his lack of rigour and his poor drafting and language skills – for example during meetings held on 9 and 30 June 2005 and at the evaluation interview on 26 October 2005. Moreover, the Executive Director gave him several opportunities to improve his performance and she supported him.

The Agency emphasises that under Staff Regulation 33(1) the expiration of a fixed-term contract does not give rise to the payment of an indemnity. It asserts that the complainant was informed that his contract would not be extended at the two interviews in June 2005, and that he expressly admitted this during the internal appeal proceedings. He therefore received more than six months’ notice. If, however, the Tribunal were to come to the conclusion that this notice was too short, the Agency considers that the complainant should be awarded an indemnity of no more than one month’s pay, because a notice period of “two months before the end of a month” should have been given. It adds that neither the complainant’s contract nor the Staff Regulations stipulate that notice of a decision not to extend a contract must necessarily be given in writing.

D. In his rejoinder the complainant denies that his performance was unsatisfactory and states that he would like an independent expert to assess the quality of his work. He maintains his version of the facts and reiterates his submissions on the merits.

E. In its surrejoinder AITIC states that the complainant has not presented any new information in his rejoinder and it maintains its position.

CONSIDERATIONS

1. AITIC was founded in 1998 as a private association within the meaning of Articles 60 *et seq.* of the Swiss Civil Code. The association became an intergovernmental organisation pursuant to an agreement of 9 December 2002. Its legal status is determined by the Headquarters Agreement it concluded on 31 August 2004 with the Swiss Federal Council. This Agreement was applied retroactively as from 30 April 2004, the date on which the Agreement of 9 December 2002 entered into force. The private association was not, however, dissolved and liquidated until May 2006.

The complainant, a national of the Republic of Senegal, was a diplomat at that State’s permanent mission in Geneva when he joined AITIC on 27 January 2003 as an Associate Officer, on a two-year contract governed by Swiss law.

2. The transformation of AITIC’s legal status necessitated the termination as at 31 December 2004 of all employment contracts between the private association and its employees. The latter were offered new fixed-term

contracts with the intergovernmental organisation in accordance with the Staff Regulations adopted on 17 December 2004.

The complainant, whose initial contract would have expired on 26 January 2005, accepted this offer and on 28 January 2005 he signed a new employment contract for a period stretching from 1 January to 31 December 2005 at the latest. He then took up duties as a "Trade Affairs Officer". The Executive Director expressed some criticisms in his performance evaluation, and his contract was not extended upon its expiry on 31 December 2005. The complainant lodged an internal appeal against that decision with the Agency's Executive Board. This appeal was dismissed by a decision of 15 January 2007, of which the complainant was notified on 22 February 2007 and which forms the subject of the complaint.

3. The parties have had the opportunity to explain their views at length in writing through two exchanges of submissions. They have produced a large number of items of evidence which are sufficient to enlighten the Tribunal fully as to the subject of the dispute. There is therefore no reason to question witnesses or to hold the hearings requested by the complainant.

4. The complainant challenges the legality of the internal appeal proceedings.

(a) He is mistaken in submitting, firstly, that the Executive Board should not have taken a decision in writing, but during a meeting held in accordance with Article 10 of the Agreement of 9 December 2002, which, although it refers to decisions of the Council of Representatives, also applies *mutatis mutandis* to those of the Executive Board. Rule 8.3 of the Rules of Procedure for the Executive Board provides that, in the intervals between the Board's meetings, a decision in writing may be proposed and that decision shall be deemed to have been adopted by the Board if all its members have accepted it in writing.

(b) The complainant submits, secondly, that "some Executive Board members did not participate at all in any deliberations in connection with his appeal, not even by letter", and that they were not consulted.

The first sentence of Rule 8.4 of the above-mentioned Rules of Procedure states that "a proposed decision shall be deemed to have been accepted by all members of the Executive Board in writing if, within ten working days from the date the proposal is made, no member raises formal objections and no member requests the convening of a meeting to discuss the proposed decision".

In this connection the Agency's reply provides detailed, precise explanations by which it seeks to show that the written procedure was scrupulously observed in this case. In his rejoinder the complainant simply invites the Tribunal to refer in this respect to the arguments put forward in his complaint. But the latter contains no factual evidence demonstrating that the Executive Board breached the written procedure laid down in its Rules of Procedure.

This plea must therefore be dismissed.

5. The complainant also takes issue with the way in which the evaluation procedure was conducted, prior to the Agency's refusal to extend the contract he had signed with it on 28 January 2005.

(a) The Agency's contract policy is defined in Staff Regulations 17 to 20.

The contract of 28 January 2005, like all the employment contracts issued on 1 January 2005, was a fixed-term contract which could be extended one or more times. But the total length of service under that type of contract should not normally exceed five years. The Executive Director may terminate a fixed-term contract if duties and obligations of a staff member are no longer fulfilled or performance proves to be unsatisfactory. Although Staff Regulation 20 does not say so expressly, these two reasons may in some circumstances justify either the termination or the non-extension of a contract.

The issue of whether a staff member is no longer fulfilling his or her duties and obligations or whether his or her performance is unsatisfactory must be determined by means of an annual performance evaluation. Staff Regulations 21 to 23 make provision for such evaluation by the staff member's direct supervisor or by the Executive Director, as appropriate.

(b) According to Staff Regulation 22, the staff member has the right to see and comment on the evaluation; this

evaluation, along with any such comments, forms part of the staff member's permanent record.

In its reply the Agency describes the formal evaluation procedure which it claims to have introduced in 2005 for all staff members without exception. Although the Agency has not produced the text establishing that procedure, the complainant does not dispute the contents of this description in his rejoinder.

In accordance with this procedure the staff member first receives an electronic self-evaluation form which he or she is invited to complete. The Executive Director, who has the possibility of making remarks on the staff member's replies, then fills in the section intended for his or her comments. The staff member is then called for an evaluation interview which is conducted on the basis of this form. He or she can make observations on the Executive Director's comments and the latter can then amend his or her comments. At the end of the interview, a printout of the completed form is handed to the staff member for rereading, any further comments and signature. After signature by the Executive Director the evaluation document is placed on the staff member's permanent record, which he or she may consult at any time.

(c) It is not disputed that the complainant received the self-evaluation form in good time and that he duly completed it. Nor is it disputed that the prescribed evaluation interview took place on 26 October 2005 and that the Executive Director handed the form containing her comments to the complainant.

It has been established that having seen the Executive Director's comments, the complainant refused to sign the evaluation document immediately. He alleges that his request to be allowed to express his opinion on these comments in writing was turned down. According to the Agency, the Executive Director did, however, offer to amend the content of some of her comments, or even to delete those which offended him most. The complainant allegedly objected to this and unilaterally ended the interview by leaving the office. The Executive Director, who is said to have then finalised her comments, signed the evaluation document on her own and placed it on the complainant's permanent record. He asserts that the Executive Director amended her comments in his presence, but refused to show him these amendments. The complainant says that he was peremptorily shown to the door and did not learn of the final content of the Executive Director's comments until after his separation from service.

6. It is not unusual for a supervisor and a staff member to diverge on the evaluation of the latter's performance, and as a result for an evaluation interview to end in disagreement between the parties. Since no provision is made for the continuation of this procedure after the evaluation interview, when such a case arises within the AITIC the evaluation document must logically be placed on the staff member's permanent record with or without his or her signature. Moreover, there does not appear to be anything to prevent a staff member from accompanying his or her signature with a final reservation indicating that he or she does not endorse the unfavourable comments contained in the document.

In the instant case it is of little importance whether the evaluation interview was ended unilaterally by the complainant or by the Executive Director. The decisive factor is that the complainant has not proved that, during the interview, he was denied the right to express his opinion on the unfavourable comments fully and in writing in the evaluation document, and to express a final reservation about them when signing the document. Moreover, the Executive Director abided by the applicable rules of procedure by immediately placing the evaluation document which she had signed on the complainant's permanent record. This step did not breach the complainant's right to a hearing, since he had the possibility, which he did not use, of consulting the evaluation document so that he could in full knowledge of the facts challenge the subsequent decision not to extend his contract.

The plea that his right to a hearing was breached is therefore groundless.

7. According to the complainant the Agency was not entitled to end his fixed-term contract without giving him the notice required by the Staff Regulations and by the contract.

(a) Separation from service is governed by Staff Regulations 31 to 33. Pursuant to Regulation 31(b) it occurs as a result of the expiration of a contract in accordance with its terms. Regulation 33(1) stipulates that in that case the staff member must be given notice, and it specifies that the expiration of a fixed-term contract in accordance with its terms does not give rise to the payment of an indemnity. Termination of contract without notice constitutes a disciplinary measure which can be taken only when the conditions set forth in Staff Regulations 34 *et seq.* are met. Neither party claims that they were met in the present case.

The employment contract of 28 January 2005 states that in the event of separation from service as a result of the expiration of the contract in accordance with its terms, notice must be given “two months before the end of a month”. The complainant should therefore have been notified of the non-extension of his contract by 31 October 2005 at the latest.

(b) The complainant contends that he was not officially informed by the Executive Director that his employment contract would end definitively on 31 December 2005 until they met on 17 November 2005. According to him, no mention was made of separation from service at the meetings which he admits he had with the Executive Director on 9 and 30 June 2005, or at the evaluation interview on 26 October 2005. Furthermore, he submits that the announcement of the non-extension of his contract on 17 November 2005 did not take the form required for such a portentous decision: it was made only orally and then merely confirmed by an e-mail of 6 December 2005.

(c) The Agency submits on the contrary that it duly informed the complainant as early as 9 June 2005 that his fixed-term contract would not be extended upon its expiry, and that the purpose of the interview of 17 November and the e-mail of 6 December 2005 was simply to settle the separation arrangements.

(d) The provisions of the Staff Regulations and of the contract of 28 January 2005 regarding separation from service are silent as to the form in which the Agency must give notice to staff members whom it discharges. It is not, however, necessary to indicate here what form such notice should take; it is sufficient to note that the organisation must manifest its intention to terminate an employment contract in a form which makes it possible to ascertain that the staff member was informed of the termination of the contract within the prescribed period of time.

(e) In the present case, the Agency has not discharged the burden of proving that it terminated the employment contract of 28 January 2005 with the requisite period of notice.

In this regard it relies on a statement made by the complainant in the rejoinder he sent in June 2006 to the Chairman of the Executive Board during the internal appeal proceedings, which reads as follows:

“I fully agree upon the occurrence of two meetings with the [Executive Director] on the indicated dates [9 and 30 June 2005]. I also do agree with the [Executive Director] that we discussed the future of my contract, and more precisely her plan to terminate it by end of 2005.”

Contrary to the Agency’s submissions, this statement does not prove in any way that the complainant was informed that he was being given notice. At the most it shows that his performance and the advisability of extending his contract beyond 31 December 2005 were discussed by the parties.

It is also to no avail that the Agency mentions steps allegedly taken by the complainant to seek a new employer during the second half of 2005 and the leave he was given for that purpose. This behaviour once again indicates only that the parties were somewhat undecided as to the advisability of extending his employment contract. It does not prove that the latter was terminated with the notice laid down in the contract and the Staff Regulations.

(f) It is clear that the employment contract of 28 January 2005 was not terminated with the requisite period of notice. The complainant’s plea based on the circumstances in which he was informed of the termination of his contract therefore succeeds.

8. The impugned decision must be set aside, without there being any need for the Tribunal to rule on the merit of the Agency’s evaluation of the complainant’s performance and hence the justification for the decision not to extend his contract.

The Tribunal will confine itself to pointing out that the complainant’s contentions in that connection concern the Agency’s power of discretion, the exercise of which is reviewed by the Tribunal only on limited grounds.

9. The complainant is entitled to compensation for the moral and material injury caused by the termination without notice of his one-year fixed-term contract. In assessing this injury the Tribunal notes that the complainant himself acknowledges that he was officially informed on 17 November 2005 that his employment contract would end definitively on 31 December 2005. In the circumstances, the Tribunal considers that he will receive fair redress for the injuries suffered by being awarded 20,000 Swiss francs.

10. The complainant is also entitled to costs in the amount of 2,000 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. AITIC shall pay the complainant compensation in the amount of 20,000 Swiss francs for all the injuries suffered.
3. It shall also pay him costs in the amount of 2,000 francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Claude Rouiller

Patrick Frydman

Catherine Comtet