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

106th Session **Judgment No. 2781**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. T. against the Agency for International Trade Information and Cooperation (AITIC) on 5 October 2007, the Agency's reply of 24 January 2008, the complainant's rejoinder of 29 April and AITIC's surrejoinder of 9 June 2008;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The Staff Regulations of AITIC stipulate the following:

"**Regulation 38**

Administrative decisions are open to appeal to the Executive Board by a staff member on the grounds of non-observance, in substance or in form, of the terms of the contract and of such provisions of the *Staff Regulations* as are applicable to the case.

Regulation 39

The Administrative Tribunal of the International Labour Organization shall, under the conditions prescribed in its statute, hear and pass judgement upon a complaint from a staff member alleging non-observance, in substance or in form, of the terms of the contract and of such provisions of the *Staff Regulations* as are applicable to the case."

The complainant is a national of the United States of America born in 1972. He was an intern at AITIC between mid-March and mid-July 2003. On 1 April 2006 he was recruited by the Agency as a Trade Affairs Officer on a probationary fixed-term contract. The Executive Director made several critical remarks about his performance when drawing up his performance evaluation report. The complainant learnt of the comments which the Executive Director intended to include in his report at a meeting on 14 November 2006. The report in question, which is dated 17 October 2006, was signed by the Executive Director and the complainant on 14 December 2006. That same day the Executive Director informed the complainant in writing that his contract would not be renewed when it expired on 31 March 2007. The reasons given were not only the restructuring in progress at the Agency, but also the fact that the complainant's analytical skills would be better appreciated in a research organisation.

On 18 June 2007 the complainant lodged an appeal with the Executive Board, in which he requested inter alia the removal of his performance evaluation report from his permanent record, the setting aside of the decision of 14 December 2006 and his reinstatement. By a letter of 10 July 2007, which constitutes the impugned decision, the Chairman of the Executive Board replied that his appeal was irreceivable as it was time-barred.

B. The complainant submits that the Agency did not tell him how long he had to file an appeal and that the Staff Regulations do not specify a time limit for doing so. In addition, he taxes the Agency with not stating the reasons for the decision of 10 July 2007. Referring to the Tribunal's case law, he draws attention to the fact that a former official alleging breach of contract or of the rules to which he was subject may still come to the Tribunal and that an organisation may be held liable even after its contractual or statutory ties with the official have ceased.

The complainant asks the Tribunal to find that his internal appeal and his complaint are receivable, to set aside the impugned decision, to invite the Agency to resume its consideration of his appeal on the merits and to award him costs in the amount of 10,000 Swiss francs.

C. In its reply the Agency recognises that Staff Regulations 38 and 39 are general rules. However, Regulation 39 expressly refers to the conditions laid down in the Statute of the Tribunal, which stipulates in Article VII, paragraph 2, that to be receivable a complaint must have been filed within ninety days after the complainant was notified of the decision impugned. In the absence of any other provision, and for the sake of legal certainty, that time limit has been applied by analogy to implement Regulation 38. Even if it is doubtful that the evaluation report can be described as an "administrative decision" within the meaning of Regulation 38 and be open to appeal to the Executive Board, the Agency considers that the appeal filed by the complainant on 18 June 2007 – i.e. more than seven months after the interview in November 2006 and notification of the final version of the Executive Director's comments – was out of time insofar as it was directed against the report. The complainant was likewise time-barred from challenging the decision of 14 December 2006. The Agency states that on 11 September 2007 it made the procedure clearer by adopting Staff Administrative Memorandum No. 6 entitled "Grievances and Appeals". Henceforth, in order to challenge an administrative decision, the staff member must request a review of the decision by the Executive Director within 40 working days of being informed of it. The Executive Director must then reach a final decision within 30 days and the staff member may appeal against that decision within 20 days.

In the event that the Tribunal finds that the complainant's appeal was receivable, AITIC asks that, for the sake of procedural economy, the case should not be referred back to the Executive Board. It adds that if the Tribunal were to invite it to resume consideration of the merits of the appeal, the Executive Board would in all likelihood apply paragraph 3(m) of the above-mentioned memorandum, according to which it "may waive recourse under *Staff Regulation 38* in order to permit the staff member to appeal directly to the Administrative Tribunal of the International Labour Organisation".

In the Agency's opinion the evaluation procedure was properly followed. Citing the case law, it points out that the Tribunal may not

substitute its own opinion of a staff member's performance, conduct or fitness for international service for that of the executive head of the organisation. Furthermore, non-renewal of a contract is at the discretion of the appointing authority; such a decision is subject to only limited review by the Tribunal and on certain conditions which are not met in the instant case. It states that the complainant's contract expired in accordance with its terms pursuant to Staff Regulation 31. He received longer notice than that specified in his contract, and before notifying him of the decision not to renew his contract the Agency had given him a serious warning and an opportunity to improve his performance. Moreover, he was told of the reasons for this decision. In this connection, the Agency explains that the complainant had difficulty in adapting to AITIC's working methods, that his academic approach was incompatible with meeting deadlines and that he was frequently absent for personal reasons.

D. In his rejoinder the complainant contends that Staff Administrative Memorandum No. 6 cannot be applied retroactively and that his appeal of 18 June 2007 is therefore receivable. He presses his claims, although he makes it clear that he leaves it to the Tribunal to decide whether or not to rule on the merits of his case directly. He also contends that the working atmosphere at AITIC was unhealthy, owing to the Executive Director's style of management, and he asks the Tribunal to hear witnesses in order to confirm this. He asserts that he completed numerous important assignments within tight deadlines and submits that the Agency has provided no proof of his alleged adjustment difficulties.

E. In its surrejoinder the Agency maintains its position and states that the procedure clarified by the above-mentioned memorandum already applied prior to 11 September 2007. In its opinion, the allegations regarding the Executive Director are unjustified and irrelevant.

CONSIDERATIONS

1. The complainant was recruited by AITIC on 1 April 2006. In accordance with Staff Regulation 18 his initial contract was concluded for a probationary fixed term of one year.

This recruitment originated in the complainant's contacts with AITIC during his internship in 2003, at a time when the Agency, which was initially set up as an association registered under Swiss law, had not yet acquired its current status as an intergovernmental organisation.

2. Although the complainant's services had apparently been regarded as completely satisfactory when he had worked for AITIC in the past, the Executive Director of the organisation made a very negative assessment of his performance during his contract. Indeed, the complainant's annual performance evaluation of 17 October 2006 recorded numerous criticisms concerning his insufficient respect for the administrative constraints inherent in the Agency's operations and his excessively academic approach to his work, which was deemed ill-suited to the organisation's action-oriented policy.

3. As might have been expected in light of this performance evaluation report, the complainant was informed by a letter of 14 December 2006 from the Executive Director that his appointment would not be renewed when it expired on 31 March 2007. The following reasons were given for this decision: "[the] analytical skills [of the complainant] would be better appreciated and used in a research organisation" and "AITIC [was then] restructuring its staff after the departure of a senior employee".

4. On 18 June 2007 the complainant filed an appeal with the Executive Board in accordance with Staff Regulation 38 to contest the decision not to renew his contract. The main thrust of this appeal was to dispute the evaluation of his performance in the above-mentioned report and to request its removal from his permanent record since, according to the complainant, this report did not reflect his performance objectively and the non-renewal of his contract was in

fact caused by discord with the Executive Director, which was mostly ascribable to her "autocratic approach".

5. However, by a decision of 10 July 2007, the Chairman of the Executive Board dismissed this internal appeal as irreceivable on the grounds that "the period during which the impugned decision could be challenged ha[d] expired". It is this decision to dismiss his internal appeal that the complainant is now challenging before the Tribunal.

6. In the Agency's opinion, and according to its interpretation of the Staff Regulations, the complainant's internal appeal, lodged more than six months after he had been notified of the decision not to renew his contract, was rightly deemed to be time-barred.

7. If that were indeed the case, this complaint should likewise be dismissed by the Tribunal as irreceivable since, according to firm precedent, a complainant who has lodged an internal appeal in breach of the procedural rules and of the time limits laid down by the applicable texts cannot be considered to have complied with the requirement of exhausting internal means of redress on which the receivability of his complaint depends under Article VII, paragraph 1, of the Statute of the Tribunal (see, for example, Judgments 1132 and 1256).

8. It is, however, clear that the decision of 10 July 2007, which significantly fails to mention the provision on which the signatory purported to base his assertion that the complainant's internal appeal was out of time, did not in truth rest on any text.

In fact the above-mentioned Staff Regulation 38, which provides for appeals to the Executive Board to challenge administrative decisions taken by the Agency, does not prescribe any time limit for lodging such an appeal. While Chapter I of these Regulations does make provision for their clarification by Staff Administrative Memoranda issued by the Executive Director, at the material time no such memorandum had set any time limit either.

9. In its submissions to the Tribunal the Agency argues that, since the texts give no indication as to the setting of a time limit, the ninety days prescribed for the filing of complaints with the Tribunal by Article VII, paragraph 2, of its Statute should be applied to the filing of an appeal with the Executive Board under Staff Regulation 38. According to the Agency, reference to this time limit is justified by analogy, since Staff Regulation 39 recalls that the Tribunal may hear a case only on the conditions prescribed in its Statute. However, it cannot be inferred from the above-mentioned Staff Regulations 38 and 39 that, by virtue of this indirect reference to the Statute of the Tribunal alone, the internal appeal open to the Agency's staff members is likewise subject to a ninety-day time limit, especially as the deadline applicable to internal appeals provided for in international organisations' staff regulations – which varies from one organisation to another – has no conceptual link with the time limit for bringing a case to the Tribunal.

10. As the Tribunal has already stated on many occasions, the existence of a time bar will not be presumed (see, for example, Judgment 528, under 3). No procedural time limit will be enforceable unless express provision is made for it in a text, or it is at least so clearly implied from a legal context as to leave no room for doubt (see Judgment 2082, under 10), which is obviously not the case here. The only exception that may be envisaged is that of an appeal lodged so long after the appellant has been notified of the impugned decision that he or she might be considered to have waived the right to do so. But at all events that is not the case here either.

11. Since in the instant case the internal appeal provided for in the Staff Regulations was not subject to any validly specified time limit, it could be lodged at any time.

As the Agency rightly points out, this absence of any time limit for exercising the right of appeal had the obvious disadvantage of exposing AITIC's administrative decisions to great legal uncertainty. Nevertheless, it is not for the Tribunal to remedy this lacuna in the

applicable texts by making the receivability of the appeal in question subject to a time limit of its own creation (see Judgment 804, under 8).

12. Moreover, the Agency itself has corrected this defect in its rules. Indeed, all the procedural rules and time limits for the internal means of redress open to AITIC staff members have since been defined by Staff Administrative Memorandum No. 6 issued by the Executive Director on 11 September 2007. But the time limits which now exist should not, of course, be applied retroactively to the appeal lodged by the complainant before that memorandum came into force.

13. Since the decision dismissing the appeal in question as being time-barred was consequently unfounded, the Tribunal must decide whether, as the complainant requests, the case should be referred back to the Agency in order that the Executive Board examine the merits of this appeal or whether, as the Agency submits subsidiarily, it would be preferable that the Tribunal rule immediately on the whole dispute by the present judgment.

14. At first sight, the second solution might appear more appropriate in terms of efficient administration of justice, particularly because it would spare both parties, in their best interests, from a possible second round of judicial proceedings. Moreover, in the present case this solution might appear all the more natural for the fact that the complainant does not disagree with it in his final submissions. Indeed, although he continues to request, as one of his principal claims, that the case be remitted to the organisation, he leaves it to the Tribunal to determine whether such a course is appropriate.

15. However, at this point it should be recalled that, as the Tribunal's case law has long emphasised, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. Consequently, save in cases where the staff member concerned forgoes the lodging of an internal appeal, an official should not in principle be denied the possibility of

having the decision which he or she challenges effectively reviewed by the competent appeal body.

This implies that, when it appears that a complainant has been wrongly denied the full benefit of his or her right to an internal appeal, the Tribunal should opt for referral of the case back to the organisation rather than retaining jurisdiction and hearing the whole dispute immediately, especially as the possibility that review of the impugned decision by the competent body may suffice to resolve the dispute should obviously not be ruled out. This is why, when an internal appeal has not been properly considered by an organisation's joint appeal body, either because elements of the dispute have not been fully examined, or because of a procedural flaw, the Tribunal is frequently led to remit the case to the organisation in order that the appeal be heard by the competent body (see, for example, Judgments 999, 2341, 2370, 2424 or 2530). Similarly, in the instant case, it appears essential to refer the case back to AITIC in order that the complainant may properly exercise his right to have his appeal heard by the Executive Board, of which he was unduly deprived through wrongful application of a time bar.

16. In the present case it is all the more necessary to refer the case back to the organisation because, given the nature of the challenge raised by the complainant, recourse to the Tribunal would not afford him such a wide-ranging review of the decision at issue as that obtained through the internal appeal to which he is entitled.

Indeed, the nub of this dispute lies in the challenging of the Executive Director's assessment of the complainant's performance, which resulted in the decision not to renew his contract. As the Tribunal has consistently held, in Judgments 1052, 1492 and 1741, for example, it has only a limited power to review such a decision, which will be set aside particularly if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if there was an abuse of authority. But when a contract is not renewed because of substandard performance, the Tribunal – as the Agency underlines in its written submissions – will

not substitute its own assessment of the complainant's fitness for his duties for that of the organisation's executive head.

In an internal appeal initiated by the complainant before the Executive Board, the latter may, on the contrary, completely replace the Executive Director's evaluation of the complainant's performance with its own. Furthermore, as the Staff Administrative Memorandum of 11 September 2007 indicates, the Executive Board may decide to allow an appeal for reasons of equity, whereas the Tribunal will rule primarily in law. In these various respects the scope of the internal appeal is therefore wider than that of a complaint before the Tribunal.

17. Lastly, the Agency's argument that, if the case were remitted to the Executive Board, the latter would in all likelihood apply paragraph 3(m) of the above-mentioned Administrative Memorandum, which would enable it to "waive" recourse to an internal appeal prior to the filing of a complaint with the Tribunal, is clearly irrelevant.

Indeed, the appeal to the Executive Board under Staff Regulation 38 against administrative decisions would be illusory if the Agency could thus prejudge the decision which might be adopted by that collegiate appeal body when it considered the case.

Furthermore, and contrary to what the Agency appears to assume, the above-mentioned paragraph 3(m) cannot be interpreted as granting the Executive Board the right to refuse to consider the appeal in question. According to the wording of this paragraph, its sole purpose, like that of many similar provisions contained in the staff regulations of other international organisations, is to make it possible to exempt an appellant, at that person's request, from the obligation to lodge an internal appeal before turning to the Tribunal; it is not to authorise the competent body to refrain from examining an appeal submitted to it – which in the instant case would moreover be contrary to the obligations which this judgment places upon it.

18. It follows that the impugned decision, which dismissed the complainant's internal appeal on the grounds of irreceivability, must be set aside and the Tribunal will remit the case to the organisation in

order that the Executive Board give an opinion on the merits of the appeal.

19. At all events, this solution renders moot the request submitted by the complainant in his rejoinder for an oral hearing should the Tribunal decide to rule on the merits of the dispute.

20. Since the complainant's principal claims succeed, he is entitled to costs which the Tribunal sets at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The decision of 10 July 2007 dismissing the complainant's appeal to the Executive Board of AITIC is set aside.
2. The case is referred back to the organisation in order that the Executive Board rule on the merits of this appeal.
3. The organisation shall pay the complainant costs in the amount of 5,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 7 November 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Mary G. Gaudron
Patrick Frydman
Catherine Comtet