Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

K. K. W.

v.

CDE

125th Session **Judgment No. 3902**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. S. K. K. W. against the Centre for the Development of Enterprise (CDE) on 20 July 2016 and corrected on 5 August, the CDE's reply of 26 December 2016, corrected on 24 January 2017, the complainant's rejoinder of 4 May and the CDE's surrejoinder of 31 July 2017;

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

Having examined the written submissions and decided not 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 pay him the indemnity due in the event of the closure of the CDE.

The CDE was an institution jointly administered by the African, Caribbean and Pacific Group of States (ACP) and the European Union (EU) under the Cotonou Agreement, a partnership agreement concluded for a period of 20 years as from 1 March 2000. It had a mandate to support the implementation of private-sector development strategies in the ACP countries.

In June 2014 the ACP-EU Council of Ministers decided to proceed with the orderly closure of the CDE. On 20 January 2015 the Director-Curator of the CDE, who had been appointed in order to implement a

closure plan and to manage the CDE during the process leading to its closure, began to prepare the aforementioned plan. The latter, which envisaged the finalisation of the winding-up of the CDE by 31 December 2016, was approved in June 2015.

The complainant, who since 1995 had performed the duties of Financial Controller and who since 1 March 2007 had held a contract for an indefinite period of time, was informed by a letter of 30 June 2015 from the Director-Curator that the approval of the closure plan had no consequences in his case. As he would reach the age of 65 in June 2016, under the plan his post would continue to exist until 30 June 2016, when his employment would automatically end, without an indemnity, in accordance with Article 34, paragraph 3, of the Staff Regulations of the Centre for the Development of Enterprise. However, as the complainant had not received any step increase since January 2009, it was proposed that he should sign an agreement providing inter alia for the grant of one step on 1 January 2016 and the payment of an indemnity for the "loss of the possibility to receive a step increase during the period prior to 31 December 2015" and of a sum of 225 euros as compensation for the legal costs incurred during the conciliation procedure between the Director-Curator and the Staff Committee concerning the matter of a step increase. The complainant signed this agreement on 18 September 2015 and thereby waived his "right to introduce any action whatsoever regarding the application of the remuneration scales [...] against the CDE". In March 2016 he was offered an additional indemnity in respect of step increases, the gross amount of which was 4,766.48 euros. As he did not wish to waive his right of appeal on this issue, he refused to sign the latter agreement which was to take the form of an addendum to the agreement which he had signed on 18 September.

In the meantime, on 18 August 2015, the complainant had filed an internal complaint with the Director-Curator against the decision of 30 June 2015. In this internal complaint he submitted that, as far as he knew, he was the only staff member holding a contract for an indefinite period of time who would remain in service "after the closure of the CDE" on 31 March 2016. He considered that the extension of his

appointment beyond that date was simply a device aimed at depriving him of the indemnity due under Article 34, paragraph 5, of the Staff Regulations in the event of the closure of the CDE, as the nature of his duties did not, in his view, require that he be retained in service. He therefore requested the payment of the indemnity provided for in the aforementioned paragraph 5 and an indemnity covering the period from 1 April to 30 June 2016. The Director-Curator dismissed this internal complaint on 5 October on the grounds that, like two other staff members, the complainant was part of the small team who had to remain in their posts after 31 March 2016. On 26 November 2015 the complainant requested the appointment of a conciliator as provided for in the Staff Regulations. In his report, delivered on 21 April 2016, the conciliator found that there was "no possibility of objectively arriving at a settlement of the dispute". On 20 July 2016 the complainant filed a complaint with the Tribunal, impugning the "decision" of 21 April 2016.

The complainant claims the payment of the indemnity provided for in Article 34, paragraph 5, of the Staff Regulations, as well as 225 euros for legal costs incurred during the conciliation procedure concerning the step increase and the additional indemnity of 4,766.48 euros, provided that the CDE must pay the social security contributions on the latter sum. He also requests a payment in respect of the balance of his leave entitlements and his reinstallation expenses in his country of origin, reimbursement of mission expenses (486.66 euros) incurred in Pointe-Noire (Republic of the Congo), moral damages, interest at the rate of 5 per cent per annum for the late payment of all the sums which he considers to be due to him and, lastly, costs in the amount of 15,000 euros.

In its reply, the CDE submits that the complaint is irreceivable with regard to the claims which are not directly related to the impugned decision and in respect of which the complainant has not exhausted internal means of redress and that, moreover, it is unfounded. The CDE also states that 225 euros have already been paid to cover legal costs. Given the "abusive and vexatious" nature of the complaint, it asks that the complainant be ordered to pay costs in the amount of 200 euros.

In his rejoinder, the complainant abandons his claim to the payment of 225 euros, since he acknowledges that he received this sum in the course of the proceedings. With regard to his claims regarding his leave balance and his mission expenses, the complainant states that partial payment was also made during the proceedings and he requests the payment of the outstanding amount.

In its surrejoinder, the CDE maintains its position, but asks that the complainant be ordered to bear the full costs of the proceedings.

CONSIDERATIONS

1. In the Joint Declaration adopted at its 39th Session, held on 19 and 20 June 2014 in Nairobi, Kenya, the ACP-EU Council of Ministers decided to proceed with the closure of the CDE and granted a delegation of powers to the ACP-EU Committee of Ambassadors to adopt the necessary decisions to that end. By its Decision No. 4/2014, the Committee authorised the Executive Board of the CDE to take, with immediate effect, all appropriate measures to prepare for the closure of the CDE and added that the closure plan must envisage the finalisation of the winding-up of the CDE by 31 December 2016. This led to the appointment of a Director-Curator who, after negotiations with the Staff Committee, drew up a closure plan which was adopted by the Executive Board at its meeting on 29 and 30 June 2015. Under this plan the appointments of most staff members were to be terminated on 31 March 2016. However, a small team, including the complainant, would be retained after that date. The complainant's employment ended on 30 June 2016. All staff members except for the complainant were entitled to the indemnity provided for in Article 34, paragraph 5, of the Staff Regulations.

2. Article 34 of the Staff Regulations of the Centre states:

"Apart from cessation on death, employment shall cease:

1. at the end of the period of notice following resignation by the staff member. [...];
2. at the end of the period of notice following notification by the Centre;

> The 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. [...];
>
> 3. at the end of the month in which the staff member reaches the age of 65 years.
> 4. In the interest of the efficient working of the Centre, a staff member's contract may be terminated in the case of incompetence or unsatisfactory service during the course of employment, in accordance with Article 55.
> 5. In the event of the closure of the Centre, due notably to the lack of funding, a staff member shall receive compensation of one month's gross basic salary per completed year of service, up to a maximum of twelve months. Such calculation shall be based on the staff member's last gross basic monthly salary.
> 6. In the event of redundancy of a post, the staff member concerned shall receive notice as provided for in paragraph 2 and shall receive compensation as defined in paragraph 5."

3. The Director-Curator considered that, as the complainant would reach the age of 65 on 5 June 2016 and the post of Financial Controller that he held would continue to exist until 31 December 2016, the complainant's employment would end on 30 June 2016 in accordance with Article 34, paragraph 3, without there being any need to apply paragraph 5 thereof.

4. The complainant alleges that the CDE discriminated against him with regard to the date chosen to determine his eligibility for the indemnity referred to in the aforementioned Article 34, paragraph 5. In his opinion, the date which should be taken into account is 31 March 2016, not 30 June 2016, and even though his employment continued for longer, depriving him of the indemnity constituted a breach of Article 34, paragraph 5.

Decision No. 4/2014 of the Committee of Ambassadors required the Executive Board to implement a closure plan which "shall envisage the finalisation of the winding-up of the CDE by 31 December 2016. The closure plan shall include the time necessary for making final payments, final reports, financial and statutory audits with a view to the winding-up of the CDE by 31 December 2016" (Article 2, paragraph 3, of the decision). In accordance with that decision, the closure plan did

in fact envisage that most operational activities would cease by 31 March 2016, but not all of them. In this connection, the Centre points to an independent consultant's contract, signed in September 2016 with a view to completing the Private Sector Development Programme (PSDP) in the Republic of Congo, as evidence that that programme had not closed down completely on the date when the aforementioned contract was signed. In addition, a small team comprising the Human Resources Officer, the Financial Controller and an accountant remained in their posts after 31 March 2016 to finalise the winding-up of the Centre by 31 December 2016 under the management of the Director-Curator.

At all events the complainant's contract was not terminated. It ended automatically on 30 June 2016, in other words at the end of the month in which he reached the age of 65, in accordance with Article 34, paragraph 3, of the Staff Regulations. Hence the contract did not end because of the CDE's closure. For this reason, contrary to the complainant's contention, Article 34, paragraph 5, does not apply.

Consequently, the plea that Article 34 of the Staff Rules has been breached is unfounded.

5. The second matter on which the complainant relies in contending that the refusal to pay him the closure indemnity involved discrimination is the fact that Mr A., whose contract was terminated for reasons other than the Centre's closure, did receive the aforementioned indemnity.

Mr A. was Head of the CDE's Regional Office in Yaoundé (Cameroon). He was recruited on 1 April 2011 under a contract for a fixed period of time, which was extended twice and expired on 31 March 2016. It could not be extended because the maximum length of successive contracts for a fixed period of time (five years) had been reached. However, he received a settlement agreement, Article 2 of which stated:

> "Bearing in mind the Employment Contract will be terminated due to the expiry of its term, the Staff Member accepts he is not entitled to any termination indemnity.

> Provided all PSDP Programmes administered by the Yaoundé regional office managed by the Staff Member are either terminated in the way planned by the CDE Executive Board or alternatively transferred to a third party, the CDE will upon the Effective Termination of the Employment contract, nevertheless pay the Staff Member a termination indemnity [...]."

The complainant points out that the amount of that indemnity matches that of the indemnity stipulated in Article 34, paragraph 5, of the Staff Regulations, which was negotiated with the Staff Committee when the closure plan was discussed. He also notes that, in a letter sent to the counsel of the Staff Committee by the Director-Curator, the latter describes Mr A.'s *quid pro quo* as "rather symbolic", since he was merely expected to do "what [he] is already required to do anyway, i.e. manage the Central Africa regional office in a professional and efficient way".

The Centre replies that in order to avert some substantial financial and logistical risks inherent in the recruitment and training of a new head of mission, while ensuring that the programmes managed by the Yaoundé Regional Office were completed by 31 March 2016, it was essential to encourage Mr A., who possessed all the requisite professional skills, to see to it that this was done. It denies that the indemnity under the settlement agreement was "symbolic", pointing out that the programmes in question could not be completed by 31 March 2016 and that, in accordance with the terms of the agreement, Mr A. did not receive the indemnity as he had not fulfilled his part of the bargain. That was why the Director-Curator signed a service contract with him on 21 April 2016 with a view to completing those programmes as quickly as possible. Article 7 of the contract specified that remuneration would comprise a lump sum of 5,000 euros plus a "success fee" in an amount equal to that laid down in the settlement agreement, provided that the programmes were completed by 31 May 2016.

It should be remembered that, according to firm precedent, "the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 1990, under 7, 2194 under 6(a), 2313, under 5, or 3029, under 14)" (see Judgment 3787, under 3).

It is plain from the evidence in the file that the complainant's situation was dissimilar to that of Mr A. It was in the context of a service agreement signed after the expiry of his employment contract that Mr A. was offered a "success fee" on condition that he managed to terminate a number of programmes by 31 May 2016. The fact that the amount of the "success fee" matched that of the indemnity mentioned in Article 34, paragraph 5, of the Staff Regulations does not alter the nature of the fee. The complainant, on the other hand, was bound by a contract for an indefinite period of time which was still in force and he was not under an obligation to complete a number of actions by 30 June 2016 because, after his separation, his duties were entrusted to a new financial controller under a service agreement. As the complainant's situation was not identical to that of Mr A., he is wrong to contend that the principle of equality was breached.

6. The complainant submits that he was subjected to a third form of discrimination in that Ms A., the Human Resources Officer, and Ms J.-F., a Finance and Administration Assistant, who remained in their posts until 30 September 2016, obtained the same benefits as those of their colleagues whose contracts ended on 31 March 2016, whereas the complainant, who also remained in his post beyond that date, did not. He also contends that a special clause was included in the settlement agreements of both of these colleagues to the effect that, if they were to die between 1 April 2016 and 30 September 2016, their heirs could claim the indemnity, which, according to the complainant, proves that Centre's closure date was 31 March 2016.

In this connection, it is sufficient to recall that the complainant's employment ceased because he had reached the age of 65, the situation covered by Article 34, paragraph 3, of the Staff Regulations, whereas the employment of the two above-mentioned colleagues ceased because the Centre closed, the situation covered by Article 34, paragraph 5, of the Staff Regulations. As the complainant's situation was different to that of his two colleagues, his argument based on a breach of the principle of equality fails.

7. The complainant raises a fourth plea of discrimination grounded on the fact that the appointment of Mr P.D., the Head of Administration, was terminated on 31 March 2016. In the complainant's opinion, if a staff presence was necessary after 31 March 2016, Mr P.D. and not the complainant should have been retained, because he (the complainant) had been obliged to perform duties which were the responsibility of Mr P.D. The Centre replies that, given the number of staff who remained in their posts and the fact that the Head of Administration reported directly to the Director-Curator, Mr P.D.'s duties could be performed by her.

The post of Financial Controller is objectively different to that of Head of Administration, owing to the specific rights and duties conferred on him by the Financial Regulation. It is therefore to no avail that the complainant relies on the principle of equality.

8. The complainant submits that the CDE abused its authority by requiring him to continue working when his presence was no longer necessary, solely in order to evade payment of the indemnity provided for in Article 34, paragraph 5, of the Staff Regulations.

In his complaint, the complainant draws attention to the fact that any financial operation involves four officials: the programme manager who initiates the operation, the financial controller who verifies operational and financial aspects before the operation is authorised by an authorising officer, the authorising officer who approves the payment and, lastly, the accounting officer who effects it (see Articles 14, 17 and 18 of the Financial Regulation adopted by Decision No. 5/2004 of the ACP-EU Committee of Ambassadors). The general thrust of his reasoning is that, since the involvement of the financial controller arises at the time when a decision to commit funds is taken and not when those funds are effectively disbursed, his function presupposes that the international organisation is active. As, in his view, the "operational activity" of the CDE ceased on 31 March 2016, he considers that thereafter at the operational and administrative levels there was no longer any work to be done which lay within his sphere of responsibility. In this connection, he refers to the verification of transactions which he had never had to

carry out in the past, and to his mission to Pointe-Noire which lay within the sphere of responsibility of the former Head of the Regional Office with whom the Director-Curator had signed a service contract for that purpose. According to the complainant, the only reason for sending him on this mission was to convince him that it was necessary to retain him in his post.

In its reply, the CDE submits that, contrary to the complainant's submissions, the Financial Controller's tasks go beyond simply verifying operational and financial aspects before an operation is authorised by the authorising officer. The Financial Controller plays a central role in the Centre's financial administration. That is why Article 14 of the Financial Regulation provides that, although for administrative purposes, the Financial Controller reports directly to the Director, she or he enjoys complete independence and is appointed by the Executive Board. The CDE also points out that in addition to Article 14, paragraph 4, which concerns the verification of operational and financial aspects before an operation is authorised by an authorising officer, the Regulation contains several articles (Articles 14, paragraph 6, 19, paragraph 4, 20, paragraph 3, 22, paragraph 2, 25, paragraph 1, 26, paragraph 6, 35, paragraphs 3 and 4, and 37, paragraph 5) which provide for action by the Financial Controller. It also points to the activity reports for 2011 and 2012 drawn up by the complainant as evidence that the Financial Controller's tasks go beyond verification prior to authorisation. Lastly, it mentions the activity report of the new Financial Controller who took over from the complainant, which, according to the Centre, shows that it was necessary to maintain this post. In the opinion of the CDE, all these factors highlight the important role of the Financial Controller, which guaranteed the institution's sound financial management up until the Centre's complete closure. With regard to the complainant's mission to Pointe-Noire, the CDE comments that it was undertaken in response to a decision by the Executive Board which intended "to request further explanations and clarification on the [...] eligible character (or not) of the expenses and spending made for the RFO CAF, PRCCE and PASDP CAM", which lay within the complainant's sphere of responsibility. It adds that while the mission might have been exceptional, so were the circumstances: as the CDE was on the point of being closed definitively,

it was legitimate to send the complainant, who was independent since he reported solely to the Executive Board, in order to verify some outstanding financing issues.

In his rejoinder, the complainant again states that he had already undertaken a first mission to Pointe-Noire in February 2016 and had submitted his report to the Director on 23 February 2016. In his view, the only remaining action concerned administrative and financial closure, for which he was not responsible. He also explains that his mission concerned solely the PRCCE programme in the Republic of Congo, and he expresses surprise that his report of 23 February 2016 was not approved by the Executive Board, given that it was couched in identical terms to his numerous previous reports which had not raised any problems. He considers that his report on his second mission provided no fresh insights. Moreover, he submits that apart from Article 14, paragraph 4, the provisions of the Financial Regulation cited by the CDE in its reply as conferring specific duties on the Financial Controller are either irrelevant or have become obsolete and are no longer applied. He reviews the points made in his own activity reports of 2011 and 2012 from which he infers, contrary to the CDE's submission, that he merely conducted verification prior to the Director's approval. In short, the complainant considers that the duties entrusted to him from 1 April 2016 to 30 June 2016 were not those of a financial controller and that his retention in his post after 30 March 2016 was contrived for the sole purpose of preventing him from benefiting from Article 34, paragraph 5, of the Staff Regulations.

The complainant, commenting on his successor's activity report, considers that none of the "approvals" given were within the competence of the Financial Controller as defined in Article 14 of the Financial Regulation. He infers from this that the appointment of a new Financial Controller after his separation in fact stemmed from a simple financial calculation: such an appointment, made solely in order to justify the need to retain a financial controller, cost the CDE much less than the amounts it would have had to pay the complainant pursuant to Article 34, paragraph 5.

In its surrejoinder, the CDE emphasises that the end of operations on 31 March 2016 is distinct from the legal closure of the Centre, which was scheduled for 31 December 2016. Consequently the plea regarding a breach of Article 34, paragraph 5, of the Staff Regulations is without legal foundation. Subsidiarily, the Centre puts forward the following arguments. First, some tasks concerned operations which had commenced before the operational closure on 31 March 2016 and which had to be finalised after that date. Secondly, the Financial Controller was also responsible for several tasks related to vital operations enabling the Centre to function until 31 December 2016 for winding-up purposes. As long as the organisation remained active – for whatever reason – financial operations had to be conducted in accordance with the Financial Regulation, in other words subject to verification by the Financial Controller prior to authorisation by the authorising officer (Article 14, paragraph 4, of the Financial Regulation). The CDE states that the Director-Curator could also ask the Financial Controller to carry out verifications of documents in order to check that operations financed by the budget had been correctly implemented (Article 14, paragraph 6, of the Financial Regulation), even after an operation had been authorised. While in the special context of the Centre's closure, the duties assigned to the complainant were not always those to which he was accustomed, they nonetheless came within the Financial Controller's remit. That function is entirely independent. In the CDE's view, there cannot therefore be any question of collusion between the Centre and the new Financial Controller to create the illusion that a financial controller was still being employed. The CDE asserts that the duties of the new Financial Controller were not in principle different to those performed by the complainant prior to 31 March 2016, before he adopted a considerably narrower view thereof.

9. Article 2 of Decision No. 4/2014 of the ACP-EU Committee of Ambassadors of 23 October 2014 reads:

> "[...]
>
> 2. The closure plan shall permit the closure of the CDE in an orderly manner, while respecting the rights of all involved third parties, and ensuring that the ongoing private sector support projects are completed

either by the CDE itself or by an entity to whom their management can be assigned.

3. The closure plan shall envisage the finalisation of the winding-up of the CDE by 31 December 2016. The closure plan shall include the time necessary for making final payments, final reports, financial and statutory audits with a view to the winding-up of the CDE by 31 December 2016."

In accordance with this provision, the closure plan drawn up by the Director-Curator and approved by the Executive Board was to be implemented in stages: closure of the operational programmes and termination of the appointments of most staff members by 31 March 2016, followed by a winding-up phase at the end of which the Centre was definitively closed on 31 December 2016. Only then did the Centre cease to exist legally. For that reason, the Financial Regulation remained in force until that date. This Regulation attaches particular importance to the position of Financial Controller, to whom it gives a wide degree of independence (Article 14, paragraphs 2, 3 and 5) and a number of essential duties. It also provides that each financial operation requires action by three persons whose duties are incompatible: the authorising officer, the controller and the accounting officer (Article 16, paragraph 2). Even after 31 March 2016, a number of financial operations plainly still had to be conducted. The closure plan therefore rightly made provision for the retention of three posts until 31 December 2016: a financial controller (in the person of the complainant until 30 June 2016 and a new financial controller after his separation), an authorising officer (in the person of the Director-Curator) and an accounting officer (in the person of an accounting assistant who continued to serve until 30 September 2016 and a new accountant after her departure).

There is an abuse of authority when an administration acts for reasons that are extraneous to the organisation's best interests and seeks some objective other than those which the authority vested in it is intended to serve (see Judgment 1129, under 8; see also Judgment 2885, under 12). This is not the case here. The closure plan provided for the retention after 31 March 2016 of a small team, including the complainant, precisely in order to proceed in a legally admissible and correct manner with the closure of the CDE required by the Joint

Declaration adopted by the ACP-EU Council of Ministers at its session on 19 and 20 June 2014 in Nairobi and Decision No. 4/2014 of the ACP-EU Committee of Ambassadors. The organisation's objective was therefore lawful.

The plea that there was an abuse of authority is unfounded.

10. The complainant then alleges a breach of the duties of good faith, care and respect of the staff member's dignity. He considers that, by obliging him to remain under contract solely in order to avoid payment of the closure indemnity provided for in the Financial Regulation, the CDE breached both its duty of care towards him and its duty to act in good faith when performing its own obligations. He argues that an international organisation must provide a staff member with work and, specifically, work consonant with her or his position. Its duty to act in good faith in performing its obligations and its duty to respect a staff member's dignity mean that it cannot regard his position as having only a financial purpose, or go so far as to require him to perform duties of no value to the organisation and which for him were degrading, given his level of responsibility.

The Centre replies that, on the one hand, the position of financial controller could not be abolished and the duties pertaining to it were not fictitious and, on the other, it was the complainant whose attitude manifestly changed as from 1 April 2016. Whereas he had previously demonstrated particular zeal in exercising his functions, particularly in supervising the general management of the CDE, as from 1 April 2016 he began to refuse to give his opinion on or to approve certain items, which he deemed not be his responsibility.

11. A steady line of precedent has it that "bad faith cannot be presumed, it must be proven. Additionally, bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose" (see Judgment 2800, under 21, cited in Judgment 3154, under 7; see also Judgment 3407, under 15). The complainant submits that his services were retained solely in order to avoid payment of the closure indemnity. The Tribunal cannot agree with this reasoning.

As stated above, the submissions in the file show that the organisation pursued a legitimate objective in ensuring optimal conditions for the Centre's closure, which is why a number of staff members were retained in their post after 31 March 2016. The plea regarding a breach of the principle of good faith may not be accepted any more than the plea concerning abuse of authority, with which it largely overlaps.

The complainant is seeking to obtain the indemnity referred to in Article 34, paragraph 5, of the Staff Regulations. He considers that, in the circumstances, the Centre should have made him redundant on 31 March 2016, in other words three months before his contract was due to expire in any case because he would reach the age limit (Article 34, paragraph 3, of the Staff Regulations), since that would have made him eligible for the indemnity. The right which the Tribunal must uphold is the right to remain in employment, not the right to termination thereof. The Tribunal considers that termination of employment must be an *ultima ratio* measure to which recourse may be had only after all other alternatives have been examined and found to be impracticable (see Judgment 2830, under 8(a)). At all events, continued employment must be preferred to redundancy.

The complainant criticises the duties which he was asked to perform between 1 April 2016 and 30 June 2016. In his opinion, they were inconsistent with his position and degrading. It is not for the Tribunal to substitute its assessment for that of the organisation which was being wound up as regards the specific tasks to be entrusted to a staff member. It is well established in the case law that a decision determining a staff member's duties is at the discretion of the executive head of an organisation and as such is subject to only limited review by the Tribunal. It may be set aside only if it is *ultra vires* or in breach of a rule of form or procedure, or shows some mistake of fact or of law, or has overlooked some essential fact, or if some obviously wrong inference has been drawn from the evidence, or if there is misuse of authority (see Judgment 1590, under 4). That is not the case here.

The CDE honoured its duty of care by retaining the complainant in his post until the expiry of his contract. The Tribunal fails to see how the tasks which he was given between 1 April and 30 June 2016 could

be regarded as degrading; they were all related to financial matters. Moreover, the Tribunal notes that the item 3.6 of the job description of the CDE Financial Controller's post, which the complainant appended to his complaint, specified that the Financial Controller was responsible for performing other duties assigned by the Directorate, inter alia.

Consequently, the plea that the duties of good faith, care and respect of a staff member's dignity were breached is rejected.

12. In his complaint, the complainant accuses the CDE of adopting retaliatory measures against him solely because he had filed an appeal. In his opinion, they consist in refusing to pay him either the sum of 225 euros provided for in the settlement agreement concerning a step increase which the complainant signed or a gross sum of 4,766.48 euros mentioned in the annex to the agreement, which he refused to sign on the grounds that it contained an article waiving any right of appeal.

In his rejoinder, the complainant adds two further factors which he terms "retaliatory measures": first, the three-month delay in paying the balance of his leave entitlements and the non-payment of four days of outstanding leave and, secondly, failure to pay for airline tickets for his return to his country of origin, or to pay the reinstallation allowance and relocation indemnity.

The CDE submits that these claims have been raised for the first time before Tribunal and are not directly related to the impugned decision, namely the decision not to pay the complainant the indemnity referred to in Article 34, paragraph 5, of the Staff Regulations. It considers that they are therefore irreceivable for failure to exhaust internal means of redress.

The Tribunal will not rule on this objection to receivability as these claims are, any case, unfounded for the reasons stated below.

As regards the sum of 225 euros, it has been paid in the meantime and the complainant has therefore withdrawn this claim. He provides no proof that the six-month delay in paying this sum stemmed from a desire of the CDE to retaliate.

As for the payment of the sum of 4,766.48 euros, the complainant considers that making it subject to an undertaking by him to forgo any appeal against the agreement concerning the award of this benefit is an inadmissible constraint. In his opinion, the CDE committed an abuse of authority by granting an indemnity only to those staff members who agreed to sign the settlement agreement and who waived their right of appeal. Such reasoning is tantamount to considering that any agreement providing for waiver of the right of appeal is unlawful. This is, however, inconsistent with the case law of the Tribunal, which held in Judgment 3867, under 5, that "in the context of a settlement, as is the case here, the infringement of an official's right to appeal or file a complaint is not unlawful. On the contrary, it is entirely acceptable for an official to waive such rights in return for the benefits gained from the settlement. This is, furthermore, common practice in the context of separation agreements, as here." Naturally, as this judgment makes clear, the agreement must make provision for benefits over and above those stemming from the applicable staff regulations, otherwise this would amount to undue pressure brought to bear on the official in return for nothing but the organisation's honouring of its own duties (see Judgment 2715, under 13; see also Judgment 3091, under 13). In the present case, Article 48 of the Staff Regulations provides for the possibility, but not the obligation, to adjust remuneration on a yearly basis. The proposal contained in the settlement agreement in question was hence more favourable to the complainant. The clause containing the waiver in the settlement proposed to the complainant is therefore lawful and cannot be regarded as undue pressure, or as a retaliatory measure, on those who refused to sign the agreement.

With regard to the non-payment of four days of outstanding leave the CDE justifies this as follows. The complainant applied for leave on 23 and 24 June 2016. Although this request was refused by the Director-Curator, he failed to appear for work, which is why the CDE considered that those two days should be deducted from his outstanding leave balance. The complainant also took leave on 20 and 30 May 2016, but regards these two days as working days, because he allegedly sent some work-related emails on both days. As the complainant was not asked to work on those two days, the CDE deducted them as well from his

outstanding leave balance. The complainant's claim with regard to the four days of leave for which he has not been compensated is therefore unfounded and a three-month delay in paying the other days of leave cannot be considered as proof of retaliation.

In respect of the reinstallation allowance and removal expenses, the CDE rightly submits that it is for the complainant to provide evidence that he has in fact moved back to his country of origin and to submit three quotations in order to enable the CDE to choose the company which will assist the complainant with his move (see Internal Rules Nos. R 17/CA/05 and R 18/CA/05). The submissions contain no evidence of relocation by the complainant, who indicates in the file that he is resident in Belgium. The complainant's claim is therefore unfounded and the position taken by the CDE cannot be regarded as a retaliatory measure.

The plea that retaliatory measures were taken against him is unfounded.

13. The Tribunal therefore rules as follows on the complainant's claims:

– the request for payment of the closure indemnity (141,153 euros) is unfounded;
– the sum of 4,766.48 euros mentioned in the annex to the proposed settlement agreement concerning the application of remuneration scales is not due, since it does not stem from a legal obligation but from a proposed settlement, which constitutes neither a retaliatory measure nor an abuse of authority, and which the complainant refused to sign;
– the payment of a balance of four days of leave (1,491.21 euros) and reinstallation expenses in his country of origin (87,288 euros) cannot be ordered, as the examination of the plea regarding alleged retaliatory measures shows that the complainant's request is unfounded;
– the outstanding Pointe-Noire mission expenses (27.58 euros) do not constitute injury related to the impugned decision, and the claim regarding the payment of this amount must therefore be dismissed as irreceivable in the context of this complaint;

– moral damages, interest on late payment and legal costs (15,000 euros) may not be granted because the complaint fails.

14. In its reply, the CDE presents a counterclaim that the complainant should be ordered to pay 200 euros for filing an abusive and vexatious complaint. It submits that despite the complainant's senior position within the Administration, he disregarded all the provisions applying to his situation in an attempt to obtain financial benefits to which he was not entitled. In its surrejoinder, it asks that the complainant be ordered to pay all the costs of the proceedings.

The Tribunal considers that there are no grounds in this case for granting this request.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The CDE's counterclaim is dismissed.

In witness of this judgment, adopted on 14 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

GIUSEPPE BARBAGALLO PATRICK FRYDMAN YVES KREINS

DRAŽEN PETROVIĆ