T.

v.

ITER Organization

129th Session **Judgment No. 4219**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. T. against the ITER International Fusion Energy Organization (ITER Organization) on 12 May 2018 and corrected on 22 June, the ITER Organization's reply of 8 October, the complainant's rejoinder of 18 December 2018 and the ITER Organization's surrejoinder of 17 April 2019;

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, who had been seconded to the ITER Organization, challenges the decision to end his secondment and the failure to investigate his harassment allegations.

The complainant was seconded for the first time to the ITER Organization in 2009. He then worked from July 2014 to June 2016 under a contract of employment with the ITER Organization. In 2016 he signed a secondment form by which he was seconded by the Commission of the European Communities (the European Commission) to the ITER Organization, from 1 July 2016 to 30 June 2021.

On 5 January 2018 the Director of the Human Resources Department of the ITER Organization informed him that, "in consideration of [his] prolonged absence from work since 6 February 2017 due to medical reasons, the Director-General ha[d] requested [his] recall by the European Commission". By an email of 14 February 2018 the European Commission informed him that he was recalled to the European Commission effective 16 April.

On 15 February 2018 the complainant appealed to the Director-General against the decision of 5 January to terminate his secondment. He alleged that the decision was unlawful given that he was not consulted as required under Article 4.3 of the Agreement on the Secondment of Commission Officials to the Organization (hereinafter the "Secondment Agreement"), and paragraph 7 of the secondment form. The reason given to justify the request to recall him was not valid, as his illness was service-incurred. His illness was a consequence of the harassment to which he had been subjected. He therefore asked that his illness be recognised as service-incurred and that he be compensated. He also requested the Director-General to immediately carry out a "formal investigation of his case" and that his allegations of harassment be investigated. He asked to be compensated for the material and moral damage he had suffered and to be awarded costs.

On 20 March 2018 the Director-General replied that he was a seconded staff member, and that his status was governed by Chapter III of the Staff Regulations, entitled "Provisions Applicable to Seconded Staff". Article 31.1 of the Staff Regulations provided an exhaustive list of the provisions that were applicable to seconded staff. Article 26 on appeals was not amongst them. His appeal was consequently irreceivable. With respect to the allegations of harassment (concerning facts that had occurred in 2013 and 2014), he noted that the ITER Organization had received no formal complaint of harassment.

On 12 May 2018 the complainant filed a complaint with the Tribunal impugning the decision of 20 March. However, in his complaint brief, he also indicates that he impugns the notification of 14 February 2018 (which he received on 2 March) by which the European Commission

informed him that he was recalled effective 16 April 2018, along with the earlier preliminary notice of 5 January 2018.

The complainant asks the Tribunal to declare unlawful the decision to "terminate his assignment" with the ITER Organization and have him recalled by the European Commission, as expressed in the notification dated 14 February 2018 and preceded by the email of 5 January 2018, and to set aside the decision of 20 March 2018. He claims compensation for the material damages resulting from the decision to "terminate his assignment" with the ITER Organization, including loss of income and expenses, and for the moral damages he suffered as a consequence of the decision to "terminate his assignment". He asks the Tribunal to order the Organization to acknowledge that he was harassed, to acknowledge that his illness resulted from harassment and to compensate him for any material and moral damages resulting from the harassment. Lastly, he seeks an award of costs.

The ITER Organization asks the Tribunal to find that it is not competent to hear the complaint. Subsidiarily, it asks the Tribunal to dismiss the complaint as irreceivable, or as devoid of merit.

CONSIDERATIONS

1. This complaint was filed on 12 May 2018. It is desirable to identify at the outset the decision or decisions said to be impugned in these proceedings. The complaint form identifies the impugned decision as one made on 20 March 2018 and communicated to the complainant on the same day. This is a reference to a letter of that date from the Director-General to the complainant that primarily concerns a purported appeal by the complainant in a letter of 15 February 2018 to the Director-General and, additionally, touches on allegations of harassment made in that letter of 15 February 2018. The subject matter of the purported appeal is described in a number of ways in the letter of 15 February 2018 but, at base, it was a decision of the Director-General to request the complainant's recall by the European Commission. The Director-General's decision in relation to the purported appeal was that the complainant had no right of appeal.

2. The letter of 15 February 2018, in addition to being a notice of appeal, was a request that the Director-General "immediately carry out a formal investigation of [his] case" which, in context, would have included a request for an investigation of allegations of harassment made by the complainant. The response of the Director-General in his letter of 20 March 2018 to this request was that the defendant organisation had never received a formal complaint of harassment and that, accordingly, "there [was] no failure from the [defendant organisation]".

3. In the complainant's brief, he also impugns the notification from the European Commission dated 14 February 2018, apparently received on 2 March 2018, recalling him. The grounds advanced by the complainant for impugning the decision to request his recall and the decision to do so are twofold. Firstly, he argues that he was not consulted before the request was made. Secondly, he argues that the justification for the decision to request his recall was inadequate. Insofar as his allegations of harassment are concerned, the complainant argues they have been ignored and should have been investigated.

4. The defendant organisation contends in its reply that the Tribunal is not competent to deal with this complaint and that it is irreceivable. It also requests the Tribunal to make a procedural ruling limiting the proceedings in the first instance to a consideration of these two contentions. It is unnecessary to make such a procedural ruling. Mostly, when a party challenges the competence of the Tribunal or argues that a complaint is irreceivable, the Tribunal will treat these issues as threshold issues which need to be addressed before, if it becomes appropriate, addressing the merits of the case if the challenge to competence or receivability fails.

5. In support of its argument that the Tribunal is not competent, the defendant organisation points to the fact that from June 2016 and thus at the time the decision was made to request the recall of the complainant, the decision to recall was made and the grievance about harassment was advanced to the Director-General, the complainant did not have a contract of employment with the defendant organisation.

It points to case law to support the proposition that the existence of such a contract between the organisation and the individual concerned is necessary to attract jurisdiction in relation to a complaint by that individual referring, in particular, to Judgments 231 and 3247. It is common ground that, as a matter of fact, after June 2016 (and the same was true before July 2014) the complainant was working at the defendant organisation pursuant to a secondment agreement signed by the complainant on 26 April 2016. It is not in issue that the complainant was not paid a salary by the defendant organisation, did not participate in its pension and medical insurance schemes and that, to the extent that the Staff Regulations applied, the application was limited, the defendant organisation could not dismiss him as an individual working on a secondment agreement and had no disciplinary authority over him.

6. The ultimate legal foundation to the argument concerning the Tribunal's competence is Article II, paragraph 5, of the Tribunal's Statute, which relevantly provides that the Tribunal is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any international organization which has submitted to the jurisdiction of the Tribunal. The defendant has submitted to the Tribunal's jurisdiction but the European Commission has not, assuming that was possible.

7. In relation to the challenge to the impugned decision, insofar as the Director-General concluded the complainant had no right of appeal, the following comment can be made. There can be no doubt that there is no general right of appeal available to staff of international organisations deriving, at least impliedly, from their terms of appointment to challenge decisions with which they are aggrieved irrespective of the provisions of applicable staff rules or regulations. However, even if the staff rules or regulations do not provide for an appeal, they cannot preclude the initiation of proceedings in the Tribunal (see, for example, Judgment 2312, consideration 3).

8. In the present case, the right of staff to appeal is conferred by Article 26 of the Staff Regulations of the ITER Organization that

is found in Chapter II, entitled "Directly-Employed Staff". Chapter III is entitled "Provisions Applicable to Seconded Staff". That chapter commences with a provision that identifies the Articles in the Staff Regulations to which the seconded staff "shall be subject". There may be some scope for debate about what this means viewed in isolation, but having regard to the structure of the Staff Regulations as a whole its purpose is clear. It is to enumerate those Articles which do apply to seconded staff and, by necessary implication, those which do not. The enumerated Articles do not include Article 26. Thus the Director-General was correct in deciding that the appeal to him concerning the complainant's recall was irreceivable.

9. However, the complainant relies on his right to come directly to the Tribunal. As noted earlier, that right exists apart from a provision in the staff rules or regulations concerning the right of appeal. Thus, apart from two matters, the complainant is probably entitled to challenge by way of complaint to the Tribunal the decision of the Director-General to request his recall. One of the two matters was whether the complainant was an official of the ITER Organization for the purposes of Article II of the Tribunal's Statute. This is discussed shortly in a different context. The other matter is whether the complaint was brought within the 90 days specified in Article VII of the Tribunal's Statute. The ITER Organization argues it was not. The complainant was informed of the Director-General's decision to seek his recall on 5 January 2018. He then had 90 days in which to file a complaint with the Tribunal. The complaint was in fact filed on 12 May 2018. This was well outside the 90-day period. That period expired on 5 April 2018 and, by then, the complainant was aware he could not appeal internally (as informed in the letter dated 20 March 2018). Accordingly the complaint, insofar as he challenges directly in the Tribunal the decision of the Director-General to request his recall, is irreceivable. The decision of the European Commission to make the recall is not justiciable before the Tribunal as it has not, as noted earlier, submitted to the Tribunal's jurisdiction, even if it was possible.

10. In relation to the challenge of the impugned decision insofar as the Director-General rejected the complainant's request to investigate his claims of harassment, it is necessary to consider whether this involves the non-observance, in substance or in form, of the terms of appointment of the complainant or the Staff Regulations of the ITER Organization, and the anterior question of whether the complainant was an official of the ITER Organization for the purposes of Article II of the Tribunal's Statute, bearing in mind that when he requested that his allegations of harassment be investigated he was on secondment from the European Commission. Additionally, a potentially complicating factor is that at the time the complaint was filed with the Tribunal, the recall of the complainant had been perfected. That is to say, it took effect on 16 April 2018, a little less than a month before the complaint was filed.

11. It is to be recalled that the reason given by the Director-General for rejecting the request to examine the complainant's allegations of harassment was that no formal complaint had been made. This conclusion appears to be based on the provisions of the Policy against Harassment, Discrimination and Abuse of Authority which came into effect on 14 March 2018. However the complainant's request to the Director-General to investigate the claim of harassment was made almost one month earlier on 15 February 2018. At that time, the 2017 Code of Conduct applied, and while it foreshadowed the March 2018 Policy, it did not prescribe any particular method for initiating a complaint of harassment. But an international organisation has a duty to investigate claims of harassment (see, for example, Judgment 3608, consideration 6) and this is no less so for the ITER Organization (see Judgment 3766, consideration 8). Of some importance is that the 2017 Code of Conduct declared that it "applie[d] to all staff members (directly employed or seconded) regardless of their location and responsibilities within the ITER Organization". Casting the operation of the 2017 Code of Conduct so widely is understandable. It was to ensure that everyone working within the ITER Organization, irrespective of status, was obliged to give effect to the Code and was able to benefit from it.

12. The Tribunal now turns directly to the question of whether the complainant was an official for the purposes of the Tribunal's Statute. In relation to seconded staff, it has been said by the Tribunal that "[a]s a general rule, the effect of secondment is to suspend the contractual relationship between the releasing agency and the employee, who retains the right to return to the releasing agency upon expiry of the secondment term without having to seek other employment. During secondment, [she or]he is subject to the staff regulations and rules of the receiving agency" (see Judgment 2184, consideration 4). Ultimately, of course, the status of a seconded employee has to be assessed having regard to the specific arrangements in place concerning the secondment. One case where a seconded employee was not viewed as an official or employee of the receiving organisation is Judgment 3247. Additionally, as the Tribunal observed in Judgment 2918, consideration 11, "[s]econdment is, in essence, a tripartite agreement which, ordinarily, involves an agreement between the person seconded and the receiving organisation, at least as to some matters". In that case the applicability of the Staff Regulations depended on whether an individual had concluded an employment contract with the organisation and the Tribunal found the seconded staff had not. Additionally in that judgment reference was made to Judgment 703, which established that secondment does not necessarily preclude the person concerned from becoming a staff member of the organisation to which she or he is seconded.

13. In the present case, it is necessary to refer to several documents to address the complainant's status. The first is a document entitled "Administrative Arrangement between the European Commission and the [ITER Organization] for the joint implementation of the ITER project on secondment in the interest of the service and assignment of officials to [the ITER Organization]". Its stated purpose is to provide a legal framework by which European Commission officials are made available to the ITER Organization. The Administrative Arrangement identifies the modalities for making the European Commission officials available to the ITER Organization. It says the modalities depend on the type of post to be occupied. There appear to be two broad categories

of seconded officials, namely, those "seconded in the interest of the service" and those who are seconded within the meaning of the ITER Organization Staff Regulations, the so-called "officials assigned". The Administrative Arrangement provides that officials "seconded in the interest of the service" are "employed and directly paid by the ITER Organization" and that the ITER Organization Staff Regulations "shall be applicable" to them during the duration of the secondment (see Article 3). It also provides that for "officials assigned" a secondment agreement shall be concluded between the European Commission and the ITER Organization (see Article 10).

14. The European Commission and the ITER Organization signed a document entitled "Secondment Agreement" in May 2009. The Agreement provides that it enters into force on signature by the contracting parties and shall remain in force for the duration of the Administrative Arrangement (see Article 10.1). It also provides that the Director-General shall draw up a secondment form, which is to be signed by the ITER Organization, the European Commission and countersigned by the seconded official (Article 2 of the Secondment Agreement and the Annex to the Agreement). Articles 3 and 4 govern the relations between the seconded official, the European Commission and the ITER Organization. Article 3 provides that an official seconded to the ITER Organization shall be considered as being in active employment in the European Commission, while Article 4 relevantly provides that a seconded official shall be a "staff member" of the ITER Organization under the management authority of the Director-General and shall be subject to the ITER Organization Staff Regulations. Article 4 also provides indications as to the recall of the seconded official.

A secondment form was signed in July 2009, by the European Commission, the ITER Organization and countersigned by the complainant. It refers to the Secondment Agreement signed in May 2009, and provides information on the starting date of the assignment, the duration of the assignment and the position to which he was assigned. This was, in substance an agreement between the complainant, the ITER Organization and the European Commission, and also provides that during his secondment the complainant shall comply with the internal

rules and regulations of the ITER Organization including, but not limited to, safety, security and environmental protection to be observed on the premises of the ITER Organization. The complainant signed other secondment forms thereafter. The secondment form that is relevant for the present purposes was signed by the complainant on 26 April 2016. It was operative at the time the complainant wrote to the Director-General on 15 February 2018. It contained the following provision:

> "2. During the secondment, the Seconded Official shall be a staff member of the ITER Organization and shall be under the administrative and technical authority of the Director-General. In its relations with the Commission the seconded Official shall be considered as being in active employment in the Commission services according to the provisions of Article 35 a) of the [European Communities] Staff Regulations."

15. It should be noted that on 24 November 2016 the European Commission and the ITER Organization signed an amendment to the Secondment Agreement. The amendment concerned was about the need to specify that when the European Commission assigns officials to the ITER Organization according to European Union Staff Regulations, it corresponds to a secondment in the meaning of the ITER Organization Staff Regulations. It also addresses the need to harmonise the ITER Organization and the European Commission's provisions concerning recall of seconded officials.

16. It is clear from the foregoing that the complainant was, on 15 February 2018, a member of the staff of the ITER Organization. What is also clear is that he was bound by and assumed the burdens and also the benefits of the 2017 Code of Conduct. It is not entirely beyond doubt that the complainant was an official for the purposes of the Tribunal's Statute. But in the circumstances just described, it is appropriate for the Tribunal to proceed on the basis that the complainant was an official, was entitled to pursue a complaint of harassment, was entitled to have it investigated and can challenge in the Tribunal decisions made on his harassment complaint. The Director-General was in error in refusing to initiate the investigation of his complaint within the ITER Organization.

17. It is true that shortly after the events in February and March 2018, the complainant was, in fact, recalled and this occurred before he filed his complaint with the Tribunal. However the Tribunal has recognised that former officials can seek redress in the Tribunal when, inter alia, the former official is seeking to enforce rights which had arisen during the currency of her or his employment with the international organisation concerned (see, for example, Judgments 3505, consideration 3, and 3915, consideration 3).

18. While this complaint is receivable and one aspect of the complainant's case is well founded, the question of relief is problematic. In relation to the alleged harassment, he seeks an order directed to the defendant organisation "to recognize that he has been a victim of harassment and compensate him for the damage he has suffered as a consequence of the harassment, in the amount of [euros] 50,000". Even if it was appropriate, as a matter of principle, to make such an order, there is insufficient material before the Tribunal to undertake an assessment of whether harassment has occurred. Also, in the circumstances of this case, given that the complainant has left the ITER Organization, it would not be advisable to direct the ITER Organization to investigate his allegations (see Judgments 3639, consideration 9, or 3935, consideration 8). However, he is entitled to moral damages for the failure of the ITER Organization to do so in response to his letter of 15 February 2018. The Tribunal assesses those damages in the sum of 6,000 euros. The complainant was partially successful and he is entitled to costs, assessed in the sum of 4,000 euros.

DECISION

For the above reasons,

1. The ITER Organization shall pay the complainant 6,000 euros moral damages.

2. The ITER Organization shall pay the complainant 4,000 euros costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ