

G. (No. 2)

v.

ITER Organization

123rd Session

Judgment No. 3768

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. K. G. against the ITER International Fusion Energy Organization (ITER Organization) on 5 June 2014, the ITER Organization's reply of 1 October, the complainant's e-mail of 17 November 2014 informing the Registrar of the Tribunal that he did not wish to enter a rejoinder, the complainant's additional submissions of 29 July 2016 and the ITER Organization's final comments thereon of 24 August 2016;

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.

The complainant joined the ITER Organization in 2008 under a five-year fixed-term contract. His contract was renewed for one year from 5 March 2013 to 4 March 2014.

By a letter of 20 August 2013 the Director-General informed the complainant that his contract would not be renewed beyond its date of expiry due to the abolition of his post. All possible efforts had been made to reassign the complainant, but no suitable assignment could be

found. The decision had been taken based on the recommendation of the Staffing Board.

On 18 October 2013 the complainant lodged an appeal against the decision not to renew his contract. In his view there was clearly still a need for the duties attached to his post to be performed, and he alleged that his “unlawful” 2012 performance appraisal report, in which he had obtained the rating “needs to improve”, had “obviously influenced the decision to abolish [his] post and the conclusion that no other assignment could be found for [him]”. In a letter of the same date the complainant requested the Head of the Human Resources Division to provide him with the staffing strategy of his Directorate, the Individual Review Form (IRF) for his post and any other justification for the decision of non-renewal.

On 15 November the complainant was informed that the Director-General had decided to maintain his decision not to renew his contract due to the abolition of his post. Attached to the letter was a copy of the IRF, but the documents related to staffing strategies could not be disclosed to him as they were confidential.

By a letter of 21 November 2013 the complainant requested mediation. In his report of 8 February 2014 the Mediator found that there had been procedural irregularities in the process leading to the non-renewal of the complainant’s contract. The complainant had not been given an opportunity to express his views on his line manager’s competency evaluation and ratings contained in the IRF, and there was no evidence that the Staffing Board had discussed the line manager’s initiative to abolish the complainant’s post and his assessment of the complainant’s competency prior to issuing its recommendation. The Mediator recommended that the complainant be given the opportunity to make comments on the IRF and that the Staffing Board consider the IRF together with the complainant’s comments and make a new recommendation to the Director-General.

The Director-General decided to follow the Mediator’s recommendations. The complainant sent his comments on 14 February and discussed them with his line manager on 24 February. The Director-General then convened a special Staffing Board on 4 March 2014, which advised him to abolish the complainant’s post and not to renew his contract. By a letter of 10 March 2014 the complainant was informed

of the Director-General's decision to confirm his initial decision not to renew his contract due to the abolition of his post and the absence of any available position to which he could be reassigned. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order his reinstatement, with all entitlements and benefits, as from 5 March 2014. He asks that the Tribunal order the ITER Organization to undertake immediate action to assign him to a suitable post. He claims moral damages, as well as costs in the amount of 5,000 euros.

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

CONSIDERATIONS

1. The complainant challenges the Director-General's decision not to renew his one-year fixed-term contract when it expired on 4 March 2014. He contends that the decision is tainted by procedural and substantive unlawfulness. On the other hand, the ITER Organization insists that the decision was made on objective grounds and in the context of a re-organization. It was accordingly stated in the letter of 20 August 2013 that that decision had been taken "in the framework of the re-organization of ITER Organization owing to its evolving business needs". It was also stated in the same letter that all possible efforts had been made to reassign him but that no suitable post had been found, and that he could apply for posts that would become available in the future. An elaboration of the reasons for the non-renewal were provided in the confirmation letter of 15 November 2013, which relevantly states as follows:

"Far from being a personal decision which would be based on your family situation, your [performance] appraisal or your responsibilities in the Staff Committee – for which you give no evidence, the decision [...] has been made with regard to the need to review the priorities for manpower skills and expertise of the Electrical Engineering Division (EED) in accordance with the evolving business needs of the ITER Organization.

[...] I do not contest that some of your transversal duties and responsibilities will still be necessary for the Project in the next years. However, it appears that

they will be directly handled by the Technical Responsible Officers of the main Systems.

[...]

Therefore, a new position (CEP 140) has been opened to replace the CEP 055 slot.”

2. The complainant had joined the ITER Organization on 3 March 2008 on a five-year contract. The title of his post was “Senior Power Supply Technical Engineer, Electrical Power Supply Division, Department for Central Engineering and Plant Support”. In his renewed one-year contract the title of his post was slightly changed to “Power Supply Technical Engineer in the Coil Power Supply Section, Electrical Engineering Division, Directorate for Central Engineering and Plant, Department for ITER Project”. However, his functions remained basically the same. The contracts stated that upon their conclusion he was “subject to Staff Regulations of the ITER Organization” and permitted either party to terminate the contract “for any of the reasons specified in the Staff Regulations”.

3. Under Article 6.1 of the Staff Regulations, the power to grant or to renew contracts of employment for up to five years is within the discretion of the Director-General. He is required to notify a staff member of non-renewal at least six months before the end of the contract. The complainant was notified within the stipulated time.

4. The Tribunal has consistently stated that although the Director-General’s power not to renew a contract upon its expiry is discretionary, it must be exercised within the bounds of an international organization’s own regulations, rules and directives. The Tribunal’s case law also imposes obligations and provides guidelines which an international organization must observe where it does not renew a staff member’s fixed-term contract.

Substantively, the case law states that a decision not to renew a fixed-term contract must be based on objective and valid grounds and that the discretionary nature of a decision not to renew a fixed-term contract may be reviewed only on limited grounds. Accordingly, the Tribunal will not substitute its own assessment for that of the organization. It will

only set aside such a decision if it is *ultra vires*; if the decision is tainted by a legal or procedural irregularity; is based on incorrect facts; if essential facts have not been considered or wrong conclusions have been drawn from the facts, or if the decision is based on an error of fact or law or amounts to an abuse of authority (see, for example, Judgments 3299, under 6, 2861, under 83, and 2850, under 6).

5. The Tribunal's case law concerning the abolition of a post in a re-organizing process was succinctly stated as follows in Judgment 2830, under 6:

“(a) An international organisation may find that it has to reorganise some or all of its departments or units. Reorganisation measures may naturally entail the abolition of posts, the creation of new posts or the redeployment of staff (see Judgments 269, 1614, 2510 and 2742). The steps to be taken in this respect are a matter for the Organization's discretion and are subject to only limited review by the Tribunal (see Judgments 1131, under 5, and 2510, under 10).

(b) The Tribunal has consistently held that ‘there must be objective grounds’ for the abolition of any post. It must not serve as a pretext for removing staff regarded as unwanted, since this would constitute an abuse of authority (see Judgment 1231, under 26, and the case law cited therein).”

6. While the ITER Organization states that the complainant's post was abolished and his contract was not renewed because he did not meet the evolving or new business needs of his Division, the complainant argues that the abolition of his post was not made on objective grounds but was merely a pretext to terminate his employment. He contends that the series of decisions that culminated in the abolition of his post were caused by bias against him because of his activities as a staff representative. He insists that it was this factor that caused him to receive the “needs to improve” rating in his 2012 performance appraisal report, which in turn infected his IRF which rated his performance as marginal in all relevant competencies. However, the Tribunal finds insufficient evidence from which to conclude that the ITER Organization's assertion that it was repositioning to meet the evolving or new business needs of the complainant's Division was only a pretext to get rid of him or that there was bias against him which caused a vitiating error in the impugned decision.

7. The complainant further insists that there must have been extraneous motives for abolishing his post and that this is exemplified in his supervisor's statements that only experienced and qualified engineers were needed at ITER. He also insists that this was evidence of "bias" as the Organization ignored his experience and insisted that he did not have the qualifications to meet its evolving needs; ignored his years of experience which fitted into the Organization's needs in the design and installation of complex electrical systems for Tokomaks and gave him no reason for requiring a specific educational qualification without considering equivalent professional experience. However, the Tribunal considers that these matters are within the discretion of the Organization and finds no evidence of any vitiating error in the decisions to abolish the complainant's post and to terminate his contract on these grounds.

8. Referring to the Tribunal's case law that one test to determine whether or not a post has been truly abolished is to ask whether the abolition resulted in a reduction in staff in the affected department, the complainant states that the staff complement in his Division has increased by four rather than reduced. He states, further, that even though three of these four new posts are at a lower grade than that of his former post they require higher educational qualifications. He insists that there were no objective reasons for regrouping the functions in the Division in such a way as to exclude him.

On the other hand, the ITER Organization insists that since it is a project-oriented organization with an expected existence of 35 years, it hires staff with the competencies required according to the evolution of the project and cannot retain staff whose competencies are not needed anymore.

The Tribunal again considers that these matters are within the discretion of the Organization and finds no evidence of any vitiating error in the decisions to abolish the complainant's post and to terminate his contract on these grounds.

9. The complainant further contends that the ITER Organization made no reasonable efforts to reassign him to another post. He states

that the Director-General's request to the Human Resources Division to assist him was belated as it came in the final decision of 10 March 2014 on the complainant's appeal. He also states that he received only very nominal reassignment assistance. He lists two posts for which he applied in 2013 and six for which he applied in 2014, but for which he was not shortlisted. He also lists five other posts for which he applied in 2014 and gave the status of those applications as "[o]ngoing".

It is observed that in an e-mail to the Human Resources Division of 16 September 2013 the complainant stated as follows, among other things:

"Dear Colleagues

I am writing to thank you for meeting me last Friday 13th September 2013 following my request for an interview 'for personnel whose contracts are not to be renewed to assess their suitability for other positions'. I was reassured to hear that you have sought possible opportunities for my redeployment within ITER and that you will continue to do so, I mentioned some possible areas to you.

For my part I will continue to apply for other advertised posts for which I consider myself qualified."

In the circumstances, the Tribunal considers that the ITER Organization made reasonable efforts to reassign the complainant. In the foregoing premises, the complainant's claim on substantive grounds is unfounded.

10. The complainant submits that the procedures employed in making the decisions to abolish his post and not to renew his contract were flawed. The Tribunal does not accept his contention that a vitiating procedural flaw occurred, because the initial Staffing Board did not properly consider his case as he had no opportunity to present it. The ITER Organization had sought to cure that defect by redoing the process, when the Mediator appointed under Article 26.2 of the Staff Regulations identified it. This eventually led to the constitution of a special Staffing Board, which reconsidered the matter and provided the Director-General with a new recommendation on the basis of which he made the final decision to abolish the complainant's post. That Board recommended as follows:

"Having examined the skills of [the complainant] in the light of the future organization and activities of the Electrical Engineering Division, combined with the overall ITER Organization reorganization considerations, the Staffing

Board advises the Director-General to abolish CEP-055 position and not to renew [the complainant's] contract.”

11. The Deputy Director-General and Director of the Department for ITER Project chaired the meeting of the special Staffing Board. The other members of the Board were the Director of the PSE Directorate; the Head of the Electrical Engineering Division; the Director of the FBM Directorate, acting on behalf of the Director of Department for Administration; the Director of the GEA Directorate and the TCD Section Leader, acting on behalf of the Head of the Human Resources Division.

12. The complainant submits that the special Staffing Board was not properly constituted based on the guidance provided by the Director-General's Memorandum dated 21 May 2012. The Tribunal observes that the Memorandum is under the caption: “Communiqué from the Director-General on contract renewals and amendment of Staff Regulations”. It was sent to staff members whose contracts ended in 2012. 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 analyse 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 special Staffing Board to those he deemed competent and relevant to the question at stake does not appear unreasonable. It was therefore unimportant that the special Staffing Board was constituted of fewer members than the Memorandum referred to and less members than constituted the initial Staffing Board.

13. The Tribunal considers that the ITER Organization's failure to disclose to the complainant “the documents related to staffing strategies” on the ground that “they constitute confidential managerial documents” was a procedural flaw. These are the documents which would have assisted

the complainant, in the context of the mediation process, to understand the actions, rationale and decision to abolish his post. While the ITER Organization disclosed them to the Mediator, it refused to disclose them to the complainant. This was in breach of the principle of procedural fairness as well as the Organization's duty of care to the complainant entitling him to moral damages in the amount of 10,000 euros. The ITER Organization will be ordered to pay him this sum within 30 days of the date of public delivery of this Judgment. The complainant will also be awarded costs in the amount of 750 euros.

DECISION

For the above reasons,

1. The ITER Organization shall pay the complainant moral damages in the sum of 10,000 euros within 30 days of the date of public delivery of this Judgment.
2. The ITER Organization shall also pay the complainant 750 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 26 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