

119th Session

Judgment No. 3444

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. M. E. F. against the International Criminal Court (ICC) on 27 July 2012, corrected on 23 August, the ICC's reply dated 18 December 2012, the complainant's rejoinder dated 12 March 2013, supplemented on 26 March and the ICC's surrejoinder dated 8 July 2013;

Considering Article II, paragraph 5, 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 and the pleadings may be summed up as follows;

A. The complainant joined the ICC in March 2007 as a Data Entry Clerk/Transcriber, grade G-3. He was then reclassified to the G-4 position of Data Processing Assistant in a Unit in the Investigation Division within the Office of the Prosecutor. He held a fixed-term contract funded by general temporary assistance funds. In March 2009 a new manager arrived in the complainant's Unit and two months later the complainant, together with other colleagues, met with her to discuss difficulties faced by some of them in the Unit.

During a meeting held on 26 October 2011 the complainant, together with other staff members, was informed that, pursuant to a decision of the Executive Committee, his contract would not be extended upon its expiry on 31 December 2011. However, in a follow up e-mail he was told that the Executive Committee had decided to extend his contract beyond its expiry date for two months only, i.e. until the end of February 2012, to give him time to look for other employment opportunities. By an e-mail of 1 November 2011 the staff of the Investigation Division were informed that the Executive Committee had decided to extend the appointments of all staff whose contracts were funded by general temporary assistance funds until the end of September 2012, except for those for whom there was no justification to extend their contracts. The complainant's contract was not extended.

On 21 November 2011 the complainant wrote to the Secretary of the Appeals Board requesting a review of the decision not to renew his contract, arguing inter alia that he had not been given the real reason for the non-renewal of his contract.

On 28 November 2011 the Chief of the Human Resources Section formally notified the complainant of the non-renewal of his contract beyond 29 February 2012. She reminded him that, as indicated in his letter of appointment, contracts funded by general temporary assistance funds were used for temporary needs on the basis of available funds. On 21 December 2011 the Prosecutor, to whom the Secretary of the Appeals Board had forwarded the request for review, informed the complainant that he had decided to reject his request. The Prosecutor replied at length to the complainant's arguments and emphasised that the complainant had been informed orally that the non-renewal of his contract was based on expected budgetary constraints and needs. The complainant filed an appeal with the Appeals Board on 19 January 2012 challenging that decision. In its report of 25 May, the Board recommended rejecting the appeal on the grounds that the correct procedure for non-renewal of a contract funded by general temporary assistance funds had been followed and that sufficient reasons had been given to the complainant. However, it noted that there were

serious problems within the complainant's Unit that might have led him to consider that he was being treated in an unfair manner. It therefore recommended that the ICC take decisive steps to address the dissatisfaction and concerns that had been expressed in the Unit regarding unfair treatment and favouritism.

By a letter of 19 June 2012, which is the impugned decision, the Prosecutor informed the complainant that she had decided to endorse the Appeals Board's recommendation to reject his appeal with respect to the non-renewal of his contract. She added that she had decided to reject the second recommendation on the steps to be taken within the Unit to address the dissatisfaction of staff on the grounds that it went beyond the scope of the appeal and therefore beyond the Board's mandate.

B. The complainant alleges that the decision not to renew his contract is tainted with abuse of authority and procedural errors. The decision was not taken by the Executive Committee but by the Investigation Division and the Head of the Operations and Planning Unit shortly before the Executive Committee took the decision not to extend the contracts of other staff members in his Unit. He adds that there was no valid reason not to renew his contract. He contends that he never received any oral or written explanation as to why his contract was not extended.

In his view, the non-renewal decision was also tainted with personal prejudice and was not taken on objective grounds and in good faith. He alleges that his post was not truly abolished. Indeed, a new staff member was appointed to continue his work and posts requiring someone with a profile similar to his were advertised. He also contends that funds were available, emphasising that more than 20 co-workers in his Unit, with a profile similar to his, had their contracts extended up to September 2012, in accordance with the decision of the Executive Committee. The majority of them had joined the ICC in 2011, long after he had, and they worked in one language only whereas he could work in three. He therefore contends that the decision not to renew his contract was taken in retaliation for having

criticised, with other colleagues, the difficult working environment in the Unit; it is thus a disguised sanction.

He asks the Tribunal to order the ICC to pay him an amount equivalent to the net salary he would have earned from 29 February 2012 to 30 September 2012 had his contract been extended. He also claims compensation for leave during that period, together with interest at the rate of 5 per cent per annum on these amounts. He further seeks moral damages in an amount equivalent to two years' net salary, and 1,000 euros in costs.

C. In its reply the ICC rejects the allegation of abuse of authority, indicating that the complainant was sufficiently and repeatedly informed of the reasons for the non-renewal of his contract. By an e-mail of 11 February 2011 the entire Investigation Division to which the complainant belonged was informed of the expected budgetary constraints and changes in the needs of the Office of the Prosecutor. The complainant was informed that his contract together with that of other colleagues would not be renewed beyond end of June 2011. However, his contract was ultimately renewed because of unexpected changes linked to the Libyan crisis and the impact it had on the work of the Unit. Later, during a meeting held on 26 October 2011 the complainant was informed that most transcription work, such as that which he performed, would be outsourced in the future.

The ICC asserts that the decision not to extend the complainant's contract was taken on the basis of the needs and the availability of funds. It stresses that this was a matter for the Administration to assess and not the Appeals Board; nor is it for the Tribunal to do so. It explains that one post was advertised for which the complainant was not qualified. Another post of Data Processing Assistant for French transcription was advertised to replace two staff members who were placed on special leave without pay, but he did not apply. According to the ICC, the complainant is revisiting the tasks he used to perform to support his argument that he could have been assigned to other tasks. It contests the description made by the complainant of some of the tasks he allegedly performed, and asserts that the colleagues to

whom he refers did not have the same profile as him. The question of seniority was irrelevant, the only matter of importance was whether there was still a need for a staff with his profile or not.

It denies any retaliation, arguing that the complainant has not substantiated his allegation. Some of the colleagues to whom he referred had their contracts extended. Moreover, the contracts of some other colleagues, who had not complained of the working environment in the Unit, were not renewed. The ICC stresses that, although not compelled to do so under Staff Regulation 9.1b), it extended the complainant's contract for two months to allow him time to look for other opportunities.

D. In his rejoinder the complainant indicates that he did not receive the e-mail of 11 February 2011 and therefore had not been informed that it had initially been decided not to extend his contract beyond June 2011. He asserts that the first non-renewal notification he received was that of 26 October 2011.

He alleges breach of his right to due process in the internal appeal proceedings because the Appeals Board was in "permanent contact" with the ICC but not with him. The Board misrepresented some facts and failed to take into account some of his arguments. He contests the authenticity of some documents the ICC relies on in its reply.

E. In its surrejoinder the ICC submits, with respect to the alleged breach of due process, that the Appeals Board thoroughly examined the complainant's appeal, as shown by its report. The ICC asserts that the documents it relied on in its reply were authentic and provides explanations as to possible misunderstandings about some documents or information.

CONSIDERATIONS

1. The complainant joined the ICC on 5 March 2007 on a fixed-term General Temporary Assistance contract as a Data Entry Clerk/Transcriber at grade G-3 in the Data Processing Unit in the

Prosecutor's Office. In 2008, he was reclassified in grade G-4 with the job title of Data Processing Assistant. His appointment was extended several times, but he was given oral and written notice on 26 October 2011 that his contract would not be extended after 29 February 2012. The written notice also indicated that although his current contract would have expired on 31 December 2011, the Executive Committee had decided to grant him two additional months to enable him to search for other employment opportunities. The Prosecutor's Office further assured the complainant of its support, especially if he needed assistance to apply for other positions. The written notice also informed him that he would be notified of any opportunities of which Human Resources became aware. However, a few days later, by communication dated 1 November 2011, the Head of the Investigation Division informed all staff members of the Division of a decision to extend all General Temporary Assistance contracts to the end of September 2012 as a first step to improve job security. The complainant and a few other members of his Unit within the Investigation Division did not benefit from this decision.

2. In internal proceedings, the complainant sought a review of the decision not to renew his contract. This culminated in the impugned decision, in which the Prosecutor did not accept the Appeals Board's second recommendation that the ICC should take steps to address what seemed to have been a prevailing atmosphere of mistrust within the Unit. The complainant does not challenge this aspect of the impugned decision. He challenges the Prosecutor's decision to accept the recommendation by the Appeals Board to reject the internal appeal as unfounded because the complainant provided no evidence to substantiate his case.

3. The Tribunal has consistently stated 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. Staff Rule 104.4(a) states that a contract ends on the expiration date stated in the letter of appointment. The complainant's contract would have expired on 31 December 2011, but for the two additional

months' notice to comply with its internal practice to satisfy Staff Regulation 9.2. He does not challenge the reasonableness of the notice which he received.

4. The Tribunal has further consistently stated that the decision whether to extend or renew a fixed-term appointment lies within the discretion of the organization. This discretion is subject to only limited review by the Tribunal. The Tribunal will not substitute its own assessment for that of the organization. A decision in the exercise of the discretion may only be quashed or set aside for unlawfulness or illegality in the sense that it was taken without authority, or in breach of a rule of form or procedure, or if it rested on an error of fact or of law, if some essential fact was overlooked, or if there was an abuse 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). Notwithstanding this, where the abolition of an office by virtue of re-organization of a department or unit is proffered as the reason for the non-renewal of a contract, this must be done on objective grounds and not as a pretext for removing undesirable staff as that would be considered an abuse of authority (see, for example, Judgments 1231, under 26, and 2830, under 6, recently confirmed in Judgment 3353, under 13-16). The decision must also be taken by the competent authority (see, for example, Judgment 1273, under 8). Moreover, the Tribunal has consistently stated that notwithstanding the discretionary nature of such a decision, it must be taken for a valid reason that is given to the staff member (see, for example, Judgment 1154, under 4).

5. In seeking to set aside the impugned decision, the complainant contends that the decision was tainted with procedural errors and with abuse of authority. This he says, is because it was not taken by the Executive Committee but by the Head of the Operations and Planning Unit a few days before the Executive Committee made the decision to extend the employment of other employees of his Unit who were also on General Temporary Assistance contracts. He insists that the Head of the Operations and Planning Unit acted beyond his authority by taking

the decision. The Tribunal notes, however, that in the complainant's submission in his request for review dated 21 November 2011, he stated that in the meeting of 26 October 2011, the Head of the Operations and Planning Unit had informed them that the Executive Committee had decided not to extend their contracts. It is plain that the Head of the Operations and Planning Unit did not make the decision, but merely informed them of it as Rule 4.2 of the OTP Operations Manual provides.

6. The complainant also seeks to set aside the impugned decision on the ground that it was tainted with substantial errors and was not based on objective grounds because it evinced personal prejudice, lack of good faith, discrimination, unfair and unequal treatment. He also contends that the decision was taken in retaliation against him because he had protested against discrimination and favouritism within his Unit. The Tribunal finds these allegations to be unfounded because the complainant provided no evidence to prove them. It is noteworthy, for example, that the contracts of some of his colleagues, who were also critical of the work environment within his Unit, were renewed, while the contracts of some who were not critical were not renewed. The ICC accepted that there were internal work related problems within the Unit. It is apparent from the evidence that the Prosecutor's Office and the Unit were making genuine attempts to address the problems.

7. The Tribunal also notes the ICC's further explanation that the complainant's contract was not renewed in its attempt to meet operational needs and budgetary considerations. The ICC further states that new requirements in the area of data processing had shifted over time presenting new challenges, and, additionally, there was a need to comply with the request of the States Parties to show efficient use of resources. The Unit had accordingly outsourced some aspects of its transcription work, but kept some aspects of it in order to maintain a basic institutional capacity in a number of languages. The Tribunal has stated that these are matters that are within the purview of an international organization, and, accordingly, it will not substitute its

own assessment for that of the ICC (see, for example, Judgment 3016, under 7). In the foregoing premises, the aspects of the complaint that are considered in this paragraph and in paragraph 6 of this Judgment are dismissed as unfounded.

8. However, the Tribunal finds that the complaint is well founded on the complainant's allegation that the ICC did not provide him with a clear and valid reason for not renewing his contract. The ICC states that the complainant was "sufficiently and repeatedly" informed of the reasons. It refers to its communication with the complainant and some members of staff of 11 February 2011. The ICC states that this communication informed them that their contracts would not be renewed after June 2011 because of anticipated budgetary constraints, as well as because of changes in the needs of the Unit. According to the ICC, that decision was rescinded and the contracts were renewed at the time because of changed circumstances that were brought about by the crisis which arose in Libya. However, the Tribunal sees no evidence that the complainant was informed of the contents of the communication of 11 February 2011. Moreover, the Tribunal rejects the ICC's submission that by informing the complainant then of reasons could pass as reasons for the non-renewal of his contract when it ended on 31 December 2011. There is no nexus between the two events.

9. The Tribunal further notes the ICC's insistence that during the meeting of 26 October 2011, the complainant was told that most of the transcription work, including that which he performed, would be outsourced in the future. However, since no reasons were stated in the communication of 26 October 2011, which confirmed the notice that was given orally to the complainant earlier that day, the Tribunal, on balance, accepts the complainant's evidence that no reasons were given orally at the meeting. Moreover, the Tribunal has seen no reasons stated in the communication to the complainant dated 28 November 2011, as the ICC seems to suggest. It is for these reasons that the Tribunal finds that the complaint is well founded on this ground. The complainant is entitled to damages, for which the sum of 8,000 euros is awarded. The complainant is also awarded 1,000 euros costs.

DECISION

For the above reasons,

1. The ICC shall pay the complainant 8,000 euros damages.
2. The ICC shall pay the complainant 1,000 euros costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, 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 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ