

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

106th Session

Judgment No. 2780

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms V. R. against the Customs Co-operation Council (CCC), also known as the World Customs Organization (WCO), on 30 July 2007 and corrected on 8 August, the Organization's reply of 21 November 2007, the complainant's rejoinder of 3 March 2008 and the WCO's surrejoinder of 16 June 2008;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is a Belgian national born in 1967. The WCO employed her as a bookkeeper on weekly temporary contracts between 20 September and 30 November 2004. On 1 December 2004 the complainant was appointed to a post of accounts clerk at grade B2 following a competitive selection procedure; the appointment was for three years, subject to the completion of a six-month probationary period. On 16 February 2005 the Head of the Division of Administration and Personnel announced a vacancy for a Chief

Accountant at grade B4, for which the complainant applied. She was appointed to this post on 1 April 2005 and her appointment was confirmed on 14 September 2005.

On 13 February 2006, while the complainant was on sick leave, the Secretary General wrote to the Chairman of the Staff Committee to inform him of some criticism of the complainant's work and to ask for the Committee's opinion on the possible termination of her appointment. On 21 February the Committee replied that it was unable to form an opinion on the material circumstances and asked for more details. The complainant's staff report was drawn up in June, at which juncture her evaluators in turn criticised her performance. In her comments, the complainant disagreed with these assessments and supplied a lengthy description of the difficulties she had encountered in the performance of her duties.

By letter of 26 June 2006 the Secretary General informed the complainant that, after consulting the Staff Committee, he had decided to terminate her appointment in the Organization's interests pursuant to Staff Regulation 12 (a)(i). The complainant would continue to draw her salary and allowances during the four-month period of notice, but she had to stop work immediately. By letter of 25 July she asked the Secretary General to withdraw his decision of 26 June and to send her a copy of the Staff Committee's opinion. On 23 August 2006 the Secretary General replied that her request for the withdrawal of his decision had been rejected, but he sent her a copy of the Staff Committee's opinion of 21 February 2006. The complainant requested the convening of the Appeals Board and on 1 March 2007 she submitted her appeal dossier to the Board's Chairperson. On 30 July 2007 she filed a complaint with the Tribunal, since she considered that her appeal had been implicitly rejected on 30 April, because under Staff Rule 29.3(b) the Appeals Board should submit its report to the Secretary General "within 60 days after its Chairman received the application from the appellant".

B. The complainant contends, firstly, that the provisions of Staff Regulation 12(a)(i), Staff Rule 12.1(a) and Staff Circular No. 142 have been breached, because the Staff Committee was not consulted before

the decision to terminate her appointment was taken. In her opinion, since the decision of 26 June 2006 was substantially different to the dismissal proposal presented to the Committee in February 2006, it ought to have been submitted to the Committee for an opinion, but this did not occur. The complainant adds that as in February 2006 the Committee stated that it was unable to express an opinion on the material circumstances, the consultation did not fulfil its purpose.

Secondly, the complainant submits that the Organization disregarded her rights of defence and failed to comply with the provisions of Staff Regulation 12(a), Staff Rule 11.3(c) and (f) and paragraphs 7 to 9 of Staff Circular No. 186. She objects to the fact that no conversation with her took place prior to the preparation of her staff report and she says that her evaluators assessed her performance without realising the efforts she had had to make in order to perform her duties. She asserts that the report was not forwarded to the appropriate advisory body or to the Secretary General before he took the disputed decision. She complains that she was not given any real opportunity to reply to the criticism expressed about her performance and she takes the Secretary General to task for having based his decision on factors which had not been mentioned previously and for not providing her with the documents to which this decision referred.

Thirdly, the complainant contends that the principle of good faith has been violated because she was taxed with not having the requisite skills, although the vacancy announcement for her post did not mention any qualifications. She infers from the fact that she was appointed to the post that she possessed the required qualifications. She also argues that, as her appointment was confirmed in September 2005, taxing her with not performing her duties properly is likewise a violation of the above-mentioned principle. She describes the “abnormal circumstances” in which she was recruited as Chief Accountant, which contributed to the serious material and moral injury that the WCO caused her to suffer.

The complainant requests that, prior to delivering judgment, the Tribunal order the Organization to produce the documents referred to in the letter of 26 June 2006, a copy of her personal file, documents

listing the holders of the post of Chief Accountant between 1 January 1999 and 14 February 2005, and the job description and qualifications for that post; she requests additional time to comment on these documents. Thereafter, she would like the Tribunal to quash the decision of 26 June 2006 and to award her 30,000 euros for moral injury as well as a sum equivalent to two and half years of her salary as Chief Accountant as compensation for damage to her career. She also claims costs.

C. In its reply the Organization explains the complainant's appeal dossier was forwarded to the Secretary General on 29 March 2007. On 28 June, in other words within the three-month period available to him, he furnished his comments, which were transmitted to the complainant on 14 August. The Appeals Board issued its report on 13 November 2007 and the Secretary General will take a final decision within the prescribed time limit. As the complaint was filed on 30 July, it is irreceivable because the internal means of redress have not been exhausted. The Organization states that the 60-day period laid down in Staff Rule 29.3(b) for the Appeals Board's submission of its report to the Secretary General proved to be unrealistic; that is why the WCO Council decided in June 2007 to extend it to eight months. Moreover, the Organization takes the complainant to task for not enquiring about the progress of the proceedings before filing a complaint with the Tribunal.

On the merits it submits that Staff Regulation 12 and Staff Rule 12.1 have not been breached because the letter sent to the Staff Committee on 13 February 2006 and that of 26 June were almost identical. The Committee had received all the information it required to issue an opinion, and the fact that it failed to do so should not be held against the Organization, which, according to the Tribunal's case law, was not obliged to embark on a second round of consultations.

Furthermore, the WCO states that the various stages in the assessment procedure were strictly complied with and that the complainant was able to exercise all her rights. In this respect it denies that the staff report was drawn up without any prior discussion with the complainant and it claims that the Secretary General based his decision

on factors of which she was fully aware. It appends to its reply some of the documents requested by the complainant, but says that the production of the others is either inappropriate, as they are confidential, or that it serves no useful purpose. It adds that the information regarding the number of people who held the post of Chief Accountant is irrelevant in this case. The complainant may at any time ask to consult her personal file and its production would likewise appear to serve no useful purpose.

Lastly, the Organization states that the complainant's appointment to the post of Chief Accountant cannot be challenged in the context of these proceedings, and it endeavours to show that the procedure leading to that appointment was not flawed. It submits that the selection of a candidate and the confirmation of his or her appointment does not entail the "absolution" of errors committed during the probationary period and after confirmation of the appointment. It alleges that it has suffered definite injury on account of the complainant's mistakes and negligence, which have tarnished its reputation.

D. In her rejoinder the complainant holds that the terms of paragraphs 4 and 5 of Staff Circular No. 197 were breached since there was a delay in forwarding her appeal dossier to the Secretary General and in transmitting his comments to her. She maintains that it was not up to her to enquire about the progress of the proceedings, because the Chairperson of the Appeals Board was required to send her a copy of these comments "as soon as possible", which he failed to do. In her opinion, it was therefore the Organization which did not act diligently.

She reiterates her arguments regarding the merits. However, she admits that her staff report was preceded by a conversation with her, and she therefore partly alters her second plea by asserting that the said report was not based on that conversation. She draws attention to the fact that her working conditions were "abnormal", since she had to assume duties that she was unable to perform. Lastly, she informs the Tribunal that, by a letter of 12 December 2007, the Secretary General informed her that he had decided to confirm the decision of 26 June 2006 on the basis of the Appeals Board's recommendations.

E. In its surrejoinder the WCO maintains its position. It infers from the wording of paragraphs 4 and 5 of Staff Circular No. 197 that the time limits applicable to the internal appeal procedure are at the discretion of the Chairperson of the Appeals Board, due heed being paid to the circumstances. It also explains that under the relevant texts there is no mandatory requirement that dismissal should rest on the staff report of the official concerned.

CONSIDERATIONS

1. After being employed by the WCO as a temporary bookkeeper and subsequently as an accounts clerk, the complainant was appointed Chief Accountant at grade B4 on 1 April 2005, subject to a six-month probationary period. Her appointment was confirmed on 14 September 2005. She returned to work on 23 June 2006 after almost six months of sick leave. The Secretary General informed her of her dismissal in a letter of 26 June 2006.

2. On 23 August the Secretary General rejected the complainant's request that he should withdraw his decision to dismiss her. On 21 September the complainant requested him to convene the Appeals Board. On 6 October the Secretary General informed her that her request had been forwarded to the Chairperson of the Appeals Board, who would contact her once she had deposited the security required under Staff Regulation 29(e).

By letter of 30 November 2006 the Chairperson of the Appeals Board sent a proposal regarding the composition of the Board to the complainant and invited her to submit her appeal dossier by 1 March 2007. On that date the complainant sent him her dossier, which he forwarded to the Secretary General on 29 March asking him to furnish his comments by 29 June; the Secretary General transmitted his comments to the Chairperson of the Appeals Board on 28 June. On 14 August the Board forwarded these comments to the complainant. In its report of 13 November the Board recommended that the Secretary General dismiss the appeal. By a letter of 12 December 2007 the

Secretary General confirmed his decision of 26 June 2006 to dismiss the complainant.

In the meantime, since she believed that under the applicable provisions she was entitled to consider that her appeal had been implicitly rejected on 30 April 2007, the complainant had filed a complaint with the Tribunal on 30 July 2007.

3. The Organization submits that the complaint is irreceivable on the grounds that the internal means of redress have not been exhausted.

To counter this objection to receivability the complainant relies on the provisions of Staff Rule 29.3, which read as follows at the time when she filed her complaint:

- “(a) The Appeals Board shall adopt and submit to the Secretary General a report containing a record of the proceedings in the appeal, a summary of the matter and its recommendation.
- (b) The Board shall submit its report to the Secretary General within 60 days after its Chairman received the application from the appellant. The Board may, however, extend this time-limit in exceptional circumstances.

[...]”

The complainant also relies on paragraphs 4 and 5 of Staff Circular No. 197 on Appeals Board procedure, which state the following:

- “4. As soon as possible after receiving the dossier from the appellant the Chairperson will transmit a copy to the Secretary General with an invitation to furnish, within an agreed time-limit, comments on the appeal together with any additional documents or correspondence deemed relevant to the case.
- 5. As soon as possible after receiving the Secretary General’s comments, the Chairperson will transmit a copy to the appellant.”

Lastly, she refers to Article VII, paragraph 3, of the Statute of the Tribunal, which lays down that:

“Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days provided for by the last preceding paragraph shall run

from the expiration of the sixty days allowed for the taking of the decision by the Administration.”

4. The question is whether, under the texts cited above, the complainant’s appeal was implicitly rejected.

5. With regard to the application of Article VII, paragraph 3, of the Statute of the Tribunal, the Tribunal’s case law indicates that this provision must be interpreted in the light of Article VII, paragraph 1, which stipulates that a complaint shall not be receivable unless the internal means of redress provided by the applicable Staff Regulations have been exhausted. Hence, where an organisation takes any decision “upon any claim of an official” – in the meaning of Article VII, paragraph 3 – within the sixty-day period thus stipulated, and particularly where it forwards the request to the competent advisory appeal body before the expiry of that period, this step forestalls an implied rejection which could be referred to the Tribunal.

In the instant case it is clear from the complaint that the Secretary General had transmitted the complainant’s appeal by 6 October 2006 at the latest, in other words within the sixty-day period that began to run on the date on which she requested the convening of the Appeals Board. For this reason no rejection could be implied pursuant to Article VII, paragraph 3.

6. With regard to the application of Staff Rule 29.3(b), it is true that a literal interpretation of this rule, in the version in force at the time when the complainant filed her complaint, suggests that the Appeals Board must submit its report to the Secretary General within sixty days of receipt of the application, although the wording does not clarify what is meant by “received the application”: does this refer to receipt of the request to convene the Board, or to receipt of the appeal dossier? But it is equally true that the Board, in examining the case brought before it, must comply with the general principles governing all proceedings, especially the principle of adversarial proceedings. That requirement is in fact enshrined in the above-mentioned

paragraphs 4 and 5 of Staff Circular No. 197 and it also partly justifies giving the Board the possibility of extending the time limit.

7. The complainant requested the convening of the Appeals Board by letter of 21 September 2006. The Secretary General replied on 6 October that her request would be granted only if she deposited security – a requirement which, from the point of view of the exercise of the right to appeal and right to be heard, is questionable to say the least, but to which the complainant does not object. On 30 November 2006 the Chairperson of the Appeals Board informed the complainant that the Secretary General had transmitted her request to him; he made a proposal regarding the composition of the Board and suggested that she submit her appeal dossier by 1 March 2007, in accordance with Staff Rule 29.2 and Staff Circular No. 197. On 1 March the complainant submitted her dossier to the Chairperson of the Appeals Board indicating that she had no objection regarding the proposed composition; she did not comment on the time limit which she had been given for the submission of her dossier. The Chairperson transmitted the dossier to the Secretary General on 29 March and asked him to furnish his comments by 29 June. The Secretary General sent his comments to the Chairperson on 28 June. On 30 July 2007 the complainant filed a complaint with the Tribunal in which she indicates that she is challenging an implied decision rejecting her appeal.

8. In view of the foregoing, the Tribunal cannot find that on 30 April 2007 the complainant's appeal was implicitly rejected and that, as a result, the dismissal decision of 26 June 2006 became final. Indeed, even if the complainant's restrictive interpretation of Staff Rule 29.3(b) were to be accepted, it must be pointed out that, as indicated above, she had unreservedly accepted the time limit she had been given to submit her appeal dossier. The Appeals Board could not therefore refrain from setting a time limit for the Organization's reply, if it were not to breach the requirements of adversarial proceedings and the principle that the parties must be treated equally. The Organization therefore had until 29 June 2007 to file its comments and it did so on 28 June. Consequently, the complainant is mistaken in asserting that

the Board should have submitted its report on 30 April 2007, especially as it may be inferred from the foregoing that the complainant had implicitly agreed to the extension of the time limit laid down in Staff Rule 29.3(b).

9. The complainant, who filed a complaint with the Tribunal without waiting for the completion of the internal procedure, which was following its normal course, has not therefore exhausted the internal means of redress, as required by Article VII, paragraph 1, of the Statute of the Tribunal, and her complaint, which is irreceivable because it is premature, must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, 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 4 February 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet