

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P.-S.

v.

WTO

121st Session

Judgment No. 3603

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms V. P.-S. against the World Trade Organization (WTO) on 30 November 2012 and corrected on 8 April 2013, the WTO's reply of 22 May, the complainant's rejoinder of 19 July and the WTO's surrejoinder of 23 September 2013;

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

Having examined the written submissions;

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

The complainant contests the WTO's rejection of her request to consider her as an internationally recruited official.

In October 2002 the complainant travelled from Rome to Switzerland to attend a French language course. While staying in Pully (Switzerland) and waiting for a place to become available in that course, she submitted a Personal History Form to the WTO, indicating her Rome address as her "permanent address" and the address where she was staying in Pully as her "present address". On 28 November 2002 she commenced working at the WTO under a short-term contract. She was considered as locally recruited. On 3 December 2002 the WTO submitted an application to the Swiss authorities for the issuance of

the complainant's residence permit (*carte de légitimation*), showing 22 November 2002 as the date of her entry into Switzerland.

Effective 1 July 2006 the complainant was granted a fixed-term contract, again as a locally recruited official. On 3 December 2009 she requested the Human Resources Division (HRD) to change her recruitment status from "local" to "international". HRD rejected this request as time-barred in a memorandum of 19 April 2011. On 11 May 2011 the complainant wrote to the Director-General seeking a review of the decision regarding her recruitment status. When her request was rejected, she filed an internal appeal on 6 July 2011 asking that her recruitment status be modified to "international". Further to the Joint Appeals Board's (JAB) recommendation, the Director-General dismissed this appeal on 3 November 2011 as time-barred and thus irreceivable.

In the meantime, on 31 August 2011, the complainant was awarded effective 1 September 2011 a regular contract "on a local basis". On 17 October 2011 she sought a review by the Director-General of the decision to award her a regular contract under local recruitment conditions. Her request was rejected on 14 November 2011 as time-barred on the ground that she had failed to submit it within the 40-day time limit provided for in Staff Rule 114.3(a). She then filed an internal appeal on 14 December 2011, arguing *inter alia* that other staff members had had their recruitment status reviewed long after the expiry of the 40-day time limit stipulated in Staff Rule 114.3(a). She asked again that her recruitment status be modified to reflect her "international status". The JAB issued its report on 25 May 2012 recommending that the appeal be dismissed but that the Administration reply to the complainant's assertions regarding the out-of-time changes in the recruitment status of other staff members.

By a letter of 18 June 2012 the complainant was notified of the Director-General's decision to dismiss her appeal and to reply within 20 working days to her assertions regarding the individuals identified as having benefitted from an out-of-time change in their recruitment status. On 5 September 2012 the Administration complemented the decision of 18 June by providing the complainant with information on the recruitment status of the only staff member who, amongst those

identified by her, had consented to the disclosure of information on his recruitment status. While that is the decision which the complainant identifies as the impugned decision in the complaint form, in her brief she indicates that she is contesting the Director-General's decision of 18 June 2012.

The complainant asks the Tribunal to quash the impugned decision and to order that her contract be modified to reflect her international status as from the date of her recruitment in 2002. She also asks that she be paid the salary, step increases, benefits and other emoluments, including pension contributions, that she would have received had she been considered internationally recruited at the time of her initial recruitment on 28 November 2002, retroactively from that date or, alternatively, from 2 September 2011, the date of her acceptance of a regular contract. She seeks 250,000 Swiss francs in moral damages for WTO's gross negligence, misrepresentation, failure in its duty of care and continuing discrimination. She claims interest at the rate of 6 per cent per annum on all amounts awarded to her, calculated from the date of her initial recruitment in 2002 or, alternatively, from 2 September 2011. She also claims costs and such other relief as the Tribunal determines just, necessary and equitable.

The WTO asks the Tribunal to dismiss the complaint as time-barred and thus irreceivable and to reject all of the complainant's claims as unfounded.

CONSIDERATIONS

1. In her complaint form, which was filed on 30 November 2012, the complainant identifies a decision of 5 September 2012 as the decision which she challenges. However, in her brief she leaves no doubt that the impugned decision is the decision by the Director-General dated 18 June 2012. Irreceivability of her complaint as time-barred in the Tribunal is not however an issue given the statement contained in the WTO's memorandum of 5 September 2012 that the parties had agreed that the date of this memorandum would be the relevant date for the calculation of the time limits in the event of further appeals.

The memorandum of 5 September 2012 addressed a matter that concerned the complainant's internal appeal, which the JAB had recommended for follow-up action by the Director-General.

2. The complainant was first recruited to work with the WTO on a short-term contract in November 2002. She had given Rome in her Personal History Form as her "permanent address" and Pully (Switzerland) as her "present address". Rule ST03.1 of the WTO Short-Term Staff Rules provides as follows under the caption "Recruitment Policy":

- "(a) Recruitment under these rules shall normally be made locally. Staff members shall be considered as locally recruited if at the time of recruitment they are resident within a radius of 75 km from the Pont du Mont-Blanc in Geneva regardless of the duration of that residence, except that staff members who are transferred, seconded or loaned from an intergovernmental organization in Geneva and who had been internationally recruited to that organization shall retain that status.
- (b) Exceptionally, where the required skills cannot be found locally, staff members may be recruited internationally. Staff members who are resident outside a radius of 75 km from the Pont du Mont-Blanc in Geneva at the time of recruitment shall be considered as internationally recruited."

3. The complainant did not at that time object to her recruitment status as being "local". Given the terms of the provision and the fact that she gave Pully as her "present address" an objection would have been unsustainable. In fact, she has acknowledged that she gave that address when she made the application to facilitate her chance of recruitment. There was therefore no error in her being given that status on her recruitment in 2002, as she contends in her internal appeal and now before the Tribunal. Neither was the WTO negligent or in non-compliance when she was recruited with that status.

4. The complainant notes that on 19 January 2005, by way of Notice to the Staff OFFICE(05)/6, the Administration informed the staff that it had decided to review the recruitment status of fixed-term and regular staff members who believed that their recruitment status was erroneously determined at the time of their first regular

appointment (as opposed to prior short-term contracts). She states that the process did not apply to staff serving on short-term contracts, as she was at the time. Eligible staff members were invited to submit an official request with supporting evidence to HRD by 18 February 2005 and were informed that no claims submitted after that date would be considered. She states that she was not aware of this process and in any event she would not have been eligible because she was a short-term staff member at the time.

5. The complainant was given a fixed-term position with the WTO in July 2006. She states that “[i]n the course of receiving the offer of and signing the contract, [she] requested the advice of the HRD staff member [Ms P. G.] in relation to the phrase therein ‘under the local recruitment conditions’” and was told that “there was no difference between a local and international recruitment”. She states that, since she was not given a copy of the Staff Rules either in 2002 or at the time in 2006, she relied on that advice and signed the fixed-term contract. She complains of other instances of misrepresentations made to her mainly concerning the time within which she could have applied for a change in her recruitment status and the procedures. It suffices, however, that she subsequently raised the question of her status as “local” and unsuccessfully requested a reconsideration of her recruitment status outside of the WTO’s internal grievance procedure in December 2009.

6. In May 2011 the complainant unsuccessfully sought a review of her recruitment status through the internal grievance procedure. In his decision of 3 November 2011, the Director-General accepted the recommendation of the JAB that her internal appeal was irreceivable, having determined that the applicable time-limit for her request for review was to be calculated from March 2009, when she first became aware of the difference between local and international status.

7. The present complaint arises out of the complainant’s request of 17 October 2011 for a review of her recruitment status after

she received a regular contract on 31 August 2011 on the basis of her local status. She accepted the contract on 2 September 2011 before she requested the Director-General to review “[the] part of that administrative decision, viz, the determination that I should be offered ‘local’ status in my regular contract per Staff Rule 103.1(a)”.

8. The complainant’s request for the redetermination of her status was made on the ground that it was incorrect both in fact and in law. She justified her case as follows: at the time that she was recruited, she was resident in Rome as she worked for the Embassy of Argentina to the Holy See from June 1997 to 31 August 2002. When she applied for employment with the WTO, the Personal History Form which she submitted showed that Rome was her permanent address and, although she was present in Pully when she applied, she was not resident there. Accordingly, she claimed that she should have been recruited as an internationally recruited staff member pursuant to Staff Rule 103.1.

9. Staff Rule 103.1 provides as follows:

“Rule 103.1

Recruitment

Local recruitment

- (a) Staff members shall be considered as locally recruited if at the time of recruitment they are resident within a radius of 75 km from the Pont du Mont-Blanc in Geneva regardless of the duration of that residence, except that staff members who are transferred, seconded or loaned from an intergovernmental organization in Geneva and who had been internationally recruited to that organization shall retain that status.

International recruitment

- (b) Staff members who are resident outside a radius of 75 km from the Pont du Mont-Blanc in Geneva at the time of recruitment shall be considered as internationally recruited.”

10. The complainant’s claim that she should have been recruited as an internationally recruited staff member lacks basis because she was first recruited under Rule ST03.1 of the Short-Term Staff Rules

and not under Staff Rule 103.1. However, in her request for review of 17 October 2011, she reminded the Director-General of his decision in 2006 to apply a liberal construction to Staff Rule 103.1(b) in order to rectify injustices in several cases and she submitted that the principle of equal treatment required that the same liberal interpretation be applied to his redetermination of her status. The question whether Staff Rule 103.1 may have become applicable to cause a reconsideration of her status when she was offered her regular appointment on 31 August 2011 became a live issue under her request of 17 October 2011 for a review of her recruitment status.

11. In rejecting her request for review, the following was relevantly stated in the memorandum on behalf of the Director-General dated 14 November 2011: when Staff Rule 103.1 states that the determination of recruitment status is to be made “at the time of recruitment” the reference is to the first recruitment of the staff member. The complainant’s recruitment status was correctly determined as “local” when she was first recruited in 2002 on a short-term basis. She could have sought a redetermination of that status when her contractual situation changed from short-term to fixed-term, as the granting of the fixed-term contract could have been considered a “recruitment”, given that a short-term and a fixed-term contract are not governed by the same rules. However, since a fixed-term and a regular contract are governed by the same rules, the change from one to the other does not amount to “recruitment”. The granting of a regular contract under Staff Rule 104.2(b) cannot amount to recruitment under Staff Rule 103.1, and, for that reason, Staff Rule 104.7(c) does apply to the complainant’s situation. She could also have requested a review of her status in March 2009, when she became aware of the information that she needed to suspect that her recruitment status may have been incorrectly determined. The Director-General had therefore determined that her request for a review of her recruitment status was time-barred and was not reopened by the decision to grant her a regular contract.

12. Staff Rule 104.2 is under the rubric “Types of contract”. The terms of Staff Rule 104.2(b) may be discerned in the context of the Rule as a whole, which provides as follows:

“Fixed-term contracts

- (a) On recruitment staff members shall be granted a fixed-term contract. The initial appointment under a fixed-term contract shall be for a minimum period of one-year, which shall be deemed to be a probationary period. The contract shall not entitle the staff member to an extension, but it may be extended one or more times. Other than in exceptional circumstances, the total length of continuous service under fixed-term contracts shall not exceed five years.

Regular contracts

- (b) Upon the recommendation of the Appointment and Promotion Board, and without prejudice to *Staff Regulation 4.3*, the Director-General may grant a regular contract to staff members upon completion of five years of continuous service under fixed-term conditions and who, by their qualifications, performance and conduct, have fully demonstrated, on the basis of their performance evaluation reports, their suitability as international civil servants and have shown that they meet the required standards of competence, integrity and efficiency.”

13. Staff Regulation 4.3 is not applicable to the present case, and the terms of Staff Rule 104.7(c) may be helpfully discerned in the context of Staff Rule 104.7 as a whole. It states as follows:

“Rule 104.7

Definition of home

- (a) For the purpose of the *Staff Regulations* and *Staff Rules*, a staff member’s home shall be determined at the time of appointment. Unless there are compelling reasons to make an exception, a staff member’s home shall be deemed to be in the country of which the staff member is a national at the time of the appointment. The location of the home within the staff member’s home country shall be the place with which the staff member has the closest residential or family ties. In the absence of clear indications, the capital will be designated.
- (b) Notwithstanding paragraph (a) above, the home of locally recruited staff members as defined in *Staff Rule 103.1(a)* shall be deemed to be Geneva.

- (c) The determination of a staff member's home shall remain unchanged for the duration of the staff member's service unless the Director-General decides that there are compelling reasons to effect a change."

14. The complainant identified the decision against which she appealed and her claim in her internal appeal of 14 December 2011 as follows:

"1. [...] (the 'Appellant') hereby appeals to the Joint Appeals Board (JAB) the Director-General's reply to her request for review, as set out in a Memorandum by his delegate, [...] on 14 November 2011 [...], a copy of which is attached hereto as Exhibit 1. The request for review also concerns the related administrative decision contained in the offer of a new regular contract of 31 August 2011 [...]. [...] 3. The Appellant hereby appeals the administrative decision contained in Exhibit 1 on the basis of Staff Regulation 12.3. The Appellant submits that the non-grant of appropriate (international) status to her at the time of her recruitment is the 'non-observance, in substance [and] in form, of the terms of ... the Staff Regulations and Staff Rules...' and is thus appealable. The Appellant also notes serious irregularities and discriminatory treatment by the Organization in comparison to other staff in similar or identical situations. The Appellant also alleges a breach of the Administration's duty of care to its employees, in this case the Appellant."

15. The complainant further sets out the relief that she sought in her internal appeal of 14 December 2011 as follows:

"The Appellant requests that the JAB recommend to the Director-General that he modify the Appellant's contract status to reflect the Appellant's 'international status' per Staff Regulation 6.8 and Staff Rule 103.1(b), from the date of her recruitment by the WTO, that any monies due as a result be paid retroactively with judgment interest and that the JAB also recommend that the Director-General agree to pay an amount of moral damages."

16. In its report of 25 May 2012, the JAB concluded and recommended, in paragraph 57, that the appeal be considered admissible, as it was not *res judicata* because it was concerned with whether the regular contract which the complainant was offered on 31 August 2011, and which she signed, contained an administrative decision relating to her recruitment status. Although the impugned decision made no express reference of acceptance or rejection on this conclusion, the Tribunal holds that the JAB's conclusion was correct as that appeal (of 14 December 2011) was in relation to a different subject matter from

the one that the complainant had raised in her first internal appeal. It was a distinct cause of action arising from what was allegedly a separate administrative decision.

17. However, in paragraph 58 of its report, the JAB concluded and recommended on the merits, at the first bullet point, “that the administrative decision to modify the appellant’s contractual status did not include a new administrative decision on her recruitment status, and that there [were] no ‘compelling reasons to effect a change’ to that status, within the meaning of Staff Rule 104.7”. It was with reference to this provision that the JAB had earlier reasoned that:

“the appellant’s ‘home’ status as local, determined upon her first recruitment, would remain unchanged for the duration of [her] service unless ‘there [were] compelling reasons to effect a change’ within the meaning of Staff Rule 104.7. Moreover, on the basis of the information that has been provided to us, the alleged facts that the appellant seeks to rely upon to request that her recruitment status should be changed for ‘compelling reasons’ do not justify such a change.”

18. The impugned decision did not accept or reject this conclusion. However, in the Tribunal’s view, the JAB’s reasoning was flawed in its reliance on Staff Rule 104.7, which has little bearing on a staff member’s recruitment status. It deals with the definition of “home” for the general purposes of the Staff Regulations and the Staff Rules.

19. The critical factor for determining a staff member’s recruitment status is her or his residence at the time of recruitment, as provided in Rule ST03.1 of the Short-Term Staff Rules (for short-term staff) and Staff Rule 103.1 read together with Staff Rule 104.2 (for staff under fixed-term and regular contracts). Under the clear and unambiguous provisions of Rule ST03.1 of the Short-Term Staff Rules, the complainant’s recruitment status on recruitment on a short-term basis in 2002 was ‘local’. She was correctly so recruited as, at the time, she gave her “present address” as Pully. That was perhaps convenient for her because she then benefitted from the provision of Rule ST03.1(a) to the effect that recruitment of short-term staff “shall normally be made locally”.

20. Under Staff Rule 104.2(a) she was recruited under the Staff Regulations and Staff Rules when she was given a fixed-term contract. Her place of residence at that time for the purpose of her recruitment status under Staff Rule 103.1 was Switzerland, as it also was at the time when she was given the regular contract. Therefore, the WTO was entitled to recruit her as a local staff member under her short-term, fixed-term and regular contracts and her claim that she was at any time entitled to international recruitment status is unmeritorious.

21. The JAB considered the complainant's alternative request that the case be determined on the basis of equity. She says that equity would permit her to benefit from the same treatment as other staff members, whom, she alleges, the Administration had given the benefit of a review of their recruitment status on the basis of procedures set out in the Notice to the Staff OFFICE(05)/6. She insists that in some instances those persons had their review done outside of the 40-day time limit established in Staff Rule 114.3(a) after the expiry of the OFFICE(05)/6 process. The JAB concluded that it lacked the necessary information that would have allowed it to decide the case in equity in a manner that was consistent with the requirements of Article 17.2 of its Provisional Rules of Procedure.

22. However, the JAB made two recommendations in the second bullet point in paragraph 58 of its report. These were intended to permit the disclosure of further information to support the complainant's contention that other members of staff had benefitted from a review of their recruitment status, for which they had applied outside of the 40-day time limit after the expiry of the OFFICE(05)/6 process. This basically invited post-report action by the WTO to permit, as the JAB recommended, the "conduct [of] an open and transparent review [...] with a view to considering whether the appellant should also benefit from the same treatment". This is the only conclusion and recommendation which the impugned decision followed.

23. The impugned decision dealt with that recommendation in the following manner:

“2. The Director-General has decided to follow the recommendations contained in paragraph 58 of the above-mentioned JAB report, namely:

(i) the Administration, subject to the consent of the relevant individuals, will reply directly to you, within 20 working days from this memorandum, concerning your assertions about the individuals you identified as having been the recipients of alleged out-of-time recruitment status decisions;

(ii) all the individuals indicated by you as having being (*sic*) the recipients of alleged out-of-time recruitment status decisions appear in the list of six individuals identified by the Administration. As a consequence, and in full consistency with paragraph 58(ii) of the JAB report, the Director-General maintains his decision of 14 November 2011.”

24. The Tribunal does not discern “full consistency” between the JAB’s recommendation in the second bullet point in paragraph 58 of its report and the Director-General’s reasoning in the impugned decision (as reproduced in consideration 23 above), which maintained his earlier decision of 14 November 2011 that the complainant’s request for the review of her recruitment status was time-barred and was not reopened by the decision to grant her a regular contract. For the reasons explained in considerations 19 and 20 above, nevertheless, the Tribunal has determined that the complaint is unmeritorious in any event and would add that it is also unmeritorious in the light of the following statement by the Tribunal in Judgment 1666, under 5(b):

“Precedent has it that it is the contract concluded between the parties that determines whether the staff member’s status is local or non-local. He must object to the terms before he signs. Thereafter it is too late to rewrite retroactively a duly concluded contract. Save when the staff member was mistaken, the place of residence cannot be an issue: see for example Judgments 613 [...]; 1108 [...], 1189 [...], under 5; 1539 [...], under 9, 11 and 12. The complainant was and is bound by the terms of the contracts, which stated that he was locally recruited. The Tribunal is satisfied that he knew what local status meant: he had or could have got hold of the relevant part of the Rules and with his training as a lawyer must have grasped the meaning of the clause. So he was left under no misunderstanding, the less so since the execution of his first contract had made plain just what his rights were.”

25. In the foregoing premises and inasmuch as the complainant has not provided sufficient evidence to prove that she was treated unequally, discriminatorily or unfairly, this ground of the complaint

is unfounded. As the complaint is unfounded on the merits, it is unnecessary to deal with the issue of receivability.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 23 October 2015, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ