

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

G.

v.

ITER Organization

121st Session

Judgment No. 3606

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. L. A. G. against the ITER International Fusion Energy Organization (ITER Organization) on 24 April 2013, the ITER Organization's reply of 2 August, the complainant's rejoinder of 16 September and the ITER Organization's surrejoinder of 18 December 2013;

Considering Articles II, paragraph 5, and VII 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 may be summed up as follows:

The complainant, who had been seconded to the ITER Organization, challenges the decision not to renew his contract upon its expiry.

He joined the ITER Organization in February 2008 under a five-year appointment on secondment from the French *Commissariat à l'énergie atomique*, to which he returned upon the expiry of his contract. By a letter of 31 May 2012 the Director-General informed him that he had decided not to grant him a new contract upon its expiry on 31 January 2013. He explained that in the framework of the re-organisation of the ITER Organization his post would be abolished

at the end of his contract and that he did not have the necessary skills to occupy the new post that would be created.

In the summer of 2012 the complainant applied for the position of Global Transport and Logistics Contract Coordinator (BSI-051). However, he was informed by an email of 19 November 2012 that he had not been selected.

On 9 January 2013 he wrote to the Director-General appealing the abolition of his post, the decision not to extend his contract and the decision not to select him for the position for which he had applied. He asked him to reverse his decisions or, in the alternative, to assign him to an equivalent position in the ITER Organization. By a letter of 31 January 2013 the Director-General notified him that the appeal he had filed with respect to the non-renewal of his contract was time-barred. Regarding the decision of 19 November 2012, he indicated that the ITER Organization enjoyed a wide discretion with respect to the appointment and selection of staff and that the complainant's request could not be granted. That is the impugned decision.

The complainant asks the Tribunal to quash the Director-General's decision of 31 January 2013 and to order the ITER Organization to reinstate him as of 1 February 2013 with full pay and allowances and to assign him to a suitable post. He also claims moral damages for the abolition of his post and the Organization's failure to reassign him, and 5,000 euros in costs for these and the internal appeal proceedings.

Insofar as the complaint is directed against the decisions to abolish the complainant's post and not to extend his contract, the ITER Organization asks the Tribunal to dismiss it as irreceivable for failure to exhaust internal remedies or, alternatively, as ill-founded. It submits that the complainant's claims concerning the decision not to select him for the post for which he applied are groundless.

CONSIDERATIONS

1. In 1994 the complainant commenced working for the French *Commissariat à l'énergie atomique* but was seconded to work for the

ITER Organization under a contract commencing 1 February 2008. An express term of the contract was that it would end on 31 January 2013. The complainant's initial employment with the ITER Organization was as an alignment and metrology engineer at a grade of P3. On 1 March 2010 the complainant commenced working in a new position, namely as integrated logistics support officer at the P3 grade though the contractual arrangements for this position preserved the terms of the original contract including the expiry date of 31 January 2013.

2. On 31 May 2012 the Director-General wrote to the complainant saying:

"I regret to inform you that I have decided not to grant you a new contract at the date of expiration of the current one, on 31 January 2013.

Indeed, in the framework of the re-organization of ITER owing to its evolving business needs, your post will be abolished at the end of your present contract, and I consider that you do not have the necessary skill mix to occupy the new post that will be created instead.

I wish to stress that all possible efforts have been made to relocate you, but that no suitable assignment could be found. You have of course the possibility to apply to ITER competitions that may be opened in the future.

I would like to take this opportunity to thank you for your contribution to the ITER Project, and I wish you success in your future endeavours."

3. In August 2012, a list of the first 18 positions arising from a reorganisation within the ITER Organization was sent to staff on behalf of the Head of the Human Resources Division indicating that competitions for those positions (and others) would be organised "from th[e] summer to January 2013". One position was the Global Transport and Logistics Contract Coordinator, position BSI-051. The complainant applied for this position but, on 19 November 2012, was informed that his "candidature ha[d] not been successful and [that he was] not selected for this position".

4. On 9 January 2013 the complainant wrote to the Director-General saying that in accordance with Article 26 of the Staff Regulations, he wished to appeal against the Director-General's decisions to abolish his post, not to extend his contract and not to

select him for the position BSI-051. The complainant requested that the Director-General reverse his decisions abolishing his post and not selecting him for the post BSI-051.

5. In a letter dated 31 January 2013, the Director-General noted, at the outset, that the complainant challenged two decisions “of quite a different nature”. The first decision was characterised in the letter as “the non-renewal of your contract resulting from the abolishment of your post”. In relation to that decision the Director-General said that the complainant’s appeal was time-barred having regard to Article 26 of the Staff Regulations. As to the second decision, it was characterised as the complainant’s “non-selection for the [BSI-051] position [he] applied to”. No reasons for the non-selection which related to the particular circumstances of the complainant were given. The Director-General simply noted, by reference to the “consistent case law of [the Tribunal]”, the wide discretion international organisations had in appointing and selecting staff and that such decisions involved the exercise of a value judgement and were discretionary. The letter concluded by saying that the Director-General was not in a position to grant the complainant’s request. This letter is the impugned decision.

6. On 24 April 2013, the complainant lodged a complaint with the Tribunal. The relief the complainant seeks includes in particular the quashing of the decision of the Director-General “rejecting [his] appeal against the abolition of his post, his failure to be selected for post BSI-051 and the non-renewal of his contract” as well as reinstatement. There is an issue between the complainant and the ITER Organization about the receivability of the complaint in so far as the complainant seeks to impugn the decision to abolish his post and the decision not to renew his contract. It is convenient to deal with this issue at the outset.

7. In his legal brief the complainant argues that at the time his post was abolished, he was unaware of two things that only emerged subsequently. The first was that on 1 August 2012 the complainant became aware of the “advertisement” for the 18 positions and that one

of them was, as the complainant describes it, “a practically identical post [to the one he then occupied] with the same duties” which then aroused suspicion of manipulation on the part of the Organization. The second was that it was not until 19 November 2012 when the complainant was advised he had been unsuccessful in seeking appointment to the new post that the complainant became aware of the consequences of the abolition of his post. In relation to the non-renewal of his contract, the complainant says the advice he received in May 2012 about the non-renewal of his contract was, at best, an advance notice that, failing reassignment, his contract would not be renewed. On the assumption that the appeal against the abolition of his post was time-barred, the complainant submits that the Tribunal could and should investigate the abolition of his post as part of the consideration of the non-renewal of his contract. The complainant cites Judgment 3172, under 16. The ITER Organization takes issue with each of these propositions and points to the requirement under Article 26 of the Staff Regulations for a staff member to challenge, by way of internal administrative appeal, a decision within two months of the decision being made. In this case, the ITER Organization submits the complainant had to lodge an internal administrative appeal within two months of the letter of 31 May 2012, failed to do so and thus has not exhausted internal remedies. For this reason, the ITER Organization submits, the complaint, insofar as it relates to the abolition of the post and the non-renewal of the contract, is not receivable. In its pleas, the ITER Organization argues that there was only one decision addressed by the letter of 31 May 2012, namely the non-renewal of the complainant’s contract together with the abolition of his post. It was only one decision because of the causal relationship between the two. The Tribunal doubts this is correct but whether it is or not is immaterial.

8. By the letter of 31 May 2012 the complainant was told, unambiguously, that two relevant decisions had been made or one had been made with two elements. One was that his contract would not be renewed at the expiration of his current contract, namely 31 January 2013. The second was that the post he then held would be abolished

effective 31 January 2013. If the complainant had wished to challenge those decisions, he had two months from 31 May 2012 to do so by way of an internal administrative appeal. He did not appeal. The submission of the ITER Organization that the complainant's failure to do so ultimately rendered his complaint (concerning those two decisions) in this Tribunal irreceivable is accepted.

9. This conclusion leaves for consideration only the complainant's challenge to the decision not to appoint him to the BSI-051 position. It is convenient to commence discussion of this matter with the position adopted by the ITER Organization in its pleas. Putting aside, for the moment, the ITER Organization's recitation of the Tribunal's case law concerning appointments and promotion, the gist of its argument is this. Firstly, there were material differences between the BSI-051 position for which the complainant unsuccessfully applied and the position he held at the time the decision was made in mid-2012 to abolish it. Secondly the complainant's application for the new position was assessed by an Interview Board comprising five individuals who assessed all applicants for the position and undertook an objective assessment of the complainant's suitability and skills together with those of other applicants. This assessment revealed that the complainant was not viewed as a strong candidate and was considered "as not qualified for th[e] position". The ITER Organization argues that this assessment was consistent with the complainant's performance appraisal for 2011 which pointed to deficiencies in the way the complainant had performed his duties in the position he then held. Those deficiencies informed the way he might perform the duties of the BSI-051 position. Thirdly, the BSI-051 position was graded at P4 and the position he held at the time of its abolition was at a P3 level. This founds an argument that the complainant did not have a right to be promoted having regard to the Tribunal's case law as well as the Employment Development Policy.

10. The complainant argues, albeit in the context of arguing that the abolition of his post had not been justified, that the position he held which was abolished (the old position) was very similar to the

position for which he unsuccessfully applied, namely the BSI-051 position. He also points to the fact that two of the five individuals on the Interview Board had undertaken, unbeknownst to him, an assessment of his performance in March 2012 with a view to ascertaining whether he would be suitable to perform the tasks of the position then in contemplation which became the BSI-051 position.

11. Ultimately, however, the role of the Tribunal is not to determine or assess whether a complainant should have been appointed to a position in a competition in which the complainant failed to secure the appointment. Rather the Tribunal has repeatedly recognised that the appointment by an international organisation of a person to fill a position is a discretionary decision. The Tribunal will only intervene if the decision was taken without authority, or in breach of a rule of form or procedure, or if it rested on an error of fact or law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgment 2762, under 17). In the present case, no deficiency of these types is manifest in the decision not to appoint the complainant to the BSI-051 position. While the old position and the BSI-051 position were broadly similar, they were not the same. This is reflected in the grade of the BSI-051 position which involved management and leadership at a higher level than that entailed in the old position. The process of assessing on a preliminary basis in March 2012 the suitability of the complainant for the new position in prospect, was arguably flawed because it occurred without consultation with the complainant. However it does not follow that the participation of the two individuals in the Interview Board who undertook that assessment was a flaw in the selection process. It cannot be said that the two individuals had prejudged the suitability of the complainant for the BSI-051 position in a way that prevented them considering the complainant's attributes and suitability in the context of a competition for the position. They rated, in the March 2012 assessment, the complainant's potential to adapt to this new position and the new competencies as "medium". Such a rating does not manifest a closed mind on the part of these two individuals.

12. The complainant has not established a ground for relief in relation to his non-appointment to the BSI-051 position. Accordingly his complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 22 October 2015, Mr Giuseppe Barbagallo, Vice-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 3 February 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ