Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3135**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A.-A. S. against the Technical Centre for Agricultural and Rural Cooperation (CTA) on 2 April 2010 and corrected on 4 May, the Centre's reply dated 17 June, the complainant's rejoinder of 19 July and the CTA's surrejoinder of 27 September 2010;

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 complainant, a Togolese national born in 1950, joined the CTA in 1987. As from 1 June 1990 she held the level 3.A step 5 post of Secretary of the Administration/Accounting Assistant. Her contract for a fixed period of time was renewed on several occasions. As from 1 September 1999 her ability, efficiency and conduct formed the subject of assessment reports. At the material time she was employed under a "letter of extension" of 21 February 2005 which covered the period from 1 March 2005 to 31 December 2007.

The Director of the CTA informed the complainant in a letter of 7 December 2007 that her contract would not be renewed when it expired, on the grounds that her overall level of service, as shown in her assessment reports for 2004, 2005 and 2006, had been unsatisfactory and had remained mediocre, despite various warnings and the unfavourable ratings contained in those reports. The Director awarded her compensation equivalent to nine months' remuneration in lieu of notice, in accordance with Article 34(2) of the Staff Regulations of the CTA which entered into force on 27 September 2006. In a letter of 17 December 2007 the complainant replied that her last contract, signed in February 2005, had been governed by Decision No. 2/92 of the ACP-EEC Committee of Ambassadors of 22 December 1992 laying down the Staff Regulations of the CTA. She drew attention to the fact that Article 35(1)(b) of those Regulations stipulated that the period of notice was one month per year of service completed and she said that she "would agree" to the decision of 7 December 2007 provided that she were paid compensation equivalent to 20.7 months' remuneration in lieu of notice instead of the nine which she had been granted. By a letter of 21 December 2007 the Director pointed out to the complainant that the letter of 21 February 2005 extending her contract specified that the regulations adopted in Decision No. 2/92 "w[ould] apply until the adoption" of the new Staff Regulations. The application of the new regulations as soon as they entered into force was thus a condition of the letter extending her contract. He confirmed that she was entitled to compensation equivalent to nine months' remuneration, that is the maximum amount laid down in the aforementioned Article 34(2).

On 29 May 2009 the complainant requested the opening of the conciliation proceedings in accordance with Article 4 of Annex IV to the Staff Regulations. A conciliator was appointed in September 2009. He heard the parties on 21 January 2010 and issued his report on 4 February 2010. In his conclusions he expressed reservations as to the admissibility of the conciliation request, because the complainant had submitted it more than 17 months after "the rejection of [her] 'complaint'" of 17 December 2007, and he decided not to seek a "compromise" solution to the dispute. On 2 April 2010 the complainant

filed a complaint with the Tribunal in which she challenged the decision of 7 December 2007.

B. The complainant submits that her complaint is receivable. She contends that the decision of 7 December 2007 did not specify the appeal procedures open to her and that she could request the settlement of the dispute by conciliation "at any time before an application to the Administrative Tribunal", under Article 4(1) of Annex IV to the Staff Regulations. Furthermore, she brought the case to the Tribunal within three months of 4 February 2010 – the date on which conciliation failed – in accordance with paragraph 12 of the above-mentioned Article 4(12).

On the merits, she contends that the grounds given for the "termination" of her contract, i.e. the unsatisfactory nature of her service, is not a real and genuine reason, since her assessment reports for the period 2000-2004 contained commendations from her superiors, the three reports mentioned in the decision of 7 December 2007 attested that she had very good "specific skills" and the criteria used in her 2005 assessment were the wrong ones for her post.

Moreover, she comments that the letter of 21 February 2005 extending her contract stated that either party could put an end to "the effects of the […] extension subject to a period of notice corresponding to one month per year of service completed" and that amendments to the internal rules issued in pursuance of the Staff Regulations "applied to her only after notification". As she had not received any notification of a formal document amending the letter extending her contract, no rule could be applied to her without breaching the terms of that letter. She also considers that the reduction of the period of notice stipulated in the letter extending her contract was contrary to the general principles of acquired rights and the non-retroactivity of unfavourable rules and she therefore concludes that, having completed 20 years and 8 months of continuous service, she was entitled to compensation corresponding to 20 months' and 26 days' remuneration in lieu of notice, i.e. 187,974.08 euros. As the Centre has already paid her 81,590.76 euros, she considers

that it owes her the difference between these two sums, i.e. 106,383.32 euros. She further states that the impugned decision has caused her substantial financial injury, has given rise to a considerable loss of income in terms of her pension rights and has brought about the "forfeiture of her medical insurance cover". In her opinion, if she had continued to work for the CTA until the retirement age of 65 she would have earned at least 864,800.64 euros.

She asks the Tribunal to find that the "premature termination" of her employment contract was unlawful and improper and to order the CTA to pay her 864,800.64 euros in compensation for the economic and financial injury which she considers she has suffered and the sum of 106,383.32 euros as the outstanding amount of her compensation in lieu of notice. Lastly, she asks to be awarded costs in the amount of 50,000 euros.

C. In its reply the Centre argues that the complaint is irreceivable. In its view, the fact that Article 4(1) of Annex IV to the Staff Regulations does not prescribe any time limit for the submission of a request for the appointment of a conciliator is due to an oversight on the part of the ACP-EC Committee of Ambassadors. In the absence of a "statutory time limit", it considers that the principle of a reasonable period of time must apply. Despite acknowledging that she had been informed of the appeal procedures available in the event of a dispute between the CTA and one of its staff members when she signed the last letter extending her contract, the complainant submitted her request for the appointment of a conciliator on 29 May 2009, that is 17 months after the Director's decision of 21 December 2007, a period of time which, in the CTA's view, cannot be described as reasonable. In addition, the Centre notes that, while the letter of 17 December 2007 was a "complaint" within the meaning of Article 66(2) of the Staff Regulations, in that the complainant challenged the amount of the compensation which she had received in lieu of notice, she did not submit such a "complaint" against the decision not to renew her contract.

On the merits, and subsidiarily, the Centre asserts that the impugned decision was well founded. Although the complainant received favourable assessment reports between 2000 and 2004, that is not inconsistent with her work being evaluated differently at a later stage. Despite the recommendations made to her and the training courses which she attended, her assessment reports for 2004, 2005 and 2006 recorded her "unremittingly" unsatisfactory service. As far as 2007 was concerned, the Centre reveals that on 4 September 2007 the complainant's supervisor had sent the Director an internal memorandum – which it produces as an annex to its reply – in which she underscored the complainant's weak accounting skills.

The Centre also maintains that the complainant rightly received compensation equivalent to nine months' remuneration in lieu of notice pursuant to Article 34(2) of the Staff Regulations. It stresses that the letter of 21 February 2005 extending her contract stipulated that the new Staff Regulations would apply as soon as they entered into force. All the members of staff were informed when this happened by a memorandum dated 8 January 2007. The defendant explains that the purpose of the nine-month limit was not only to bring the Staff Regulations – which are part of European Community law – into line with the rules applicable to the temporary staff of the European Union, but also to take account of budgetary constraints. In its view, this limit did not breach the complainant's basic terms of employment. Lastly, the Centre submits that the claim for compensation for economic and financial injury is unfounded because the complainant had no right of employment with the CTA until retirement age. It further asks the Tribunal to order the complainant to pay its legal costs.

D. In her rejoinder the complainant maintains that her complaint is receivable. She says that the information which the CTA provided to her with regard to the appeal procedures available to her was neither complete nor adequate. She also disputes the legal scope of the memorandum of 8 January 2007, to the extent that it made no reference to appeal procedures and was not addressed to her directly.

On the merits, she submits that she never received an assessment report for 2007, that the CTA never forwarded the internal memorandum of 4 September 2007 to her and that the impugned decision makes no reference to that document.

E. In its surrejoinder the Centre maintains its arguments regarding the irreceivability of the complaint. On the merits, it explains that no assessment report was drawn up for the complainant in 2007 and that the internal memorandum of 4 September 2007 was not mentioned in the impugned decision because it was not an assessment report and did not therefore have to be forwarded to the complainant.

CONSIDERATIONS

1. The complainant joined the CTA as a telephonist/ receptionist on 1 May 1987. She then took on the duties of Secretary of the Administration/Accounting Assistant, and her employment contract was renewed several times. At the time of her separation from the Centre she was employed as a member of the clerical staff at level 3.A, step 5, under a "letter of extension" of 21 February 2005 covering the period from 1 March 2005 to 31 December 2007.

2. On 7 December 2007 the Director of the CTA decided that the complainant's contract would not be renewed when it expired, on the grounds that "[her] overall level of service […] h[ad] proved unsatisfactory for several years". This decision explained that the complainant would receive compensation corresponding to nine months' remuneration in lieu of notice, in accordance with Article 34(2) of the Staff Regulations adopted in the decision of the ACP-EC Committee of Ambassadors of 27 September 2006. The provisions in question state that "[t]he length of the period of notice shall be one month for each completed year of service, subject to a minimum of three months and a maximum of nine months" with the result that the complainant, who had been employed by the Centre for more than 20 years, was entitled under this Article to compensation calculated on the basis of this nine-month maximum.

3. Having been notified of this decision on 14 December 2007, on 17 December 2007 the complainant sent the Director a letter which constituted a "complaint" within the meaning of Article 66 of the Staff Regulations. Although in this letter she said that she "t[ook] note that [her] present contract w[ould] not be renewed on its expiry", she pointed out that "this contract [had been] signed in February 2005 under the CTA [S]taff [R]egulations in force under the Fourth ACP-EU Convention", which had been laid down in a previous decision of the Committee of Ambassadors of 22 December 1992. She drew attention to the fact that Article 35(1)(b) of the older text made provision for "a period of notice corresponding to one month per year of service completed" and did not restrict the length of that period to nine months. The complainant therefore contended that she was entitled to compensation calculated on that more favourable basis. She concluded her "complaint" by saying that she "would agree to [the Director's] decision subject to receiving notification that [she] would be given 20.7 months' pay in lieu of notice".

4. On 21 December 2007 the Director rejected this "complaint" on the grounds that the fact that the complainant's contract had been signed while the previous Staff Regulations were still in force did not prevent the application of the new Staff Regulations to the matter in dispute.

5. By a letter of 29 May 2009 the complainant requested the opening of the conciliation proceedings for which provision is made in Article 67 of the new Staff Regulations in the event of a "complaint" being rejected. She took issue with what she regarded as the improper nature of the non-renewal of her contract and the manner in which the above-mentioned compensation had been calculated, and therefore requested the appointment of a conciliator in accordance with Article 4(3) of Annex IV to the Staff Regulations.

6. Although conciliation proceedings were actually initiated, they proved to be fruitless, because in his report of 4 February 2010 the conciliator ultimately concluded that he had been led to "abandon

the search for anything approaching a compromise solution between the parties".

7. It was against this background that the complainant filed a complaint with the Tribunal. She seeks not only the setting aside of the decision not to renew her contract, but also compensation for the economic and financial injury resulting from this measure, additional compensation in lieu of notice and the award of costs.

8. The complainant has applied for hearings. In view of the abundant and very clear submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this application.

9. The CTA, which has raised several objections to the receivability of the complaint, contends that the complainant may in any case not challenge the impugned decision in respect of the non-renewal of her contract, because this decision was challenged in the initial "complaint" of 17 December 2007 only insofar as it concerns the amount of the compensation in lieu of notice granted to the complainant.

10. The Centre's submission in this respect is well founded.

11. As the Tribunal has already had occasion to explain in Judgments 3067 and 3068, delivered on 8 February 2012, the above-mentioned Articles 66 and 67 of the CTA Staff Regulations, concerning appeals, provide for two successive procedures which the staff member must use before referring a case to the Tribunal. Under Article 66(2) staff members who intend to challenge a decision adversely affecting them must submit a "complaint" to the Director of the Centre within a period of two months. A "complaint" is defined as "a written document requesting that an amicable solution be found to the dispute in question". In the event of a decision rejecting the "complaint", Article 67 provides that conciliation proceedings must be initiated in accordance with the provisions of Annex IV to the Staff

Regulations. Pursuant to Article 4 of this annex, the staff member must then send the Executive Board a request for the appointment of a conciliator, who must propose the terms of a "just and objective settlement of the dispute".

12. Article 67(3) explicitly states that the exhaustion of internal means of redress means that "the competent authority has previously had a complaint submitted to it pursuant to Article 66(2)", that "the complaint has been rejected" and that "conciliation has failed". Plainly all of these conditions must be met. Read together the provisions in question therefore make it clear that a complainant may submit a matter in dispute to the Tribunal only if that matter has first formed the subject of a "complaint" and then of conciliation proceedings.

13. In the instant case it is plain from the wording of the "complaint" of 17 December 2007, quoted under 3 above that, although the complainant referred to the impugned decision as a whole, this "complaint" concerned solely the amount of compensation in lieu of notice granted to the complainant and that, at that stage, she did not dispute the non-renewal of her contract. In these circumstances, even if the purpose of the subsequent request for the opening of conciliation proceedings was to challenge the whole of the decision of 7 December 2007, the Tribunal finds that the claims other than those relating to the compensation in question are irreceivable because internal means of redress have not been exhausted, as required by Article VII, paragraph 1, of the Statute of the Tribunal (see, for precedents establishing that it is impossible to widen the scope of claims presented to internal appeal bodies in proceedings before the Tribunal, Judgments 1443, under 4, 2186, under 3(b), or 2308, under 12).

14. It is to no avail that the complainant attempts to argue, in this connection, that she was not fully informed of the internal appeal procedures available to her under the Staff Regulations. Quite apart from the fact that she was manifestly aware of the possibility of lodging a "complaint", because she did so, consistent precedent has it

that the staff members of international organisations are deemed to know the provisions of the staff regulations applying to them (see, for example, Judgment 1700, under 28).

15. Since, for the reasons set out above, the claims seeking the setting aside of the decision not to renew her contract and the request for compensation for the economic and financial injury ensuing from that measure are irreceivable, the Tribunal will confine its examination of the merits of the complaint to the claims related to the amount of the compensation in lieu of notice.

16. The complainant relies on the conditions set forth in the letter of 21 February 2005 extending her contract in order to submit that the amount of that compensation ought to have been calculated on the basis of the rules laid down in Article 35(1)(b) of the 1992 Staff Regulations and not the less favourable rules contained in Article 34(2) of the 2006 Staff Regulations. That letter did specify, in section 3, paragraph V, which expressly referred to the above-mentioned Article 35 of the Staff Regulations then in force, that the applicable period of notice was "one month per year of service completed". The complainant therefore considers that, when she separated from the Centre, it could not lawfully apply the provisions of the 2006 Staff Regulations which established a maximum of nine months for this period of notice.

17. The Tribunal first draws attention to the fact that, generally speaking, the terms of employment of staff members of international organisations may vary according to amendments of the existing staff regulations or staff rules and that such references to the original provisions as may be contained in their employment contracts do not prevent this. In the instant case, this principle was actually reflected in the letter of extension of 21 February 2005, since it stated in its section 2 that the 1992 Staff Regulations would apply to the complainant's contract only "until the adoption of the new Staff Regulations under the ACP-EC Cotonou Agreement", that is the Staff Regulations issued thereafter in 2006.

18. In this respect, the complainant is wrong when she submits that the Centre could not apply the provisions of the 2006 Staff Regulations to her on the grounds that, pursuant to section 3, paragraph VI, of the letter of extension, the amendments to the "various internal rules issued by the CTA in pursuance of the [Staff] Regulations" applied to her only if she had been formally notified thereof. Indeed, the wording of this clause signifies that this notification requirement concerns only rules issued pursuant to the above-mentioned Regulations and not the provisions of the Regulations themselves.

19. Similarly, the complainant has no grounds for contending that the application to her case of the methods of calculating the period of notice laid down in Article 34(2) of the 2006 Staff Regulations would be unlawfully retroactive. As the Tribunal has often stated, a provision is retroactive only if it effects some change in a person's existing legal status, rights, liabilities or interests from a date prior to its proclamation, but not if it merely alters the effects of this status or of these rights, liabilities or interests in the future (see, inter alia, Judgments 2315, under 23, or 2986, under 14). In the present case, however, the new provision in question did not alter the compensation in lieu of notice already paid to the complainant, but only introduced a new rule on the subject, which was subsequently applied to her. It did not therefore alter any legal status, or infringe any right as from a date prior to its issuance and it thus produced effects only in the future.

20. The complainant would, on the contrary, have grounds for relying on the more favourable provisions of the 1992 Staff Regulations if, as she also submits, she had acquired a right to their continued application. On this point, the arguments laid out in the complaint might seem to be more solid, for there is no disputing the fact that a period of notice constitutes, by its very nature, a substantive and sensitive aspect of the terms of employment.

21. However, according to the Tribunal's case law as established inter alia in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment to an official's detriment of a provision governing his/her status constitutes a breach of an acquired right only if it adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him/her to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must therefore relate to a fundamental and essential term of employment within the meaning of Judgment 832 (in this connection, see also Judgments 2089, 2682, 2696 and 2986).

22. While one might be inclined to accept that the actual existence of a period of notice or even, possibly, the basic principles underpinning the manner in which it is determined, are indeed fundamental and essential, the Tribunal finds that this is not true of the number of months of service which may be taken into consideration when determining the length of this period or the amount of the compensation paid in lieu of notice, which constitutes no more than a method of calculating this benefit, especially as, in this case, the amendment of the term of employment in question, that is the setting of a nine-month maximum, is of only relative importance. It must, moreover, be pointed out that in what is in some respects the similar situation of amendments to the rules governing officials' benefits, the Tribunal consistently holds that, while the outright abolition of an allowance could constitute a breach of an acquired right, this is not true of the actual amount of the allowance or the method of reckoning it (see, in particular, Judgments 666, under 5, 1886, under 9, paragraph 3, or 2972, under 8). The same principles, *mutatis mutandis*, must form the basis of the present judgment.

23. In fact, the application to the present case of the three criteria identified by the Tribunal in Judgment 832 as a means of determining whether a breach of acquired rights has occurred, namely the nature of the altered term of appointment, the reason for the

change and the consequence of recognising or not recognising an acquired right, confirms that no breach of acquired rights is to be found here.

24. The nature of the altered term of employment stemmed from a clause of the complainant's employment contract, which might normally be an indication that a right has been acquired. But here this clause only reflected the existing provisions of Article 35 of the 1992 Staff Regulations to which, as stated earlier, it expressly referred, with the result that it actually stemmed from these provisions themselves. Unlike individual decisions or the specific terms of an official's contract, the provisions of staff regulations or staff rules rarely give rise to acquired rights.

25. As for the reasons for the disputed change, there is no doubt that it rested on legitimate grounds. Apart from the fact that, as the CTA explains, limiting the period of notice to no more than nine months made it possible to align the existing rules on the subject with those applied to the temporary staff of the European Union, this adjustment of the earlier provisions was also to take account of the Centre's budgetary constraints. Clearly, the lack of any limit on the number of months used to determine the period of notice which, in the case of long-serving staff, could translate into the award of a substantial financial benefit, was naturally very expensive for the Centre. Furthermore, the fact that the amendment of this term of employment was prompted by financial considerations does not in itself make it unlawful (see, for example, the above-mentioned Judgments 832, 2682 and 2986).

26. With regard to the consequences of this amendment, it cannot be denied that, for the complainant, it resulted in a considerable reduction in the compensation in lieu of notice which she could claim, since it was reduced from almost 21 to 9 months' remuneration. However, this reduction is not so substantial that it may be considered to have upset the balance of contractual obligations of her contract, since, in particular, the giving of nine months' notice is

still a very substantial advantage, and a period of that length is still appreciably better than that generally established by national laws.

27. In setting the amount of the disputed compensation in lieu of notice on the basis of the new provisions of the Staff Regulations which had entered into force, the impugned decision is not unlawful in any way.

28. It follows from the foregoing that the complaint must be dismissed in its entirety, without it being necessary for the Tribunal to rule on the CTA's objections to receivability, namely that the request for conciliation of 29 May 2009 was allegedly lodged out of time, as was the complaint filed with the Tribunal.

29. The CTA has asked that the complainant should be ordered to pay its costs on the basis that "the complaint is unfounded". Without ruling out, as a matter of principle, the possibility of making such an order against a complainant (see, inter alia, Judgments 1884, 1962, 2211 and 3043), the Tribunal will avail itself of that possibility only in exceptional circumstances. Indeed, it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive or chilling effect of possible adverse awards of that kind. In the instant case, although the complaint must be dismissed, it should not be regarded as vexatious. The Centre's counterclaims will therefore be dismissed.

DECISION

For the above reasons,

The complaint and the CTA's counterclaims are dismissed.

In witness of this judgment, adopted on 27 April 2012, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet