

L. I. (Nos. 1 and 2)

v.

GCF

134th Session

Judgment No. 4495

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Ms A. L. I. against the Green Climate Fund (GCF) on 21 February and 2 April 2020 respectively, the GCF's consolidated reply of 24 July, the complainant's rejoinder of 23 October, the GCF's surrejoinder of 23 December 2020, the complainant's additional submissions of 1 March 2021 and the GCF's final comments of 4 June 2021;

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 her fixed-term appointment upon its expiry.

The complainant joined the GCF in December 2015 as Head of Human Resources, initially under a consultancy contract. As from 1 September 2016, she was granted a three-year fixed-term appointment in the same post, ending on 31 August 2019. The rules governing the extension of fixed-term appointments at the GCF are set out in Section C.I of the Administrative Guidelines on Human Resources (AGHR). Paragraph 13.2 of that Section provides that a recommendation on the extension or non-renewal of a fixed-term appointment must be

submitted to the Executive Director by the Head of Division/Office no later than four months prior to the expiry of the appointment, together with the staff member's comments.

On 4 April 2019 a new Executive Director took office. On 16 May 2019 the Deputy Executive Director met with the complainant and informed her that her appointment would not be renewed upon its expiry because, as part of the GCF's new strategic direction that the new Executive Director had decided upon, the Human Resources function would have a different focus and a person with a different profile or skill set was needed as Head of Human Resources. The position would therefore be advertised with a modified job description. The Deputy Executive Director's recommendation to that effect was submitted to the Executive Director that same day. A copy was provided to the complainant, who was invited to submit her comments.

After having met with the Executive Director on 23 May 2019 to discuss the matter, the complainant submitted her written comments, objecting to the recommendation. However, the Executive Director notified her by letter of 7 June 2019 that he had decided to accept the Deputy Executive Director's recommendation and that her appointment would therefore end on 31 August 2019.

On 13 June 2019 the complainant filed a grievance challenging that decision, but she simultaneously requested that the grievance review procedure be suspended pending the outcome of a mediation process that she had also requested. Shortly afterwards, she withdrew from the mediation process and sought permission to proceed directly to the Tribunal. This request was denied, but the Executive Director agreed to waive the grievance review step so that the complainant could bring her appeal directly before the Staff Appeals Committee (SAC). The complainant lodged her appeal on 28 July 2019, alleging breach of a legitimate expectation of renewal, arbitrary and non-valid reasons for non-renewal, failure to take into account her personal situation and breach of good faith.

The SAC issued its report on 11 February 2020. A majority of its members found that the grounds relied on by the complainant were without merit and recommended that the relief claimed should not be granted, but that she should nevertheless be paid the equivalent of three months' salary to compensate for the fact that the recommendation on extension or non-renewal of her appointment had not been made at least four months prior to its expiry, as required under the applicable provisions. The minority considered that this failure to comply with the four-month time limit had given rise to a legitimate expectation of extension and that the appeal should therefore be allowed in part. The minority recommended paying her 12 months' salary and benefits. The SAC also made various general recommendations regarding the rules governing contract extensions.

On 21 February 2020 the complainant filed her first complaint with the Tribunal, impugning the implied rejection of her internal appeal which she inferred from the fact that she had not received a final decision on the appeal within the time-frame contemplated by the GCF's rules.

Shortly afterwards, she received a letter of 20 March 2020 informing her of the Executive Director's decision to reject her appeal in its entirety. He did not accept the majority's recommendation that three months' salary should be paid, as he considered she had already received adequate compensation in respect of the delay in submitting the recommendation on non-renewal of her appointment. The complainant then filed her second complaint, impugning this express decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her actual or notional reinstatement, with retroactive effect from the date of separation, so as to facilitate her enrolment in the GCF's group medical insurance plan. She claims material damages for loss of a valuable opportunity to further her career, in an amount equal to the salaries, allowances and benefits she would have received had her appointment been extended for a further three years or, alternatively, until the end of February 2021, when she would reach the age of 65. She requests that the GCF be ordered to enrol her and her spouse in its medical and life insurance plans under the usual conditions for retirees

or, failing that, to pay material damages based on the cost of obtaining comparable medical and life insurance. Additionally, she claims material damages in an amount equal to the GCF's share of contributions to the pension fund, consequential damages, and moral damages in the amount of 75,000 euros. Lastly, she claims costs in the amount of 30,000 euros and such other relief as the Tribunal considers just and proper.

The GCF asks the Tribunal to dismiss the complainant's first complaint as irreceivable on the grounds that it was filed prematurely, and her second complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. The complainant commenced working for the GCF as a consultant in December 2015. On 1 September 2016 she commenced a three-year fixed-term appointment expiring on 31 August 2019. The position she held was Head of Human Resources. She was notified on 7 June 2019 that her contract would not be extended and on 31 August 2019 she separated from the organisation. By a statement of appeal lodged on 28 July 2019, the complainant appealed against the decision not to extend her fixed-term contract. On 11 February 2020, the Staff Appeals Committee published a report which reflected a division of opinion amongst the members on the outcome of the appeal and divergence on what was appropriate ancillary relief. However, and notwithstanding the recommendations of the Committee, the newly appointed Executive Director dismissed the appeal in its entirety by letter dated 20 March 2020. This is the decision challenged in these proceedings.

2. In the brief filed with her second complaint, the complainant advances four arguments in support of her challenge to the impugned decision. The first is that the decision was *ultra vires* involving an abuse of authority; the reasons for the decision were invalid. The second is that the GCF had not acted in good faith and breached its obligations of mutual trust. The third is that the GCF had breached a rule requiring renewal proposals to be made four months prior to the expiry of the

contract. The fourth concerns the delay in the resolution of her internal appeal.

3. In order to address the first issue that the decision was *ultra vires* involving an abuse of authority and invalid reasons, it is necessary to consider events immediately following the appointment of a new Executive Director who commenced at the GCF on 4 April 2019. A little over a month later, on 7 May 2019, the GCF entered into a consulting service contract with an Irish company for what was described in the contract as “Onboarding of the new Executive Director – Additional services”. The Irish company produced a draft (dated 8 May 2019) “Human Resources Strategic Plan 2019-2022”. Clearly, having regard to the detail in the draft plan (which, in fact, was marked as a second draft), an inference can be drawn that the Irish company was involved in work under the contract before the contract was formally executed. On 8 May 2019 a copy of the draft was sent to the GCF’s Chief Financial Officer and Director of Support Services for comment. The draft included the following commentary:

“At the GCF the HR function has received substantial criticism for failing to fully understand its business goals and strategy for achieving these goals, and how to hire, retain and inculcate these goals to best serve GCF stakeholders. Simultaneous to introducing this new HR strategy the new Executive Director is implementing a programme to realign roles at middle and senior management level”

and:

“In seeking a new Chief of HR, it is critical that the candidate has a high level of expertise in aligning major HR interventions and their relevance to business performance. This calls for expert HR thinking and identifies the requisite interventions and, equally important, how they fit together to leverage organisation performance.”

4. On or about 15 May 2019, the Irish company sent to the Executive Director two documents, one of which was the “Head of Office of HR role profile”, which was a four-page document outlining in detail, under the heading “Director – Office of Human Resources”, the role, duties and responsibilities of both the Office of Human Resources and the Director and the required skills and experience for the Director.

5. On 16 May 2019 the Deputy Executive Director met with the complainant and informed her that her contract would not be renewed. She was told, according to the minutes of the meeting: “HR will now focus predominantly on mobility, creating efficiencies and deploying [a] new type of project cycle. The Fund will need an individual with different skill sets and a decision has been made that [the complainant’s] contract will not be renewed”. In the material before the Tribunal there is a draft email of the same date from the Deputy Executive Director to the Executive Director, copied to the complainant. After noting “[i]n accordance with our discussions on the strategic direction in which you wish to see the Fund concentrate its energies, specifically on the implementation of projects and the internal reorganization to achieve this objective”, the former advises the latter that “we have reviewed the skills set of the current Head and the Job Description for the position. We are of the view that her current skills set would not enable us to achieve the desired results from her [...]”. It is not entirely clear who the “we” is a reference to but, importantly, it reflected the views of the Deputy Executive Director. In its reply the GCF proceeds on the basis that this email was sent, which is not later challenged by the complainant and, in any event, is a fact recounted by the Executive Director in his letter to the complainant of 7 June 2019 informing her there would be no extension.

6. On 23 May 2019 the complainant met with the Executive Director. A transcript of that meeting is in the material before the Tribunal. The substance of the record is that initially the complainant spent some time (recorded on four pages of closely typed text) explaining her employment history and personal circumstances and, additionally, what she perceived (as an HR professional) to be more general problems with staff in not renewing her contract in the face of an expectation that its renewal would be consistent with current practice. She indicated she believed the decision not to extend her contract was arbitrary and was critical of what was probably the email of 16 May 2019 referred to in the previous consideration. The complainant did say that she did not want to stay and work for the Executive Director if he did not want her there, though this appears to have been said in the context

of opening negotiations for a settlement package to facilitate her departure.

7. The Executive Director then spoke and outlined his position. He said he wanted someone to come from the outside who would have a totally new perspective on the GCF's human resources strategy. The organisation, he said, was moving from a phase of recruiting people to a different phase which is about training, retraining people and (the transcript is incomplete at this point) mobility. He said: "you (meaning GCF) need a new management perspective – might not be better but it's new. And I think it's important for an organisation to have people who have new management perspective and so that's basically, that's the rationale for me to not extend the contract ... do not read anything beyond that one." The complainant then challenged the view that HR had only been doing recruitment saying: "[w]e've set up a whole talent section and learning and development" but then said she did not want to argue with the Executive Director and "if you think that's what you want, then I'll go. I'll stand aside", again probably as a prelude to some form of settlement negotiations as she hoped would occur.

8. In her pleas, the complainant focuses on the statement of the Executive Director that the reason reflected in the comment "might not be better but it's new", and says it was not a valid reason for not extending her contract. However, this statement cannot be taken absolutely literally and in isolation as it has to be viewed in the broader context of the review initiated by the Executive Director of, amongst other things, the objectives and goals of HR and its Head and the advice and input he had been receiving, particularly from the Irish company. The complainant relies upon Judgment 3990 which, factually, contains some parallels with the present case and observations seemingly supportive of the complainant's arguments. However, importantly, as the GCF points out in its reply, that case did not concern a decision not to renew a fixed-term contract but rather its termination before its expiry. Moreover, in that case, the Staff Regulations quite plainly circumscribed the grounds on which termination could occur. The facts in that case did not support a conclusion that any of those circumscribed grounds were met.

9. The GCF correctly refers to the limits on the role of the Tribunal in considering decisions not to renew a contract as summarised in Judgment 3586, consideration 6:

“Firm and consistent precedent has it that an organization enjoys wide discretion in deciding whether or not to extend a fixed-term appointment. The exercise of such discretion is subject to limited review because the Tribunal respects an organization’s freedom to determine its own requirements and the career prospects of staff (see, for example, Judgment 1349, under 11). The Tribunal will not substitute its own assessment for that of the organization. [...] [A]n employee who is in the service of an international organization on a fixed-term contract does not have a right to the renewal of the contract when it expires and the complainant’s terms of appointment contained a similar provision.”

10. The circumstances of this case are somewhat unusual. It is not a case in which the question of whether a senior official’s contract should be renewed or extended was being addressed against a background of stability in the most senior ranks of the organisation with settled policies including HR policies. In the present case there was a new Executive Director appointed shortly before a decision had to be made about the extension of the complainant’s contract. He was plainly focused on, amongst other things, the functioning of the HR Unit and its Head as part of his vision for the future of the organisation informed by external advice. In this respect, the answer to the question of whether the complainant’s contract should be renewed could reasonably be influenced by that vision and the views of the new Executive Director about how it might best be achieved, including his assessment of the suitability of the complainant informed by advice he had received. A substantial part of the complainant’s case is, in substance, that she was qualified to continue in the role as Head of HR even in the face of the new vision (while challenging whether in truth it was new) including demonstrating that she had the qualifications, skills and experience required of the position as set out in a vacancy notice of 25 June 2019. But this line of argument and analysis effectively invites the Tribunal to enter the territory which it has eschewed, namely substituting its own assessment for that of the organisation.

11. Three further detailed arguments should be noted or addressed. Much of the complainant's argumentation in the brief on the topic of whether the decision was *ultra vires*, an abuse of authority and involved reasons which were invalid, involved a critique of the analysis and reasons of the SAC. However, ultimately whether the approach of the SAC was flawed has no obvious bearing on the case the Tribunal must decide referable to the pleas of the parties in these proceedings. One matter referred to in this narrative is whether the complainant had a legitimate expectation that her contract would be renewed, a matter considered and relied on by the SAC. It is not entirely clear whether this is adopted by the complainant in her brief. However quite clearly in the rejoinder it is not, the complainant describing the question, as addressed in the pleas of GCF, as "wholly irrelevant to the factual and legal issues at stake".

12. The complainant also argues that any "new vision" of the recently appointed Executive Director would have required approval by the GCF Board, referring to Paragraph 23(e) of the Governing Instrument for the GCF and later to the preamble of the Administrative Guidelines on Human Resources. This proposition may be doubted and, as the GCF argues, Paragraph 23(a) of the Governing Instrument is more apt to apply to the adoption and implementation of a policy impacting on the functions and role of the HR Unit, which is in the hands of the Secretariat, led by the Executive Director. In any event, a decision had to be made by the new Executive Director about whether the complainant's contract should be renewed and had to be made in a timely way given the date on which the existing contract would come to an end. His authority to make a decision in that respect should not be regarded as conditional upon formal approval or ratification by the Board of a policy he was then implementing.

13. The complainant has not established that the decision not to renew her contract was *ultra vires*, involved an abuse of authority or involved reasons that were invalid.

14. This leads to a consideration of the complainant's second ground, namely that GCF had not acted in good faith and breached the duty of mutual trust. The complainant's pleas on this ground expressly pick up the pleas made in relation to the first ground (and, in any event, there is a measure of overlap between the grounds) and for reasons already given, should be rejected. The additional arguments on this topic, that the complainant's dignity and reputation were not respected, that the departure notice might have caused staff to have speculated the complainant had committed some wrongdoing, that there may have been discrimination against the complainant because of her age or gender and that no objective reasons were given for the non-renewal of the contract, are rejected. Save for the last argument, there is no foundation for the asserted fact or consequence beyond mere speculation.

15. As to whether there were objective reasons (to use the language of the complainant's pleas) given for the non-renewal of her appointment, the short answer is there were and they were to be found in the note of 16 May 2019, what was said at the meeting on 16 May 2019 with the Deputy Executive Director as recorded in the minutes and with the Executive Director at the meeting on 23 May 2019 as recorded in the transcript. Reasons also appear in the letter of 7 June 2019 informing the complainant her contract would not be extended and her appointment would expire on 31 August 2019. The obligation to give reasons for a non-renewal have been variously described as providing "valid reasons" (see Judgment 3769, consideration 7), and not "arbitrary or irrational" reasons (see Judgment 1128, consideration 2). While the reasons given in this case may be contestable, they were not of a character to sustain a conclusion they were, for example, not valid or arbitrary or irrational. As the Tribunal observed in Judgment 3586, consideration 6: "the Tribunal's scope of review in a case such as this is limited. Firm and consistent precedent has it that an organization enjoys wide discretion in deciding whether or not to extend a fixed-term appointment. The exercise of such discretion is subject to limited review because the Tribunal respects an organization's freedom to determine its own requirements and the career prospects of staff (see, for example, Judgment 1349, under 11). The Tribunal will not substitute its

own assessment for that of the organization. A decision in the exercise of this discretion may only be quashed or set aside for unlawfulness or illegality in the sense that it was taken in breach of a rule of form or procedure; or if it is based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 3299, under 6, 2861, under 83, and 2850, under 6).”

16. The complainant has not established that in deciding not to renew her contract, the GCF did not act in good faith and breached the duty of mutual trust.

17. The third ground advanced by the complainant was that the GCF had breached a rule requiring renewal proposals to be made four months prior to the expiry of the contract. It is not contested by GCF that it did, in this respect, breach paragraph 13.2 of Section C.I of the Administrative Guidelines on Human Resources. The proposal not to renew was forwarded by the Deputy Executive Director to the Executive Director on 16 May 2019 whereas it should have been no later than 30 April 2019. The complainant contends because of this admitted breach, she is entitled to moral damages. It is not at all obvious she is. Fairly plainly the time frame for submission of such a proposal contemplates that some time will be taken in making a decision about the proposal. The time frame in which a decision must be made is not specified. However, the GCF argues, in effect, that the relevant question is whether the complainant was given reasonable notice of the non-renewal of her contract. The GCF says she was, because she was given notice on 10 June 2019, nearly three months before the expiry of her contract on 31 August 2019. The complainant does not join issue on this question. Moral damages for the bare breach of paragraph 13.2 of Section C.I of the Administrative Guidelines are not justified.

18. The fourth argument advanced by the complainant concerns the delay in the resolution of her internal appeal. The delay of approximately three months was not egregious. No moral damages are justified.

19. One further matter should be addressed. The written evidence (and commentary thereon) concerning the consultancy of the Irish company, its input into the decision ultimately made by the new Executive Director not to renew the complainant's contract and related material, was furnished by the GCF in its surrejoinder. This led to a request for and the consequential provision of, further submissions by both the complainant and the GCF. The GCF explained in its surrejoinder why it reserved this evidence and commentary to the surrejoinder, in the following way:

“As already demonstrated (reply § 67), the Defendant owes no further explanations to the Complainant regarding the new organizational strategy, insofar as she is not responsible thereof (Judgment No. 3698, consideration 2). This is why the Defendant only provided the Complainant with the relevant reasons for her to understand the objective considerations underlying the discretionary decision not to renew her fixed-term appointment upon its expiry. However, inasmuch as the Complainant persists in her plea (rejoinder § 18 to 22), the Defendant deems fit to adduce the following comments and evidence, for the sake of comprehensiveness.”

20. This reasoning is disingenuous. In her brief, the complainant drew attention to the absence of evidence about changes of approach to HR policy which might have justified the non-renewal of her contract. For example, in paragraph 72 of the brief she says: “However, the GCF did not produce to the SAC any documents regarding the *‘revision and innovation of the current HR management system and tools’*, the *‘new vision’* or the alleged *‘many announcements’* to staff. Complainant is unaware of any actual steps or actions having been undertaken internally. She certainly was not included in any of those efforts if in fact any took place.”

The paragraphs 18 to 22 of the rejoinder referred to in the quoted passage in consideration 19 above, included and repeated the contention in the brief that there was no written evidence of a new approach for human resources management. It was incumbent upon the GCF, if it wished to demonstrate to the contrary by documentary evidence, to

furnish that evidence in its reply rather than wait until the surrejoinder. It would be clear from the Tribunal's reasoning that this material has been influential in reaching the conclusion it has on the merits of the case. Importantly, from the complainant's perspective, she has been deprived, by probably six months, of a judgment resolving her complaint as a result of the time taken to provide the additional submissions concerning the documentary material irregularly adduced by the GCF in its surrejoinder. The approach of the GCF involved a manifest lack of transparency and a failure to deal with the complainant fairly. Moreover, the additional period of uncertainty together with the undoubted stress of the delay as well as the probably considerable inconvenience of preparing additional submissions justifies an award of compensation to the complainant. The complainant is entitled to moral damages which she seeks in her supplementary submissions. They are assessed in the sum of 15,000 euros.

21. While her success in these proceedings has only been limited, she is nonetheless entitled to an order concerning some of her costs which are assessed in the sum of 5,000 euros.

22. In addition to the complaint that has been considered to this point, the complainant filed another earlier complaint. Receivability is raised by the GCF in relation to that complaint and aspects of the complaint considered to this point. However, it is unnecessary to address these pleas. The two complaints should be joined so that one judgment can be rendered. Save for the moral damages referred to in consideration 20 concerning the conduct of these proceedings and the costs, both complaints should be dismissed.

DECISION

For the above reasons,

1. The GCF shall pay the complainant 15,000 euros moral damages.
2. The GCF shall pay the complainant 5,000 euros costs.
3. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 3 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ