

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

G. (No. 2)

v.

ESO

137th Session

Judgment No. 4742

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms V. G. against the European Southern Observatory (ESO) on 24 February 2022 and corrected on 12 April, ESO's reply of 12 September 2022, the complainant's rejoinder of 12 January 2023 and ESO's surrejoinder of 14 April 2023;

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 seeks compensation for the unfair treatment she considers she has suffered because her applications for several positions were rejected and she was not able to take part in training.

Facts relevant to this case are to be found in Judgment 4741, also delivered in public this day, concerning the complainant's first complaint, in which she challenged the decision not to renew her fixed-term contract.

Suffice it to recall that the complainant unsuccessfully applied for six posts at ESO between May 2017 and August 2020. In April 2017 she applied for training but was turned down. She was subsequently

withdrawn from other training in April 2018, November 2018 and January 2019.

On 26 February 2021 the complainant sent a letter to the Director General “to ideally find an amicable settlement”, in which she stated that she had been treated unfairly by ESO for several years, specifically referring to her unsuccessful job applications and lack of opportunity to receive training.

On 19 March 2021 the Director General replied to the complainant that he had found no evidence of ill treatment or error in the application of the Organisation’s rules.

On 4 May 2021 the complainant filed an appeal “against [the] 19 March 2021 decision [...] to not renew [her] fixed-term contract, not select [her] for the positions [she] applied to [and] not allow [her] to be trained”.

On 11 May 2021 the Director General replied to the complainant that under Staff Rule VI 1.02, the decision not to renew her contract should be challenged directly before the Tribunal, but that the Joint Advisory Appeals Board was competent in respect of the other aspects of her appeal. However, he stated that the Organisation could waive the requirement for internal remedies to be exhausted, should she so request. The complainant chose to refer to the Board the aspects of her appeal other than the non-renewal of her contract.

The Joint Advisory Appeals Board issued its report on 15 October 2021. It considered that the decisions rejecting the complainant’s job applications and concerning her non-participation in training had become final and could no longer be challenged before it, and that there was no evidence that the complainant had been mistreated.

On 30 November 2021 the Director General informed the complainant that he had decided to dismiss her appeal as irreceivable and unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 30 November 2021 and to order ESO to pay her compensation equivalent to two years of her last salary for the moral injury which she considers she has suffered owing to the Organisation’s “unlawful

decision” and the ill treatment to which she was subjected. She also seeks costs.

ESO asks the Tribunal to dismiss the complaint as irreceivable and unfounded.

CONSIDERATIONS

1. In her second complaint, filed on 24 February 2022, the complainant impugns before the Tribunal the decision of the Director General of ESO of 30 November 2021 in which he informed her that, in accordance with the Joint Advisory Appeals Board’s unanimous recommendation of 15 October 2021, her appeal was dismissed as irreceivable because it had been submitted after the time limit specified in Staff Regulation R VI 1.05. The complainant submits that the impugned decision is unlawful and that she is entitled to compensation for the moral injury she has suffered on account of the Organisation’s breaches of the principle of equal treatment and duty of care in her respect and the bias “which underlay the rejection and cancellation of her applications for training and the rejection of all her applications for vacant posts”.

2. It is apparent from the submissions and the evidence that the rejection or cancellation of these requests for training and applications for vacant posts resulted from decisions that were all taken by the Organisation between April 2017 and January 2019 in respect of the applications for training and between May 2017 and August 2020 in respect of the job applications. The complainant states in her submissions that she is “well aware that she can no longer challenge the Organisation’s selection decisions, particularly because this would have the effect of harming the persons appointed”. However, she makes clear that she does not seek the setting aside of these decisions, but only the setting aside of the decision rejecting her claim for moral damages and an award of fair compensation.

3. The Tribunal observes first of all that the complainant's arguments in her submissions are based on her allegations that the Organisation's decisions not to allow her to receive training and not to appoint her to the positions for which she had applied were unlawful.

4. The Tribunal further notes that, in her appeal of 4 May 2021, the complainant specified that the appeal was directed against what she called the Director General's decision of 19 March 2021 "to not renew [her] fixed-term contract, not select [her] for the positions [she] applied to [and] not allow [her] to be trained, for ill-advised, unsound and unwarranted reasons, some of which were never submitted to [her]". The Tribunal observes that the complainant again focuses in the appeal on training which she was refused in 2017, 2018 and 2019 and on the refusal to appoint her to posts for which she applied unsuccessfully between May 2017 and August 2020.

5. The Tribunal finds that these submissions and the evidence plainly show that the decisions to refuse the complainant training and to reject her job applications were all taken before August 2020. However, as the Joint Appeals Advisory Board and the Director General of ESO pointed out, Staff Regulation R VI 1.05 provides that appeals must be lodged within 60 days of notification of the disputed decision. The decisions on which the complainant's claim for moral damages rests were therefore not submitted for an internal appeal within the time limit prescribed in the Staff Regulations.

6. The Tribunal has repeatedly emphasised the importance of the strict observance of applicable time limits when challenging an administrative decision. In Judgment 4673, consideration 12, it pointed out that a complaint will not be receivable if the underlying internal appeal was not filed within the applicable time limits (see also, in this regard, Judgment 4426, consideration 9, and Judgment 3758, considerations 10 and 11). According to the Tribunal's firm precedent based on the provisions of Article VII, paragraph 1, of its Statute, the fact that an appeal lodged by a complainant was out of time renders her or his complaint irreceivable for failure to exhaust the internal means of

redress available to staff members of the organisation, which cannot be deemed to have been exhausted unless recourse has been had to them in compliance with the formal requirements and within the prescribed time limit (see Judgments 4655, consideration 20, and 4517, consideration 7).

7. It follows from the foregoing considerations that, at the time she lodged her appeal of 4 May 2021, the complainant was clearly time-barred from challenging the Organisation's decisions to refuse her training and to reject her applications to the vacant posts. It is undisputed that the complainant never instituted internal appeal proceedings in respect of these decisions before her attempt to do so in her appeal of 4 May 2021.

8. Furthermore, the Tribunal considers that the complainant cannot refer to what she calls the Director General's 19 March 2021 decision so as to trigger a new time limit for an appeal. What the Director General wrote cannot be considered as a decision rejecting her various job applications or requests for training.

9. Lastly, the Tribunal cannot accept the complainant's argument that, in the present case, her complaint is limited to the Organisation's "decision" to dismiss her claim for compensation for the moral injury it had caused her, pointing to the fact that she is not requesting that each of these individual selection decisions be set aside, which would render her claim receivable. The Tribunal considers this manner of presenting the case contrived, because, as it recalled in Judgment 4655, consideration 15, in a dispute involving a challenge to individual decisions, as here, compensation for injury arising from the alleged unlawfulness of such decisions could only be granted as a consequence of their setting aside, which presupposes by definition that they have been challenged within the applicable time limit. Endorsing the complainant's argument would have the effect of authorising the Organisation's staff members in practice to evade the effects of the rules on time limits for filing appeals by allowing them to seek compensation at any time for injury caused to them by an individual decision, even though they did not challenge that decision in due time. Such a situation

would scarcely be permissible having regard to the requirement of stability of legal relations which, as the Tribunal regularly points out in its case law, is the very justification for time bars (see, for example, Judgment 3406, consideration 12, and the case law cited therein).

10. Since the complainant's internal appeal was time-barred, it must be considered that she failed to exhaust internal means of redress, as required by Article VII, paragraph 1, of the Statute of the Tribunal. It follows that the complaint is irreceivable and must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER