

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.

v.

ITER Organization

123rd Session

Judgment No. 3770

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. K. against the ITER International Fusion Energy Organization (ITER Organization) on 19 September 2014, the ITER Organization's reply of 19 December 2014 and the email of 25 March 2015 from the complainant's counsel informing the Registrar of the Tribunal that he would enter no rejoinder;

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 may be summed up as follows:

The complainant challenges the decision not to renew his contract following the abolition of his post.

On 9 December 2013 the Staffing Board established by the Director-General met in order to discuss and make recommendations to the Director-General on the question of the renewal of contracts which were due to expire during the period July to December 2014. By a letter dated 8 January 2014, the complainant, whose contract was due to expire on 31 December 2014, was informed that his contract would not be renewed upon expiry. The reason given by the Director-General was the abolition of his post "in the framework of the re-organization of [the] ITER Organization owing to its evolving business needs". The Director-General made it clear that the new post of a lower grade which was to be created

instead was not appropriate for the complainant and no other suitable assignment could be found.

On 25 March 2014 the complainant submitted an appeal to the Director-General against the decision of 8 January asking him to “reverse the decision to abolish [his] post and the related decision not to renew [his] contract”. On 24 April the Director-General confirmed his non-renewal decision and on 30 April the complainant submitted a request for mediation.

The Mediator issued his report on 14 June 2014. He found that the Staffing Board did not have sufficient elements on which to base its recommendation on the non-renewal of the complainant’s contract and concluded that new decisions should be taken with respect to both the abolition of the complainant’s post and the non-renewal of his contract. He recommended *inter alia* that the Director-General invite the complainant to submit his comments on the Individual Review Form (IRF) dated 11 December 2013 prepared by his supervisor, on which the Staffing Board’s recommendation was based, and that he convene an exceptional Staffing Board to consider the IRF and the complainant’s comments on it “and to make a new and reasoned recommendation to the Director-General on the question of abolishing the [complainant]’s post and on the renewal or non-renewal of [his] contract”.

The Director-General decided to follow the Mediator’s recommendations. The complainant sent his comments on the IRF on 20 June 2014 and an exceptional Staffing Board was convened on 25 June 2014. The latter recommended the abolition of the complainant’s post and the non-renewal of his contract. By a letter of 26 June 2014, the Director-General confirmed his decision not to renew the complainant’s contract. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to order his reinstatement with full pay and allowances as of 1 January 2015, inclusive of all entitlements, and the undertaking of immediate action to assign him to a suitable post. Additionally, he claims compensation for moral injury and costs in the amount of 5,000 euros. Finally, he asks the Tribunal to request data from the ITER Organization on contract renewals for staff members beyond the age of 65 years.

The ITER Organization invites the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant, whose fixed-term contract for the position of Scientific Officer at grade P4, step 9, in the Tungsten Divertor & Plasma-Wall Interactions Section of the Science Division, Directorate for Plasma Operation (POP), was due to expire on 31 December 2014, was notified by the Director-General's letter dated 8 January 2014 that his contract would not be renewed. The letter stated that, "in the framework of the re-organization of [the] ITER Organization owing to [the] evolving business needs, [the complainant's] post will be abolished at the end of [his] present contract, and [...] the new post of a lower grade, which will be created instead, is not appropriate for [the complainant]".

2. By a letter of 25 March 2014 to the Director-General, in accordance with Article 26 of the Staff Regulations, the complainant requested a review of the Director-General's decision to abolish his post and not to renew his contract beyond its expiry date. In this reasoned request for review the complainant challenged the Director-General's decision on the basis that the IRF, prepared by his supervisor and dated 11 December 2013, was incorrect. He asserted that the IRF was contradicted by his 2012 performance appraisal report which praised his work on improving the modelling capability of the Scrape-Off Layer Plasma Simulation (SOLPS) code. He submitted that even if the focus area of his work (the design of the divertor and first wall) was close to completion, his results and knowledge were still required for design of the pumping and fuelling systems and the systems of plasma diagnostics and control which would require several more years of work. The complainant requested that the decision to abolish his post and not to renew his contract be reversed.

3. By letter of 24 April 2014, the Organization's Legal Advisor, on behalf of the Director-General, confirmed the decision announced in the letter dated 8 January 2014. She noted that the basis for the decision

to abolish the complainant's post was the reorganization of the ITER Organization owing to its evolving business needs. She underlined the differences between the complainant's abolished P4 post (POP-007) and the new P3 post (POP-032) which encompassed other competencies. She also stated that "it [was] not clear from [the complainant's] background that [he had] the necessary knowledge or expertise to be able to lead the future development of the code, nor that [he had] the managerial skills required to maintain the necessary external collaborations which [would] need to be developed in this area in the future".

4. On 30 April 2014, the complainant requested mediation in accordance with Article 26.1(e) of the Staff Regulations. The Mediator's report, dated 14 June 2014, recommended the Director-General to invite the complainant to submit to his supervisor his comments on the IRF; to convene an exceptional Staffing Board to consider the IRF and the complainant's comments on it and to make a new and reasoned recommendation to the Director-General only on the questions of abolishing the complainant's post and the non-renewal of his contract before the Director-General takes a new reasoned decision. The Mediator also recommended that, should the Director-General's original decision of 8 January 2014 be confirmed, the complainant be eligible to apply for the new post in circumstances in which his profile and competencies be independently compared with the post's requirements by the Selection Board.

5. The Director-General decided to follow the recommendations of the Mediator. The complainant provided his comments in an addendum to the original IRF on 20 June 2014 and an exceptional Staffing Board was convened on 25 June 2014 specifically to examine the complainant's comments and to provide the Director-General with a new reasoned recommendation. The exceptional Staffing Board advised the Director-General to abolish the POP-007 post and not to renew the complainant's contract. By letter of 26 June 2014, the complainant was notified by the Legal Advisor on behalf of the Director-General that the decision stated in the letter dated 8 January 2014 was confirmed. The Legal Advisor stated that the Human Resources Division had been requested by the

Director-General to assist the complainant as much as possible in his job research within the ITER Organization, but also noted that the complainant had not applied for the new POP-032 post. The complainant impugns the 26 June 2014 final decision in the present complaint.

6. The complainant files his complaint on the grounds that the IRF was not an adequate basis for the final decision; the IRF was not presented to the Staffing Board of 9 December 2013; the Staffing Board did not fully consider the supervisor's or the complainant's views; the exceptional Staffing Board of 25 June 2014 was not properly constituted and did not consider the complainant's comments in reaching its final recommendation; and the reasons on which the final decision was based are inconsistent as the real reason was an unofficial retirement policy. He asks the Tribunal to request data from the ITER Organization on contract renewals for staff members beyond the age of 65 years.

7. The complaint is unfounded and must be dismissed. "According to firm precedent, a decision concerning the restructuring of an international organisation's services, which leads to the abolition of a post, may be taken at the discretion of its executive head and is subject to only limited review by the Tribunal. The latter must therefore confine itself to ascertaining whether the decision was taken in accordance with the rules on competence, form or procedure, whether it involves a mistake of fact or of law, whether it constituted abuse of authority, whether it failed to take account of material facts, or whether it draws clearly mistaken conclusions from the evidence. The Tribunal may not, however, supplant an organisation's view with its own (see, for example, Judgments 1131, under 5, 2510, under 10, and 2933, under 10). Nevertheless, any decision to abolish a post must be based on objective grounds and its purpose may never be to remove a member of staff regarded as unwanted. Disguising such purposes as a restructuring measure would constitute abuse of authority (see Judgments 1231, under 26, 1729, under 11, and 3353, under 17)." (See Judgment 3582, under 6.)

8. The Tribunal does not find any of the above-mentioned errors vitiating the impugned decision, nor any evidence from which it can be

inferred that the decision to abolish the complainant's post was taken for an improper reason. The final decision (26 June 2014) is a conclusion of a proceeding which included: an initial decision (8 January 2014) based on the Staffing Board's recommendation (9 December 2013) which was based on the IRF drawn up by the complainant's supervisor (11 December 2013), the complainant's request for review of the decision (25 March 2014), the response to that request (24 April 2014), the Mediator's report (14 June 2014), the Director-General's endorsement of the Mediator's recommendations, the complainant's comments on the IRF (20 June 2014) and the exceptional Staffing Board's recommendation (25 June 2014).

9. The complainant's claims that the IRF was not an adequate basis for the final decision; the IRF was not presented to the Staffing Board of 9 December 2013; the Staffing Board did not fully consider the supervisor's or the complainant's views; and the exceptional Staffing Board of 25 June 2014 was not properly constituted and did not consider the complainant's comments in reaching its final recommendation, are unfounded. The IRF and the complainant's 2012 performance appraisal report were both written by the complainant's supervisor. The fact that they did not reach similar conclusions doesn't mean that they are contradictory. The performance appraisal report regarded the complainant's performance of the tasks associated with his post (POP-007), whereas the IRF was written in the context of an assessment of the complainant's skill-set with regard to the evolving needs of the Department and, specifically, to the requirements of the new post (POP-032). In assessing the complainant's "main strengths and improvement needs", the IRF specifically states "[the complainant] is a leading expert in the application of sophisticated 2D numerical codes to the study of fusion plasmas and he has a deep knowledge of the underlying physics. However, he has not been strongly involved in [the] development of the SOLPS code and has no experience in using or developing the new package (SOLPS-ITER), which contains an entirely new fluid code component compared to the SOLPS-4.3 version of which he is an expert user. In addition, he has traditionally relied to a large extent on external collaborators to draw the physics conclusions from his analysis while he focuses on the numerical simulation work. He has also shown little interest or initiative in support

of the ITER Integrated Modelling framework.” The Staffing Board was informed that the duties of the complainant’s post had to be changed by replacing the POP-007 post with the POP-032 post. In the Staffing Board report of 9 December 2013, under the heading “1 staff for change in Business needs: One P4 post to be replaced by one P3 post”, it is written that “[t]he duties associated with this post will focus more on the further development of the SOLPS 2-D code, both in-house and in collaboration with the ITER Members’ fusion communities, with the inclusion of new elements related to the developing understanding of [Scrape-Off Layer] and divertor plasma physics processes in burning plasmas, application of the code to the simulation of plasma scenarios using an all-tungsten divertor, and to the support of the ITER Integrated Modelling Applications Suite”. The Staffing Board was presented with the finalized IRF, dated 11 December 2013, which was reviewed, inter alia, at the 13 December 2013 meeting between the Director-General and the Staffing Board.

10. The Tribunal finds that the Mediator’s recommendations to convene an exceptional Staffing Board to consider the IRF and the complainant’s comments, and to make a new and reasoned recommendation to the Director-General only with regard to the questions of the abolition of the complainant’s post and the non-renewal of his contract, were properly followed by the ITER Organization. The complainant questions the composition of the exceptional Staffing Board, basing his argument on the composition of the Staffing Board as allegedly provided in the Memorandum of 21 May 2012 from the Director-General. However, the Tribunal notes that the Memorandum in question does not define the composition of the Staffing Board but merely reports that “[t]he Staffing Board, composed of the heads of each Directorate and Department, met three times to analyze the proposals before formulating a recommendation to the Director-General”. Furthermore, the Staffing Board is not provided for by the Organization’s Rules and Regulations but instead it was a purely informal administrative, consultative body called by the Director-General for a specific task. The Director-General’s exercise of his discretion by choosing to limit, in this specific case, the members of the exceptional Staffing Board to those he deemed competent and relevant

to the question at stake does not appear unreasonable and the Tribunal finds no fault in the composition which included the Deputy Director-General, who was the Director of the Department for ITER Project, the Director of the POP Directorate, the Director of the Department for Administration, and the Head of the Human Resources Division, i.e. the pertinent heads of the Departments which would be directly affected by the decisions in question. As the exceptional Staffing Board only had to make a recommendation regarding the complainant's specific situation, it is lawful that the members of the previous Staffing Boards, who are heads of Directorates and Departments not related to the complainant's, were not required to participate. The exceptional Staffing Board examined the complainant's comments on the IRF, dated 20 June 2014, as expressly stated twice in the recommendation dated 25 June 2014. The fact that the exceptional Staffing Board did not agree with or follow the complainant's comments on the IRF does not indicate that his comments were not considered.

11. The complainant asserts that the job descriptions for the POP-007 and POP-032 posts were essentially equal. However, the Mediator noted that the post descriptions for the two posts were different: in particular that the new post placed much greater emphasis on the development of modelling tools and the proactive role of the incumbent went beyond that required by the complainant's post. He also noted a clear difference in the wording of the post descriptions, such as the use of the word "develops" as opposed to "supports"; he added that some responsibilities appeared to be new at least insofar as a proactive role was necessarily implied; the new post required that the incumbent establish and support collaborations with the communities responsible for the development of numerical codes for modelling of divertor plasma and plasma-wall interactions within the Members' fusion programs; and the holder of the new post would be responsible for hosting of the SOLPS-ITER version and for the provision of assistance to users of the code within the Members' fusion programmes. Similarly, the exceptional Staffing Board noted that the requirements for the new post were different. The exceptional Staffing Board also compared the job competencies and staff potential table initially proposed by the complainant's supervisor.

Therefore, the exceptional Staffing Board decided to endorse the supervisor's proposal not to renew the complainant's contract. The Tribunal finds that the Mediator's and the exceptional Staffing Board's remarks on this issue reveal no reviewable error.

12. In light of the above, the Tribunal finds that the recommendations of the Mediator, endorsed by the Director-General, were properly executed, and the decision to abolish the complainant's post and not to renew his contract is lawful.

13. The Tribunal notes that the complainant invited it to request data from the ITER Organization regarding contract renewals for staff members beyond the age of 65 years. That information alone would have proved nothing of substance about whether there was a policy being implemented to dismiss staff members because they were 65 years or older.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 20 October 2016, 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 8 February 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ