

S. (No. 2)

v.

WTO

125th Session

Judgment No. 3914

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. S. against the World Trade Organization (WTO) on 23 October 2015, the WTO's reply of 18 February 2016, the complainant's rejoinder of 24 March and the WTO's surrejoinder of 9 May 2016;

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 challenges the decision not to renew his project-based fixed-term contract.

Facts relevant to this case are to be found in Judgment 3868, delivered in public on 28 June 2017 on the complainant's first complaint.

In 2012, due to budgetary restrictions imposed by Member States coupled with a significant increase in dispute settlement activity, the WTO Secretariat hired a number of specialised lawyers under "project-based contracts" to work on one or two specific cases for the dispute settlement divisions. Project-based contracts were made subject to the Short-Term Staff Rules in order to accommodate budgetary constraints, but they were of longer duration than ordinary short-term contracts (which are limited to 11 months) in order to cover the duration of the

panel proceedings. They also provided for certain additional rights and benefits which derogated from the Short-Term Staff Rules, such as the right to bring dependents to Geneva, a recruitment allowance and a removal allowance, in order to attract dispute settlement lawyers with a certain degree of experience and expertise in trade law.

The complainant joined the WTO in January 2013 as a Dispute Settlement Lawyer at grade 7 in the Rules Division under a project-based contract ending on 31 December 2014. The contract stated that it was subject to the terms and conditions described in the Short-Term Staff Rules and that it was for a fixed duration of two years maximum.

By an email of 12 November 2014 the complainant was informed that, as discussed with his Director at the end of September 2014, his short-term contract would finish as scheduled in December 2014.

On 22 December 2014 the complainant requested the Director-General to review that decision. His request was dismissed by a letter of the Deputy Director-General dated 29 January 2015, which was received by the complainant on 18 February.

The complainant lodged an appeal with the Joint Appeals Board (JAB) against that decision on 17 March, arguing that he had been the victim of a campaign of bias and discrimination which culminated in the non-renewal of his contract. He alleged that he was not given reasonable notice nor adequate reasons for the non-extension of his contract. Lastly, he challenged the terms of his appointment, arguing that the WTO Staff Rules should have applied to his contract. He asked that the decision be set aside and claimed material and moral damages, as well as costs.

In its report of 9 July 2015 the JAB concluded that, for the purposes of the appeal, the complainant's contract was subject to the Short-Term Staff Rules. It considered that, having signed the contract without expressing any reservations about its terms and conditions, the complainant could not challenge its terms beyond the time-limit for lodging a request for review. It recommended that all his claims be dismissed and that the decision of 29 January 2015 be maintained. The Director-General followed those recommendations in his decision of 30 July 2015. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award him material damages in the amount of 300,000 Swiss francs, moral damages in the amount of 100,000 francs and costs in the amount of 10,000 francs. He also seeks exemplary damages.

The WTO submits that the complainant is time-barred from challenging the terms of his project-based contract. It asks the Tribunal to reject all the complainant's claims and objects to an award of costs on the grounds that the complainant did not use professional assistance. The WTO considers that the complainant's claims are devoid of merit and that his submissions contain unacceptable, offensive and unjustified statements.

CONSIDERATIONS

1. The central question which this complaint raises is whether the WTO's decision not to renew the complainant's fixed-term project-based contract to work in its dispute settlement divisions when it expired on 31 December 2014 was unlawful and should be set aside.

2. The complainant joined the WTO on 7 January 2013 on that contract, which was subject to the Short-Term Staff Rules, except for Rules ST04.2 and ST10.1. Rule ST04.2 provides, among other things, that a contract under the Short-Term Staff Rules "shall be of less than 12 months' duration for any one contract [and] [...] carry no expectation of renewal or of conversion to any other type of contract". Rule ST10.1 sets out the requirements to be observed when a staff member holding such a contract resigns. In the impugned decision, dated 30 July 2015, the Director-General accepted the JAB's recommendations to dismiss the complainant's internal appeal against the decision not to renew the contract.

3. The complainant challenged the initial decision not to renew his contract, which he had received by an email dated 12 November 2014. He stated that the decision was "based on a mixture of bias and discrimination, coupled with a measure of retribution" because he had

challenged an earlier decision; that he was not given the required notice of non-renewal of the contract; that his legitimate expectation of renewal was frustrated because he was not given reasons for the decision; and that the WTO had “taken advantage of the lack of job security associated with [his] so-called two-year fixed-term contract [which was] subject to [the Short-Term Staff Rules], which is both an aberration and an anomaly, and an abusive practice which contravenes the otherwise clear provisions of the WTO Staff Regulations on fixed-term and regular contracts”.

4. It is settled principle in the Tribunal’s case law that a decision not to renew a fixed-term contract is within the discretion of the executive head of an international organization and that such a decision is subject to only limited review. Accordingly, the Tribunal has stated as follows in Judgment 3448, consideration 7:

“It is well established in the Tribunal’s case law that the non-renewal of a fixed-term contract is discretionary. Such a decision is subject to only limited review by the Tribunal, which respects the freedom of an international organization to determine its own staffing requirements and the career prospects of staff members. A person who is employed on a fixed-term contract does not have a right or a legitimate expectation to a contract extension. Accordingly, the Tribunal will not interfere with a decision not to extend such a contract unless the decision was made without authority, or in breach of a rule of [form or] procedure, or was based on a mistake of fact or of law, or overlooked some essential fact, or amounted to an abuse of authority.”

5. In challenging the impugned decision, the complainant contends that it involved procedural and substantive errors of law and fact. He sets out the grounds of challenge as follows:

- “(1) The JAB fails the test of independence and impartiality both in terms of its formation (presumed bias) and from the perspective of its actual findings (actual bias); and, accordingly, on the grounds of its credibility gap alone, its findings are devoid of both authority and believability.
- (2) The JAB was wrong to conclude that, by failing to exercise his right to contest the terms and conditions of his own recruitment as prescribed in his letter of appointment, the complainant had forfeited any claim to have his project-based contract deemed subject to [WTO’s Staff Rules], as expressly stipulated in the [WTO’s Staff Rules] in relation to contracts of 12 months’ duration or more.

- (3) The JAB was wrong to consider the belated email confirmation of non-renewal of the complainant's contract as both timely enough notification of non-renewal and a sufficient statement of the reasons thereof by reason only of the statement therein that 'your ... contract will finish as scheduled in December' coupled with the reference in the subject line to 'end of short-term contract (December)'.
- (4) The JAB was wrong to summarily dismiss the linkages between the complainant's claim of bias and discrimination and non-renewal of his contract inasmuch as it is [his] case that it was as a result of bias and discrimination that he was starved of all meaningful assignments during the second half of 2014, and thereby deprived of any justification that he might have had to have his contract extended.
- (5) The JAB was wrong to treat [his] contract as being devoid of any 'justifiable expectation' of a renewal and accordingly conclude that a 7-week notice period was good enough to comply with the two months' minimum requirement specified in WTO Staff Rule 104.3."

6. Inasmuch as the JAB's findings and recommendations were followed by the Director-General in the impugned decision, the above grounds are directed equally against the impugned decision.

7. Ground 4 is unfounded as the complainant provides no evidence to show that his contract was not renewed because of discrimination and/or bias in that he was starved of meaningful assignments or at all. The Tribunal notes that, notwithstanding that the burden to prove discrimination and bias rests with the complainant, the WTO provides evidence which shows that the contracts of other Rules Division staff members which were project-based were not renewed when they expired in 2014 and 2015. The WTO states that they were not renewed because, as in the case of the complainant, the projects to which the contract holders were assigned had come to an end and in a few cases contracts were extended to facilitate work on ongoing projects or for compassionate reasons.

8. The WTO raises receivability as a threshold issue in relation to what is, in effect, ground 2 of the complaint. It urges the Tribunal not to consider the issue whether the complainant's contract was wrongly subjected to the Short-Term Staff Rules. This, according to the WTO,

is because the complainant did not challenge the subjection of his contract to the Short-Term Staff Rules within the forty days required under Staff Rule 114.3, which provision was expressly mentioned in his contract.

9. The Tribunal notes that the clause in the complainant's contract relevantly states: "Your attention is drawn to Staff Rules 114.3 and 114.5, which [...] provide for the maximum time-periods within which you may request a review of, or appeal, the terms and conditions of your recruitment." The complainant did not contest the subjection of his contract to the Short-Term Staff Rules until he raised it in his request for review dated 22 December 2014 and subsequently in his internal appeal. The Tribunal therefore holds that the JAB and the Director General correctly concluded that this claim was then time-barred. Ground 2 of the complaint is therefore irreceivable.

10. In grounds 3 and 5 of the complaint the complainant contends that his rights to appropriate notification and to be provided with the reasons for the non-renewal of his contract were adversely affected, because his contract was subjected to the Short-Term Staff Rules, rather than to the WTO's Staff Regulations and Staff Rules. The Tribunal observes that Staff Regulation 10.4 states that in the case where a contract expires in accordance with its terms, the staff member shall be given notice. Additionally, the complainant notes that Staff Rule 111.2(b) expressly confers on a staff member who holds a fixed-term contract of more than twelve months' duration, as he did, the right to at least two months' written notice of non-renewal of contract.

11. It is convenient to re-state that the complainant held a fixed-term contract, albeit that it was subject to the Short-Term Staff Rules. The case law states that even where a staff rule or regulation provides that such a contract shall expire automatically and without prior notice on the given expiration date, that does not exempt an international organization from notifying a staff member of the non-renewal of her or his contract (see, for example, Judgment 675, under 9 to 11). A staff

member should also be informed of the reason for the non-renewal of such a contract (see, for example, Judgment 1154, under 4).

12. The complainant stated in his internal appeal that even if it were admitted that the Short-Term Staff Rules applied to his contract, the impact on the contract would be unchanged, because in the absence of any express notification requirements in the Short-Term Staff Rules, the requirement in Staff Rule 111.2(b) must apply to him. Staff Rule 111.2(b) states as follows:

“If a fixed-term contract is not to be extended, the expiration date shall be confirmed to the staff member in writing wherever possible three months beforehand, and in any event no less than two months beforehand.”

The complainant also states that irrespective of the obligation to give appropriate notice of non-renewal, the WTO also had an obligation to state the reasons for not renewing his contract but failed to do so.

13. It is noteworthy that in its reply to the complaint, the WTO accepts that “[t]he legal status of [a] contract under WTO Staff Regulations and Rules – project based short-term contract or fixed-term contract – is immaterial since in practice the same requirements regarding notice and adequacy of reasons apply to both”. In arriving at this conclusion, the WTO states that “project-based contracts are silent as to the notice period owed to the contract holder by the WTO. In those circumstances, whether the Tribunal applies its jurisprudence on ‘reasonable notice period’ or follows Staff Rule 111.2(b) of the WTO Staff Rules applying to staff on fixed-term or regular contracts, the notice period is essentially the same; from two to three months. The WTO considers that it gave three months’ notice to the Complainant [...]. [T]he WTO is mindful of the jurisprudence of the Tribunal on statement of reasons as far as both short-term and fixed-term contracts are concerned. While the WTO agrees with the JAB that the Complainant could not have any reasonable expectation that his project-based contract would be extended, it also considers that a proper statement of reasons was given to the Complainant [...]” The WTO therefore invites the Tribunal to move directly to address the questions of whether the WTO provided reasonable notice, and a proper statement of reasons, for the non-renewal of the complainant’s project-based contract.

14. The Tribunal accepts that the WTO was required to provide reasons for the non-renewal of the complainant's contract. It is also determined that inasmuch as the complainant's contract was subjected to the WTO's Short-Term Staff Rules, and not to the WTO's Staff Regulations and Staff Rules, a particular form of notification was not required. The Tribunal also finds that the notification was timely.

15. As far as providing reasons is concerned, the complainant contends that the WTO provided no or no adequate reason for the non-renewal of the contract. With regard to the duty to provide a reason and the adequacy of that reason, the Tribunal stated as follows in Judgment 1817, consideration 6:

“A staff member needs to know the reasons for a decision so that he can act on it, for example by challenging it or filing an appeal. A review body must also know the reasons so as to tell whether it is lawful. How ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore. If little or no explanation has yet been forthcoming, the omission may be repaired in the course of appeal proceedings, provided that the staff member is given his full say.”

The reasons may also be provided to a staff member at a meeting (see Judgment 3662, under 3 to 5). The Tribunal has also stated in Judgment 1750, consideration 6, that “[t]he case law does not require that the reasons be stated in the text that gives notice of non-renewal”.

16. The JAB found, in effect, that there was no evidence from which to conclude that the complainant was provided with the reason for the non-renewal of his contract at a meeting held at the end of September 2014. The Tribunal however notes that in his comments, dated 18 June 2015, on the WTO's responses to questions posed by the JAB, the complainant stated, among other things, that “[i]t was in the course of a meeting held on September 25, 2014, that [Mr H.] referred to ‘pending changes in DGO policy’ that would prevent him from allocating the Complainant to any cases that would spill over into the New Year”. The Tribunal also notes that the text of the written notification of 12 November 2014 states as follows:

“As your Director discussed with you at the end of September 2014, your short term contract will finish as scheduled in December. At this time I would invite you to set up a meeting with your focal point, [...] to discuss the process for leaving the organization and she will be able to answer any of your questions.”

17. This was notification that the complainant’s contract would expire in accordance with its terms on 31 December 2014, which date was the natural end of the contract. This was confirmed in the communication dated 29 January 2015, which informed the complainant that his request for review had failed. That letter also stated that the complainant was made aware upon recruitment that his project-based contract was a short-term one which was intended to attract skilled young professionals to be assigned to specific cases for the duration of each case.

Moreover, in its reply, dated 22 April 2015, to the complainant’s appeal before the JAB, the WTO made statements that elucidated the nature of the complainant’s project-based contract and showed that such a contract was intended to be only for the duration of the project for which the contracting party was recruited. It highlighted, for example, that under such contracts entry level was at grade G.7 rather than at the normal entry level grade G.6 for professional staff. It also highlighted that persons who were recruited under such contracts were not required to compete for recruitment and that they were paid a monthly non-residence allowance. It was also highlighted that such contracts are not usually renewed unless work on the subject case is ongoing or unless the person was assigned to another dispute settlement case. It was further stated that at his meeting with Mr H. at the end of September 2014, the complainant had requested assignment to another case but was informed that there was no other case to which he could be assigned. He thereupon asked whether that meant that his contract would not be extended and received an answer in the affirmative.

18. The Tribunal determines that the foregoing statements in the communications and in the internal pleadings permitted the complainant to know that his contract would expire in accordance with its terms and would not be renewed, because it was for the duration of a specific

project which had ended and he was not earmarked to work in another project. In all of the circumstances these were adequate reasons, which were provided in keeping with the case law set out in consideration 15 above. Accordingly, the complainant's plea that he received inadequate reasons for the non-renewal of his contract is unfounded.

19. Ground 1 of the complaint mirrors a similar claim in the complainant's first complaint, which the Tribunal considered in Judgment 3868. In the present complaint the complainant submits that the JAB "fails the test of independence and impartiality both in terms of its formation (presumed bias) and from the perspective of its actual findings (actual bias); and, accordingly, on grounds of its credibility gap alone, its findings are devoid of both authority and believability."

According to the complainant, presumed bias is inherent in the JAB's composition and structure as its members are "in a position of subservience" to the WTO and are more concerned with the security of their employment. He insists that "[n]o matter how unimpeachable their credentials, panel members would have needed a remarkable sense of integrity, and exceptional moral courage and fortitude, to find against their employer and risk the full measure of its wrath". As to actual bias, he argues that evidence of this abounds in the "multiple contradictions" and in the "legal stunts that the JAB routinely resorts to in order to account for inexcusable acts or omissions on the part of the [WTO]" with respect to some of its findings in the internal appeal. These, according to the complainant, include its finding concerning the notification and the statement of reasons for the non-renewal of his contract; its finding that discrimination and bias did not influence the non-renewal and its taking issue with the tone of his submissions. The Tribunal dismisses these submissions as speculative conjecture as well as unsubstantiated conclusions. Ground 1 of the complaint is therefore unfounded.

20. The complainant has provided no evidence of circumstances that show that he is entitled to exemplary damages. That claim will accordingly be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ