Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

K. (Nos. 1 and 2)

v.

ILO

127th Session **Judgment No. 4101**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. K. against the International Labour Organization (ILO) on 22 May 2015 and corrected on 1 July, the ILO's reply of 12 October 2015, the complainant's rejoinder of 26 January 2016 and the ILO's surrejoinder of 4 April 2016;

Considering the second complaint filed by Mr A. K. against the ILO on 5 June 2015 and corrected on 31 July, the ILO's reply of 29 October 2015, the complainant's rejoinder of 26 January 2016 and the ILO's surrejoinder of 4 April 2016;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant, who alleges that he was subjected to moral harassment, challenges the refusal to extend his special leave without pay and to grant him certain accommodations with regard to his working arrangements.

Having joined the International Training Centre of the ILO (hereinafter "the Centre"), located in Turin (Italy), on 12 November 2007, the complainant was authorized, on an exceptional basis, to telework from Paris (France), initially for four days per month and, subsequently, between November 2009 and November 2011, for 72 days per year.

On 26 January 2012 the Director of the Centre offered the complainant, pursuant to Article 6.1 of the Staff Regulations and on an exceptional basis, a new working arrangement consisting of a compressed working week of four days. This arrangement, which was subject to review on an annual basis, remained in place until early 2013.

On 11 March 2013 the complainant, who had found employment in Paris with another international organization, requested special leave without pay, which he was granted and which was extended until 30 September 2014. On 4 June 2014 he requested a further extension of one year. On 9 June he received the reply that in view of the requirements of the programme which he was supposed to manage, it was not possible to further extend his special leave and that he was to resume his duties at the end of this leave, on 1 October, unless he submitted written notice that he would not do so. On 13 June the complainant requested new working arrangements upon his return, consisting of either two days of telework per week, or a compressed working week combined with either one day of telework or a reduction of his working time to 80 per cent. His proposals were turned down, but he was informed that the Director of the Centre was nonetheless prepared to confirm the arrangement that she had authorized on 26 January 2012. On 30 June 2014 the complainant informed the Administration that he would not return to work at the Centre at the end of his special leave without pay. The following day he was informed that his contract would terminate on 30 September 2014.

On 24 November 2014 the complainant submitted three grievances. Further to the Administration's request, he corrected them and submitted a new version of each grievance on 8 December 2014. In the first, he challenged the "unilateral termination in November 2011"* of an agreement in principle which, according to him, had been concluded when he was appointed to the Centre, guaranteeing that he would be able to benefit from the teleworking system, and the "refusal in June 2014 to review this agreement"*, and requested, inter alia, compensation for the moral and material injury that he claimed to have suffered; in the

* Registry's translation.

second, he challenged the decision not to grant him an extension of his special leave without pay and sought to have that decision set aside, to have his resignation redefined as "non-renewal of contract without valid reason"* and to obtain compensation for the moral and material injury that he claimed to have suffered; lastly, in the third, asserting that he had been subjected to moral harassment by his former Director, he requested that an investigation be conducted in accordance with the existing procedures. After receiving a copy of the latter grievance, the complainant's former Director submitted his comments, which were forwarded to the Director of the Centre on 13 February 2015.

By a letter of 23 February 2015, which constitutes the decision impugned in the complainant's first complaint, he was informed that the Director of the Centre considered his "harassment complaint" to be irreceivable since he had been on special leave without pay at the time of the alleged facts. Although the complaint was irreceivable, the Director had considered *prima facie* all the available evidence and had decided to close the file because, in her opinion, the allegations of harassment were insufficiently substantiated.

By a further letter of 12 March 2015, which constitutes the decision impugned in the complainant's second complaint, he was informed of the Director's decision to dismiss his first grievance, concerning the "unilateral termination"* of the teleworking agreement, as irreceivable *ratione temporis* and the second, concerning the non-extension of his special leave without pay, as unfounded.

In his first complaint, filed on 22 May 2015, the complainant requests the Tribunal to set aside the decision of 23 February 2015 and to order a review of his third grievance by a person or body other than the Director of the Centre. He also asks for a harassment investigation to be opened, conducted by a person or body other than the Director of the Centre, and suggests that witnesses whom he designates be heard. He further seeks the payment of damages for the injury that he has allegedly suffered and an award of costs, in the amount of 2,000 Swiss francs.

* Registry's translation.

In his second complaint, filed on 5 June 2015, the complainant requests the Tribunal to set aside the decision of 12 March 2015, to order a review of his first and second grievances by a person or body other than the Director of the Centre and to redefine his resignation as "non-renewal of contract without valid reason"*. In his rejoinder, he asks the Tribunal to hear as witnesses the officials who reported directly to him and the former Director of the Centre who had occupied that position at the time of his appointment. He also claims damages for moral and material injury, and costs in the amount of 2,000 Swiss francs.

The ILO asks the Tribunal to dismiss the first complaint as unfounded. With regard to the second complaint, it requests that the claims concerning the alleged "unilateral termination"* of the teleworking agreement be dismissed as irreceivable and that all the other claims be dismissed as unfounded. Lastly, it asks for the two complaints to be joined, to which the complainant objects.

CONSIDERATIONS

1. The complaints were filed by the same person, against the same organization and are based in part on the same facts. It is appropriate that they be joined to form the subject of a single judgment.

2. In his second complaint, which the Tribunal considers should be dealt with first, the complainant impugns the Director of the Centre's decision of 12 March 2015 to dismiss two of his grievances of 8 December 2014. The first grievance concerned the "unilateral termination" of an alleged teleworking agreement and the second concerned the refusal to extend his special leave without pay.

3. With regard to the first grievance, the complainant alleges that there was "an agreement" that he would be able to telework, which was a prerequisite condition for his accepting to work for the Centre. The grievance concerned the "unilateral termination in November 2011 of

* Registry's translation.

the teleworking agreement [...] then the refusal in June 2014 to review this agreement"*.

With regard to the decision of November 2011, it is sufficient to note that the corrected grievance was lodged on 8 December 2014 and that the six-month time limit provided for in Article 12.2 of the Centre's Staff Regulations had therefore long been exceeded. It is thus not necessary to discuss the existence or legality of such an agreement. The Tribunal has consistently held that a complainant must not only have exhausted all internal remedies within his organization but also have duly complied with the rules governing the internal appeal procedure. Thus, if the internal appeal was irreceivable under those rules, the complaint filed with the Tribunal will also be irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal (see Judgment 1244, consideration 1).

As the Tribunal has observed on various occasions, time limits are an objective matter of fact and strict adherence to them is necessary for the efficacy of the whole system of administrative and judicial review of decisions. To allow otherwise would impair the necessary stability of the parties' legal relations (see Judgments 3704, considerations 2 and 3, and 3923, consideration 4).

The complainant maintains that at the time of the "unilateral termination" of the agreement in 2011, he was not aware of the six-month time limit for filing his grievance and believed that an internal appeal was not possible. It was only in 2014 that he had approached the Staff Union of the International Labour Office, the ILO secretariat, and obtained relevant information on the internal appeal procedures.

Such explanations, however, cannot be taken into account, since, as the Tribunal has already pointed out, staff members of international organizations have a duty to acquaint themselves with the rules and regulations which apply to them and cannot plead ignorance thereof (see Judgments 3135, consideration 14, and 3726, consideration 12).

* Registry's translation.

Lastly, the complainant asserts that the "refusal in June 2014 to review the [...] teleworking agreement"* was in fact challenged within the six-month time limit. Even if the agreement in principle to allow teleworking did actually exist and complied with the rules applicable at the Centre, the complainant himself considers that it was unilaterally terminated by the Organization in 2011. He cannot therefore challenge the "refusal [...] to review this agreement" in the context of a grievance – filed three years later – the sole object of which is in fact to challenge the termination of the agreement against which, as stated above, no timely internal appeal was lodged.

In conclusion, to the extent that it concerns the first grievance relating to the "unilateral termination" of an alleged teleworking agreement, the complaint is irreceivable.

4. With regard to the second grievance, relating to the non-extension of his special leave without pay, the complainant considers that the impugned decision is tainted with a procedural flaw, because his grievance, lodged in accordance with the provisions of Chapter XII of the Staff Regulations, "has never been reviewed by an internal body, only by the Director of the Centre"*.

The Tribunal notes, in view of the Staff Regulations, that the only appeal body to which the grievance could have been referred is the Staff Relations Committee. Article 12.2 of the Centre's Staff Regulations provides on this issue that "[t]he Director may refer any [...] complaint to the Staff Relations Committee for observations and report." Such a referral is thus optional, not obligatory. Since it is plain from the impugned decision that the Director of the Centre reviewed the grievance in thorough detail, she could legitimately dismiss it without referring it to the Staff Relations Committee.

This plea is unfounded.

5. The complainant next submits that all of the reasons given by the Centre for its refusal to extend his special leave without pay by a further year appear unfounded and unfair. In the first instance, the

* Registry's translation.

fact that the Centre had decided, after he had left, to abolish his post and not to replace him, shows that his absence did not jeopardize the implementation of its programme activities. According to the complainant, the reasons given by the Centre are based on a highly subjective assessment of its interests that does not take into account two fundamental objective facts. Firstly, his request to extend his special leave was prompted by the need to look after his ailing father and his child, then one year old. His request was therefore clearly within the scope of Circular No. HRS 22/2011 of 5 September 2011 concerning special leave without pay, which cites childcare or elder care as grounds on which such leave may be granted. Secondly, according to the complainant, it would have been "mutually" beneficial for the Centre and for himself, since it would have allowed him to enhance his technical knowledge and skills (in accordance with the objectives of Circular No. HRS 22/2011), to "secure funding [...] in order to programme training activities from which [he] wish[ed] the Centre to benefit" and to carry out research in the interest of the Centre (in accordance with Article 6.6 of the Staff Regulations). Lastly, the decision not to extend his special leave without pay constituted discriminatory treatment, other chiefs of programme at the Centre having been granted leave of absence for periods exceeding two years.

6. Under Article 6.6(a) of the Staff Regulations, "[s]pecial leave [...] may be granted by the Director to an official for advanced study or research in the interest of the Centre, or for other exceptional or urgent reasons". Paragraph 8 of Circular No. HRS 22/2011 on special leave without pay provides that such leave is not an entitlement and can be granted and approved at the discretion of the Director only when the exigencies of service and the status of the official permit the release of the official.

7. With regard to the abolition of the complainant's post after his separation from the Centre, the defendant explains that it was only following the complainant's decision of 30 June 2014 not to resume his duties at the end of his special leave without pay that the Centre found it necessary to review the organization of the programme for which he

had been responsible. Indeed, Circular No. DIR 06/2014 of 22 September 2014 announcing the decision to merge several programmes, including that of the complainant, states in paragraph 1 that "recent staff movements" had been one factor in the restructuring.

The complainant's plea cannot be upheld.

8. Although the circumstances cited by the complainant – namely the wish, on the one hand, to look after his ailing father and his young child and, on the other hand, to work in another international organization in order to enhance his knowledge and technical skills while developing new training activities and new contacts of potential use to the Centre – allowed him to apply for an extension of his special leave without pay, they did not mean that he had a right to obtain it. Article 6.6 of the Staff Regulations, cited above, allows the Director of the Centre to grant special leave, subject, inter alia, in accordance with paragraph 8 of Circular No. HRS 22/2011, to the exigencies of the service. As rightly pointed out by the defendant, the Director of the Centre therefore had discretion in this matter which allowed her to consider that, particularly in view of the heavy workload caused by the complainant's absence, the need for him to return to his post should outweigh his interest in obtaining an extension of his special leave without pay in order to consolidate his experience and skills.

According to the case law of the Tribunal, a decision on a request for special leave is discretionary (see, for example, Judgment 2262, consideration 2). Considering the discretion afforded to international organizations to take such decisions, such a decision is subject to only limited review and can be set aside only if it has been taken without authority or in breach of the rules of form or procedure, if it is based on an error of fact or law or has overlooked essential facts, if clearly mistaken conclusions have been drawn from the facts or if there is an abuse of authority (see Judgements 1929, consideration 5, and 2619, consideration 5). In this case, the Director did not exceed the limits of her discretionary authority, which the Tribunal must respect in exercising its limited power of review over such matters.

9. With regard to the allegation of discrimination, the complainant refers in his rejoinder to some chiefs of service or programme having previously been granted special leave without pay for two or more years. The defendant explains, however, their situation was not comparable with the complainant's situation.

According to the Tribunal's case law, the decision to grant special leave must be taken on a case-by-case basis. It is not possible to assume that, because special leave has been granted to one staff member, it must be granted to another, unless the two cases are identical in fact and in law. Discrimination cannot be established unless it is proved that staff members in identical situations were treated differently (see Judgment 2619, consideration 6). In this case, it may be concluded from the explanations provided by the defendant that the other staff members who were granted special leave were not in situations identical to that of the complainant. Therefore, he was not subjected to discriminatory treatment.

10. In conclusion, the complaint is unfounded insofar as it concerns the second grievance relating to the non-extension of the complainant's special leave without pay.

11. It follows from the foregoing that the complainant's second complaint, impugning the Director of the Centre's decision of 12 March 2015 with regard to his first two grievances, must be dismissed.

12. In his first complaint, the complainant impugns the Director of the Centre's decision of 23 February 2015 to dismiss his third grievance, in which he alleged that he was subjected to moral harassment.

13. The first of the complainant's pleas is that the Director of the Centre was mistaken in considering his grievance to be irreceivable.

In the impugned decision, the Director considered that during the special leave granted to the complainant at the time of the alleged facts, his employment contract was suspended and, consequently, that the rights arising from that contract, such as the right to be treated with dignity and respect in the workplace, were also suspended. Since paragraph 4

of Circular No. 13/2009 of 27 March 2009 concerning the Centre's policy and procedures for dealing with harassment defined harassment as a "deterioration in working conditions", and since the complainant was employed full-time in another international organization, she concluded that he could not have been subjected to harassment by an official of the Centre during that period and that the harassment complaint was thus irreceivable.

Without there being any need to rule on the merits of these arguments and, in particular, on the questions of whether an official with non-active status can file a harassment complaint or whether the harassment must occur at the workplace, it is sufficient to note that having declared the harassment complaint irreceivable, the Director examined it on its merits and declared that the complainant's accusations were insufficiently substantiated.

The first plea is thus not relevant.

14. In his second plea, the complainant criticizes the absence of a thorough investigation, since the Director of the Centre did not refer his grievance to an internal body, in an adversarial procedure, before taking the decision of 23 February 2015.

Paragraphs 21 and 22 of Circular No. 13/2009 concerning harassment provide that:

> "21. A copy of the alleged victim's complaint is to be sent by the Chief of the Human Resources Services to the alleged perpetrator so that the latter may respond to the allegations with their own comments and give their version of the facts within a deadline set by the Chief of the Human Resources Services.
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> 22. When that deadline expires, the Director of the Centre shall review all the available evidence and may then decide to:
>
> - take disciplinary measures under Chapter XI of the Staff Regulations against the alleged perpetrator, if the facts have been sufficiently well established;
> - close the file if the accusations of the alleged victim are insufficiently well founded;
> - refer the complaint to a Commission of Inquiry."

In the impugned decision, the Director explains that she "examined *prima facie* all of the available elements, including the following files/ documents:

- the complaint and the annexes received from the complainant;
- the reply to the allegations and the annexes provided by the alleged perpetrator;
- the written exchanges between the complainant and the Human Resources Services with regard to the complainant's working time arrangements;
- interviews with third parties who had participated directly in meetings at which the actions complained of could have been noted.

The allegations were reviewed individually and then jointly in order to determine whether they could reasonably be interpreted as constituting a form of harassment".

15. According to the Director of the Centre, the review of all of the available evidence "yielded not the slightest credible evidence in support of the allegations made in the complaint and the actions complained of could not reasonably be interpreted as constituting any form of harassment [...] in accordance with the definition proposed in Circular No. 13/2009". Pursuant to paragraph 22 of the Circular, she had therefore decided to close the file.

16. Contrary to the view apparently held by the complainant, the Director of the Centre was not obliged to refer the matter to a Commission of Inquiry. Paragraph 22 of Circular No. 13/2009 expressly provides that the Director may close the file "if the accusations of the alleged victim are insufficiently well founded". In that case, her only obligation was to respond point by point to the complainant's allegations. Considering the nature of the allegations and the answers given, the Director was not required to provide any further justification to the complainant (see Judgment 3149, consideration 17). The sole purpose of the preliminary assessment of such a complaint is to determine whether there are grounds for opening an investigation (see Judgment 3640,

consideration 5). In the absence of a contrary provision, the adversarial principle did not need to be applied at this preliminary stage of the procedure for opening a harassment investigation.

Nonetheless, the Director of the Centre did provide reasons for her decision of 23 February 2015, with the result that the complainant was able to challenge it before the Tribunal. However, in his written submissions, he merely requests that a harassment investigation be opened in an adversarial procedure, adding that it does not appear from the impugned decision that the alleged perpetrator was heard by the Centre. In his rejoinder, he further suggests that certain witnesses should be heard.

In his written submissions, the complainant raises no issue of substance to challenge the conclusions of the Director. With regard to the assertion that the person accused of harassment had not been heard, the Tribunal notes that the person concerned was invited to submit her comments during the preliminary assessment of the grievance, in accordance with paragraph 21 of Circular No. 13/2009.

Where any internal appeal body has heard evidence and made findings of fact, the Tribunal will only interfere in the case of manifest error (see Judgment 3831, consideration 28, and the case law cited therein). The complainant has not established any such error.

The second plea is therefore unfounded.

17. In conclusion, the complainant's first complaint, against the Director of the Centre's decision of 23 February 2015 concerning his third grievance, cannot be upheld.

18. In light of the above considerations, the two complaints must be dismissed in their entirety, without there being any need to accept the complainant's requests for the hearing of witnesses.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 8 November 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ