

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**L.**

**v.**

**ITER Organization**

**126th Session**

**Judgment No. 3991**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Y. L. against the ITER International Fusion Energy Organization (ITER Organization) on 22 October 2016 and corrected on 18 November 2016, the ITER Organization's reply of 14 March 2017, the complainant's rejoinder of 29 April and the ITER Organization's surrejoinder of 4 September 2017;

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 renew her fixed-term contract.

In November 2009 the complainant, a national of the Republic of Korea, was appointed under a five-year contract as Assistant Accountant at the G2 level in the Finance and Budget Division of the ITER Organization. She was appointed following her nomination by the Korean Domestic Agency (KDA), as required under Article 4 of the Staff Regulations. On 1 January 2013 she was appointed, following consultation with the KDA, to a G4 position of Accountant with no

change in the expiry date of her contract, that is to say 22 November 2014.

The complainant's contract was subsequently renewed for two years, from 23 November 2014 to 22 November 2016. At the beginning of February 2016, the Human Resources Department asked the complainant's line manager to fill in the Individual Review Form and to make a recommendation, by the end of the month, concerning the renewal of her contract. On 29 February 2016 the complainant met with the Director-General to discuss the renewal of her contract. She explained that her situation was unusual as she had not worked for a Korean public institution before joining the Organization.

On 22 March 2016 the Director-General informed her by email that following their meeting he had made enquiries with the Korean authorities about the "status of [her] eventual renewal". The Korean authorities had replied that, based on the relevant Korean policy, the general rule that a five-year contract may not be extended remained valid irrespective of whether a staff member had previously worked for a Korean public institution or not. The Director-General added that he did not intend to ask for a derogation to that rule since there was no justification for an accounting position. The complainant wrote to him on 29 March stating that the decision not to renew her contract should have been taken on the basis of the business needs of the Organization and her performance. She pointed out that Article 6.1 of the Staff Regulations did not provide that the Member State from which the staff member originates has the authority to decide on the renewal of contract. The Director-General replied the following day that the decision had been taken by him and not by the Member State.

On 15 April the complainant's line manager submitted the finalised version of the Individual Review Form. He stated that, based on the preliminary assessment of the business needs, her position was no longer required and recommended not renewing her contract.

By a letter of 22 April 2016, the Director-General informed the complainant that due to the evolving business needs and the envisaged changes in the nature and functions pertaining to her position, her contract would not be renewed upon expiry on 22 November 2016.

In May 2016 the complainant filed an appeal with the Director-General contesting that decision. She alleged in particular that the “business needs” were not proven, and that the real reason was stated in his email of 22 March, that is to say compliance with the wishes of the Korean authorities.

Having not received a reply within the prescribed time limit, the complainant submitted a request for mediation on 23 June. The Mediator issued his report on 8 August. He concluded that the justifications given for the non-renewal decision were insufficient, in particular given the lack of reliable information on how and why the Director-General came to the conclusion that the non-renewal of the complainant’s contract would be in the best interests of the Organization. The Mediator noted that there was a position (position FBM-116) identical to that of the complainant and that no consideration had been given as to whether that post should also be abolished or whether it should be abolished instead of that of the complainant, seemingly because the complainant’s contract was about to expire. He also held that the Organization should have made efforts to assist the complainant in looking for a suitable position. He therefore recommended that the Director-General review his decision, and that he request the complainant’s line manager to complete a new Individual Review Form and to make a substantiated recommendation concerning the renewal of the complainant’s contract. In the event that the line manager’s recommendation was to not renew the complainant’s contract, the Mediator recommended that similar information be provided to the Director-General with respect to post FBM-116. The Director-General should then communicate to the complainant an amended reasoned decision which would enable her to understand why, if this was still case, the non-renewal of her contract was in the “business interests” of the Organization. If the Director-General maintained his decision not to renew her contract, he should request the Human Resources Department to assist her in finding other employment within the Organization.

By a letter dated 23 August 2016, the Director-General informed the complainant that in light of the Mediator’s report, he had asked her line manager to reassess the business needs. A thorough assessment

had been conducted, which confirmed that her position would not be required in the coming years. The Director-General had also asked the Human Resources Department to check if any of the opened or planned positions were commensurate with her qualifications and experience, but no suitable position had been identified. He had therefore decided to maintain his decision. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision of 23 August 2016 and to renew her contract for a period of at least five years. In the event that she has separated from service pursuant to the impugned decision, she asks the Tribunal to order her retroactive reinstatement in a position commensurate with her experience and qualifications and the payment of all salary and allowances from the date of separation until the date of reinstatement. She seeks compensation for the damage caused to her health and to her professional reputation, as well as moral damages. She further claims costs.

The Organization asks the Tribunal to dismiss the complaint as irreceivable in part and otherwise unfounded.

#### CONSIDERATIONS

1. The complainant began her employment with the ITER Organization on a five-year contract commencing 23 November 2009. Her initial appointment was at the G2 level. However she successfully obtained a position at the G4 level in a competition in January 2013, though the appointment to this position was on the same terms, as to duration of the contract, as her initial appointment. That is, the contract would expire on 22 November 2014. Before her contract expired, she secured a further contract for two years, expiring 22 November 2016.

2. During the first half of 2016, the complainant was informed by the Director-General on two occasions that, in substance, her contract would not be renewed after it expired in November 2016. The second of these was in a communication dated 22 April 2016 from the Director-General in which he said that “in consideration of the ITER Organization evolving business needs and due to the envisaged changes

in the nature and functions pertaining to [her] post, [he] ha[d] decided not to renew [her] current employment contract”. It is unnecessary to detail all of the events, including documents generated, in the period preceding and following the communications from the Director-General. That is because the complainant sought mediation under Article 26.1(d) of the Staff Regulations, resulting in a report of the Mediator dated 8 August 2016. The report manifests a clear, rational and balanced evaluation of the events and documents pertaining to the decision not to renew the complainant’s contract. The Mediator’s recommendations were, in the circumstances, also rational and balanced and, in the result, apparently appropriate, subject to a later discussion about position FBM-116.

3. The Mediator clearly had, and said so, marked reservations about the processes which had led to the decision not to renew the complainant’s contract and also reservations about the stated reasons for the decision. In order to ensure that any subsequent decision about the renewal or non-renewal of the complainant’s contract was well founded, the Mediator recommended that the Director-General should:

- “(a) review his decision of 22 April 2016 not to renew the [complainant’s] contract when it expires;
- (b) request the [complainant’s] line manager – in coordination with the Human Resources Department and in accordance with the existing procedures adapted as considered necessary – to:
  - (i) complete a new Individual Review Form for the [complainant], with a new recommendation on renewal or otherwise and containing or accompanied by information, considerations or explanations necessary to enable the Director-General to take an informed decision on the question of renewal of the [complainant’s] contract; and
  - (ii) to prepare similar documentation or information for the Director-General concerning post FBM-116 and its incumbent in the case of a recommendation for non-renewal based on the business interests of the Organization;
- (c) communicate to the [complainant] an amended decision, at least as far as the reasoning is concerned, with – in the case of non-renewal – reasons designed to enable the [complainant] to understand why he

considers non-renewal to be necessary in the business interests of the Organization; and, in the case of non-renewal;

- (d) request the Human Resources Department to provide assistance to the [complainant] to look for such other employment in the Organization as would be in the latter's business interests.”

4. It is desirable to explain two aspects of those recommendations and briefly refer to the background. An Individual Review Form (referred to in recommendation (b)(i)) is a document completed by a staff member's line manager that contains several assessments. The first is whether the job occupied by the staff member will be required in the next five years. The second is an assessment of the staff member's performance in four of the preceding years. The third is an assessment of the staff member's competencies and potential. The fourth and final assessment is whether the staff member's contract should be renewed, whether the staff member was a key resource and whether the line manager recommended the staff member for another type of activity in the Organization. In relation to the complainant, a draft Individual Review Form was prepared in March 2016 and a final Individual Review Form was completed on 15 April 2016. In his report, the Mediator drew attention to procedural and substantive deficiencies in the process and evaluation.

5. The other aspect of the recommendations warranting some explanation is the reference in recommendation (b)(ii) to the post FBM-116. That post was identical to the post occupied by the complainant. The Mediator rejected the position taken by the Organization that this fact was irrelevant since the complainant's contract was coming to an end and whether it should maintain or not the employment contract of another colleague was an independent question. The Mediator adopted the position that: “the question as to which of the two posts should be suppressed, or whether both posts should be suppressed, should have been given consideration before the Director-General's decision in the [complainant's] case. While account should be taken of the fact that only the [complainant's] contract was due to expire, consideration should be given (also in the business interests of the Organization) to

the respective merits, length of service, abilities and profiles of other staff members performing the same functions.”

6. It is apparent from the impugned decision, namely the letter of the Director-General of 23 August 2016, that the Director-General took steps that accorded with the substance of the recommendations. Specifically the letter recorded that he asked the Finance and Procurement Department, in coordination with the Human Resources Department, to assess the former’s business needs in the years ahead. The letter also recorded that this reassessment resulted in a conclusion that the position the complainant then occupied would no longer be needed at the end of her contract in November 2016. The letter also recorded that the Director-General asked the complainant’s line manager to complete a new Individual Review Form. The complainant was provided with a copy. The document was dated 18 August 2016. The line manager concluded that the complainant’s job was not required and recommended against her contract being renewed. The letter otherwise explained the reasons for not renewing the complainant’s contract and provided justification for the unsuccessful attempts to find her another position within the Organization.

7. The complainant’s pleas mainly focus on the events leading up to the Mediator’s report. However, and even accepting the validity of the complainant’s criticisms of those events, her pleas do not come to grips with the fact that the Mediator’s recommendations, which were mainly followed by the Director-General, were designed to overcome any shortcomings founding those criticisms. Nothing of substance was advanced by the complainant to demonstrate that the steps taken to give effect to the recommendations were, themselves, tainted by error. It is true that the complainant argues that the Director-General did not provide sufficient justification of the business needs underpinning the decision not to renew her contract. But he did. And, in any event, as the Organization points out in its reply, the Tribunal sets its face against assessing the exercise of a discretionary power such as the power not to renew a fixed-term contract, unless it is demonstrated that the competent body acted on some wrong principle, breached procedural rules,

overlooked a material fact or reached a clearly wrong conclusion (see, for example, Judgments 3914, consideration 4, and 3769, consideration 6).

8. One aspect of the recommendations of the Mediator that appears to have not been taken up by the Director-General was recommendation (b)(ii).

9. In her pleas, the complainant advances two arguments relating to this recommendation. The first is that the recommendation was not taken up and there was no consideration of position FBM-116 as part of a consideration of whether the complainant's contract should be renewed. The second was that no consideration was given to the placement of the complainant in that position. The Organization's response to the second argument is that the position was then occupied and the occupant had a legal right to be employed well beyond the date that the complainant's contract of employment was to conclude, namely 22 November 2016. This response is correct and unexceptionable. As to the first argument, it was within the discretionary power of the Director-General, notwithstanding the recommendation of the Mediator, to focus only on the skills and capabilities of the complainant in assessing whether her position should continue and, if not, whether the contract should be renewed. No reviewable error attended the approach of the Director-General.

10. In the result, the complainant's arguments are unfounded and the complaint should be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.



In witness of this judgment, adopted on 3 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ