

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. (No. 2)

v.

OTIF

122nd Session

Judgment No. 3674

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr F. D. against the Intergovernmental Organisation for International Carriage by Rail (OTIF) on 25 October 2013 and corrected on 3 February 2014, OTIF's reply dated 6 November and corrected on 26 November 2014, the complainant's rejoinder of 16 March 2015, corrected on 24 March, and OTIF's surrejoinder of 29 June 2015;

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 challenges the decision not to confirm his appointment at the end of his probation period.

The complainant entered OTIF's service on 1 July 2010. When his appointment was not confirmed at the end of his probation period, he filed a first complaint with the Tribunal on 11 March 2011. On 26 February 2013, before judgment was delivered, OTIF and the complainant signed an amicable settlement agreement that provided, inter alia, that the complainant would be reinstated as from 1 January 2013 with his length

of service in the Organisation reckoned from 1 January 2011. The Tribunal recorded the complainant's subsequent withdrawal of his complaint.

The complainant resumed his duties on 1 March 2013. Under his new letter of appointment, he was to be employed for three years including a probation period of six months.

By a letter of 25 April 2013 the Chairman of the Administrative Committee notified the complainant that the Secretary General did not wish to "extend [his] probation period into a three-year contract" and that "[his] duties [would] hence end as from 1 May 2013". The Chairman explained that as the complainant was an Assistant Counsellor, under the Staff Regulations it was the Administrative Committee that had the authority to end his probation period. However, between the meetings of the Committee and in urgent cases, he exercised the Committee's powers as its Chairman, his decisions being subsequently submitted to the Committee for approval. In the same letter, the Chairman specified that as this was not a dismissal within the meaning of Article 49 of the Staff Regulations, the complainant could not file an appeal with the Administrative Committee under Article 57, paragraph 4, of the Staff Regulations. On 30 April the complainant wrote to the Secretary General asking him to review the decision of 25 April and informing him of his intention to file an appeal with the Administrative Committee under Article 58 of the Staff Regulations should the Secretary General maintain his position.

By letter of 2 May the Secretary General informed the complainant that, further to the letter informing him that his duties would end as of 1 May 2013, which had been delivered to him by hand, he "[would] not be present on [the organisation's] premises from that date", but his salary would be paid until his probation period ended, i.e. until 30 June 2013. The Secretary General confirmed that the decision not to confirm his appointment "[would] be submitted to the Administrative Committee on 27 May for final decision", adding that although according to him the complainant's case was not covered by Article 58 of the Staff Regulations, he had no objection to the complainant appearing before the Administrative Committee to present his case at its session in November 2013. Also on 2 May, the Secretary General sent the complainant

a “receipt for full and final settlement” that listed a number of sums to be paid, in particular for his accrued annual leave and his repatriation grant, and whereby the parties acknowledged that, with these payments, “all claims [were] considered settled”. As the complainant deleted this last clause, OTIF did consider itself “not bound by this settlement”.

On 13 May 2013 the complainant’s counsel wrote a letter to the Secretary General and the Chairman of the Administrative Committee. She requested them to “review [...] the terms of [her client’s] dismissal”, which should include paying him “appropriate entitlements that reflect his length of service”.

At its meeting on 26 and 27 June 2013, the Administrative Committee approved the decision of 25 April 2013 and decided to grant the complainant’s request to present his case at its session in November 2013. The complainant was informed of this decision in an official communication from the Secretary General dated 8 July 2013, which was sent to the complainant on 16 July. In the meantime, the complainant had resumed duties with the French civil service from 1 July.

In an email of 17 October 2013 the complainant’s counsel rejected the offer to her client to present his case before the Administrative Council on the grounds that OTIF had not thereby fulfilled its duty to provide internal means of redress enabling him to defend himself in a timely manner. In his complaint filed on 25 October 2013, the complainant impugns the Administrative Committee’s decision of 26 and 27 June 2013. He requests the cancellation of this decision and the decision of 25 April, the payment of the remuneration that he would have received if his contract had run until its end, the correction of his “end of service entitlements” in light of his length of service, an award of exemplary damages for moral and professional injury, an official public apology from OTIF and an award of costs. He also asks OTIF to disclose the minutes of the Administrative Committee’s meeting of 26 and 27 June 2013.

OTIF asks the Tribunal to dismiss the complaint as irreceivable on the grounds that it is time-barred and that the complainant has not exhausted internal means of redress. In the alternative, it requests the Tribunal to dismiss the complaint as unfounded.

In his rejoinder the complainant maintains his claims and further requests the payment of all of the entitlements provided for in the Staff Regulations that have not yet been paid.

In its surrejoinder OTIF asks the Tribunal to ascertain whether the rejoinder was filed within the prescribed time limit and, if not, to declare it time-barred.

CONSIDERATIONS

1. On 25 October 2013 the complainant filed a complaint with the Tribunal seeking the cancellation of both the decision of 25 April 2013 by which the Chairman of the Administrative Committee notified him that his service would end as from 1 May 2013 and the decision of 26 and 27 June 2013 by which the Administrative Committee approved the said decision of 25 April 2013. In the complaint form, the complainant identifies the impugned decision as the decision of 26 and 27 June.

2. OTIF expresses doubt as to whether the complainant's rejoinder is receivable. However, the rejoinder was filed on 16 March 2015, that is within the time limit granted to the complainant by the President of the Tribunal for that purpose, which expired that same day.

3. The defendant organisation contends that the complaint must be dismissed as irreceivable on the grounds that it is time-barred and that the complainant has not exhausted internal means of redress.

4. The objection to receivability based on the contention that the complaint was filed late cannot be accepted, since OTIF has not produced any evidence that would enable the Tribunal to establish that the complainant received the notification of 16 July 2013 before the date specified by him, that is, 12 August 2013.

5. With regard to the failure to exhaust internal means of redress, the Tribunal recalls that under Article VII, paragraph 1, of its Statute, a complaint is not receivable unless the impugned decision is a final

decision and the complainant has exhausted all means of redress open to him under the Staff Regulations.

At the material time, Article 58, paragraph 1, of OTIF's Staff Regulations provided that:

“Staff members shall be entitled to submit an appeal to the [Administrative] Committee against any administrative decision that concerns them personally, and which is not a disciplinary measure taken by the Secretary General or the Committee [...].”

The file shows that the letter of 25 April 2013 informing the complainant that his appointment would not be confirmed at the end of his probation period plainly stated that this decision could not be the subject of an appeal before the Administrative Committee. Furthermore, in his letter of 2 May 2013 confirming that the complainant's duties had ended as of 1 May but that his salary would continue to be paid until 30 June 2013, the Secretary General stated, *inter alia*, that “[his] case [did] not fall under Article 58 [of the Staff Regulations]”, although he “[would] not object to [the complainant] putting [his] case to the Administrative Committee at its session in November 2013”.

The Tribunal observes that, contrary to what the defendant contends, there was nothing to prevent the complainant, who remained an OTIF staff member until the date on which his dismissal took effect, from pursuing internal means of redress to challenge the decision of 25 April 2013. By informing the complainant in the above-mentioned letters that he could not file an appeal with the Administrative Committee under the above-mentioned Article 58, OTIF therefore misled him as to his right to avail himself of the means of redress that were open to him under the Staff Regulations.

6. The Secretary General's statement in the above-mentioned letter of 2 May 2013 that he “[would] not object to [the complainant] putting [his] case to the Administrative Committee at its session in November 2013” does not effectively remedy the fact that, by that same letter, the complainant was unduly deprived of his right of appeal.

7. In these circumstances, the complainant cannot be criticised for not having exhausted the internal means of redress before filing his

complaint with the Tribunal, and the complaint must hence be considered receivable.

8. However, the Tribunal does not see fit to examine the complaint on its merits, because the complainant's claims have not been previously considered by the competent internal appeal body. It should be recalled that, as the Tribunal's case law has long stated, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. This principle implies that whenever a complainant has been unduly denied the right an effective internal appeal, the Tribunal should ordinarily remit the case to the organisation rather than examine its merits, especially as the review of a disputed decision by the competent body may well suffice to resolve a dispute. In the present case, it is all the more necessary to refer the matter back to the organisation because, given the nature of the challenge raised by the complainant, recourse to the Tribunal would not afford him such a wide-ranging review of the impugned decision as that obtained through the internal appeal to which he is entitled.

9. In the particular circumstances of the case, the Tribunal therefore considers it appropriate to set a new time limit for the complainant to challenge the decision to dismiss him before the Administrative Committee. Hence, the complainant will have a new time limit of 30 days, as provided for in the Staff Regulations, from the public delivery of this Judgment, to file an appeal with the Committee against that decision.

10. The fact that the complainant was misled as to his right to avail himself of the internal means of redress has resulted in a delay in the final settlement of this case, whatever its eventual outcome may be. This decision alone caused the complainant injury that will be fairly redressed by ordering OTIF to pay him compensation in the amount of 2,000 Swiss francs.

11. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 2,000 Swiss francs.

12. At this juncture, the complainant's other claims will not be allowed.

DECISION

For the above reasons,

1. The complainant shall have a new time limit of 30 days from the public delivery of this Judgment to file an internal appeal with the Administrative Committee against the decision to terminate his service, as indicated in consideration 9, above.
2. OTIF shall pay the complainant 2,000 Swiss francs in compensation for the injury resulting from the delay in the final settlement of the case.
3. OTIF shall also pay the complainant 2,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ