

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

G.
v.
ESO

137th Session

Judgment No. 4741

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms V. G. against the European Southern Observatory (ESO) on 6 August 2021 and corrected on 8 and 20 September, ESO's reply of 10 January 2022, the complainant's rejoinder of 14 April 2022 and ESO's surrejoinder of 14 July 2022;

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

Considering the letter sent by the Organisation to the complainant on 24 March 2021, which the Tribunal ordered to be disclosed in its request for further submissions of 11 September 2023;

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 non-renewal of her fixed-term contract.

The complainant joined ESO in May 2016 as a paid associate under a contract lasting several weeks. On 29 June 2016 she was given a one-year fixed-term contract, which in March 2017 was extended until 31 December 2017. Her contract was subsequently renewed to cover 2018, then 2019. By a letter dated 4 November 2019, ESO offered the complainant a "final" extension of her fixed-term contract until 30 September 2020, which she accepted on 14 November 2019.

Between May 2017 and August 2020, the complainant applied unsuccessfully for several posts at ESO. From 10 February to 30 November 2020, she took maternity leave then parental leave, so her fixed-term contract was extended for the corresponding period.

On 26 February 2021 the complainant sent a letter to the Director General, stating that she had been treated unfairly by ESO for several years. In particular, she referred to her unsuccessful applications and to allegedly rejected requests for training, to the treatment she had received during her maternity leave and on her return from parental leave, and to the abuse of paid associate contracts in her regard. She concluded her letter by stating: “Taking into account the amount of evidence gathered, I am considering the different options. For this reason and before taking any action, I wanted to first report all the above to ideally find an amicable settlement. I would gladly discuss with you how we can correct these errors. Stay assured that I will always be motivated to continue my work at ESO [...]”.

On 19 March 2021 the Director General replied to the complainant that he had found no evidence of ill treatment or error in the application of the Organisation’s rules, but that he was “pleased to note however [that the complainant] remain[ed] motivated to work for ESO, and recogni[sed] [the Organisation] as a good employer”.

By a letter of 24 March 2021, the Head of Human Resources informed the complainant that, following her email in which she had cancelled her parental leave for March 2021, her “current contract extension for the equivalent duration of Parental Leave [had] subsequently also been reduced, and [would] now expire on 18 July 2021”.

On 26 March 2021 the Head of Human Resources, referring to “the original decision outlined in the letter dated 4 November 2019, to offer [the complainant] a final contract extension up until 30 September 2020, followed by statutory contract extensions relating to [the complainant’s] Maternity Leave and Parental Leave”, informed the complainant that her contract would end on 18 July 2021, as stated in the letter of 24 March 2021.

On 4 May 2021 the complainant filed an appeal “against [the] 19 March 2021 decision [...], as implemented by the 24 and 26 March 2021 decisions, to not renew [her] fixed-term contract, not select [her] for the positions [she] applied to [and] not allow [her] to be trained”. In her appeal, she stated the following: “Should you consider that your 19 March 2021 decision cannot be challenged internally and that I should directly submit a complaint to the [...] Tribunal, please let me know as soon as possible so that I can meet the relevant time-limit”.

On 11 May 2021 the Director General replied to the complainant that, under Staff Rule VI 1.02, the decision not to renew her contract should be challenged directly before the Tribunal, but that the internal appeals body was competent in respect of the other aspects of her appeal. However, he stated that the Organisation could waive the requirement for internal remedies to be exhausted, should she so request. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 11 May 2021 and to order her reinstatement as well as either the renewal of her fixed-term contract or an award of an indefinite contract. Failing reinstatement, she seeks payment of a sum equivalent to two years of her last salary. She also seeks compensation in an amount to be determined by the Tribunal for the moral injury she considers she has suffered owing to the Organisation’s mistreatment. Lastly, she claims costs.

ESO asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. In the complaint form filed on 6 August 2021, the complainant impugns what she refers to as the decision taken on 11 May 2021 by the Director General of ESO. The impugned decision was sent to the complainant in reply to her appeal of 4 May 2021, which she described as being directed against the Director General’s earlier decision of 19 March 2021, as implemented by the Organisation’s subsequent decisions of 24 and 26 March 2021. In her complaint brief,

the complainant states that, in her view, the Director General's impugned decision of 11 May 2021 "rejected her appeal against the non-renewal of her fixed-term contract and informed her that she could refer the matter to the Tribunal". However, in the brief the complainant acknowledges that the decision of 11 May 2021 informed her that "appeals against decisions not to renew fixed-term contracts may not be dealt with in the internal appeal procedure but must be submitted directly to the Administrative Tribunal".

2. The Organisation argues that the complaint is irreceivable as it was not filed within the 90-day period stated in Article VII, paragraph 2, of the Statute of the Tribunal.

3. Article VII, paragraphs 1 and 2, of the Statute of the Tribunal provides as follows:

"1. A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations.

2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published."

Staff Rules VI 1.02 and VI 1.04 provide as follows:

"VI 1.02

There shall, however, be no appeal against any decision:

[...]

– not to renew or extend a contract;

[...]

VI 1.04

A member of the personnel may appeal to the Administrative Tribunal of the International Labour Organisation against the final decision of the Director General."

4. According to ESO, the Organisation in fact informed the complainant on 4 November 2019 that that her fixed-term contract would be renewed for the last time until 30 September 2020, to which she expressly agreed on 14 November 2019. The Organisation submits

that, although the complainant and the Director General exchanged correspondence on 26 February and 19 March 2021, the Director General's letter of 19 March 2021, contrary to what the complainant asserts, did not constitute a "decision" but was merely the expression of an opinion. ESO maintains that neither the complainant's letter of 26 February 2021 nor the Director General's letter of 19 March 2021 related to the non-renewal of the complainant's contract. Furthermore, again according to ESO, the complainant was clearly informed by the letters of 24 and 26 March 2021 at the latest of the Organisation's decision not to renew her fixed-term contract. When the complainant filed a complaint with the Tribunal on 6 August 2021, it was therefore no longer possible for her to challenge the decision of 4 November 2019, the opinion expressed on 19 March 2021 or the letters of 24 and 26 March 2021, since the prescribed 90-day period had by then expired for several weeks. Lastly, ESO submits that the letter of 11 May 2021 did not constitute a new decision reopening the 90-day time limit because it merely informed the complainant of the available means of redress.

5. Firstly, in the light of the submissions and the documents in the file, the Tribunal observes that the complainant held a fixed-term contract with ESO, extended for the last time on 4 November 2019. She accepted that "final contract extension" in writing on 14 November and never subsequently challenged it. The Tribunal notes in this respect that, in the letter of 26 March 2021 which the Organisation sent to the complainant concerning the administrative arrangements for the end of her contract, ESO specifically informed her that it was referring to the initial decision of 4 November 2019 granting her a "final" contract extension until 30 September 2020, which had been followed by the statutory extensions applicable owing to her maternity leave and parental leave. The letter of 26 March 2021 also confirmed to the complainant the information contained in the letter of 24 March 2021, according to which the last day of her contract would be 18 July 2021.

6. Secondly, the Tribunal notes that the exchange of correspondence between the complainant and the Director General on 26 February and 19 March 2021 cannot be read or understood as relating to the non-renewal of her fixed-term contract. In the first place, the complainant's letter of 26 February 2021 did not refer to the non-renewal of her contract. In the second place, the letter of 19 March 2021 did not concern the non-renewal of her fixed-term contract either.

7. Thirdly, the Tribunal observes that, in the appeal which she submitted to the Director General on 4 May 2021, the complainant expressly emphasised that her letter constituted an appeal against the Director General's decision of 19 March 2021, as implemented by the decisions of 24 and 26 March 2021, not to renew her fixed-term contract. The Tribunal notes in this regard that, in paragraph 26 of the letter, the complainant stated that, should the Director General consider that "the 19 March 2021 decision" could not be challenged internally and that she should instead refer the matter to the Tribunal, she would appreciate being notified as soon as possible so as she could comply with the applicable time limit.

8. Fourthly and finally, the Tribunal notes that the Director General's reply of 11 May 2021 to that appeal, which the complainant designates as the impugned decision in the present case, simply states, in respect of the non-renewal of her fixed-term contract contested in the appeal of 4 May 2021, that under Staff Rule VI 1.02 an internal appeal against a decision not to renew or extend a contract is not possible and that such a decision can only be challenged directly before the Tribunal.

9. In the first place, the Tribunal does not consider that the Director General's reply of 11 May 2021 in fact conveyed an administrative decision since it merely informed the complainant of the possible means of redress. Her complaint against that decision is therefore irreceivable.

Indeed, in Judgment 3847, considerations 5, 6 and 8, delivered in a case that bears several similarities to the circumstances of the present complaint, the Tribunal recalled the following in respect of what is a

final decision for the purposes of Article VII, paragraphs 1 and 2, of its Statute and the receivability of a complaint filed before it against a decision of ESO's Director General not to extend a fixed-term contract:

“5. The Tribunal finds that the decision contained in the letter dated 27 May 2015 was the final decision for the purposes of paragraphs 1 and 2 of Article VII of the Tribunal's Statute. This is because although Chapter VI of ESO's Staff Rules provides for appeals against decisions of the Director General to be made through an internal appeals procedure, Staff Rule VI 1.02 excludes a decision not to renew or extend a contract from appeal. Such a decision is appealable directly to the Tribunal within ninety days under paragraph 2 of Article VII of the Tribunal's Statute.

6. It is noteworthy that the complainant seeks to set aside both the decision of 27 May 2015 and that of 20 August 2015 [...] The letter of 20 August 2015, however, merely informed her, correctly, that she had no right to seek to have the decision of 27 May 2015 appealed through the internal process. It did not convey any administrative decision. Accordingly, the aspect of the first complaint which seeks to set aside the decision of 20 August 2015 is unfounded.

[...]

8. The question whether the [...] complaint is receivable turns on whether, pursuant to paragraph 2 of Article VII of the Tribunal's Statute, the complainant filed it within the stipulated ninety days following the decision not to extend her contract.”

10. In the second place, assuming that the present complaint filed by the complainant on 6 August 2021 should be regarded as concerning the non-renewal of her fixed-term contract, the Tribunal considers that it is clear from the findings in considerations 5 to 7, above, that the complainant could no longer have been in any doubt by 26 March 2021 that the Organisation had decided not to renew her appointment. Indeed, by referring specifically only to the “decisions” of 19 March 2021 and 24 and 26 March 2021, the complainant herself acknowledged in her appeal of 4 May 2021 that this is how she had understood the situation.

11. However, the aforementioned Staff Rules VI 1.02 and VI 1.04 provide that an internal appeal may not be lodged against a decision not to renew or extend a contract and that a member of the personnel may challenge a final decision of the Director General before the Tribunal.

Contrary to what the complainant asserts in her submissions, the Tribunal considers that the wording of those provisions is clear. That is, moreover, what the Tribunal already recalled in Judgment 1734, consideration 3, with regard to Staff Rule VI 1.02, the very provision on which this dispute turns, emphasising the following:

“VI 1.02 is quite plain. An internal appeal being ruled out, [the complainant] should have thought of filing a complaint against non-renewal. If he could not understand the article on his own, he was free to get advice.”

12. It follows that, under Article VII, paragraph 2, of the Statute of the Tribunal, since the complainant did not file her complaint within 90 days of the Organisation’s decision not to renew or extend her fixed-term contract, it is also irreceivable from that standpoint. The Tribunal has recalled on many occasions that, “[w]ith respect to Article VII, paragraph 2, of the Tribunal’s Statute, the Tribunal’s case law requires strict adherence to the ninety-day time limit on the grounds that time limits are an objective matter of fact and that strict adherence is necessary for the efficacy of the whole system of administrative and judicial review of decisions” (see Judgments 4354, consideration 7, 3947, consideration 5, and 3559, consideration 3).

13. Furthermore, the complainant’s allegation that she was misled as to the potential exercise of her right of appeal by the Organisation’s allegedly ambiguous, cryptic or misleading reply in the impugned decision of 11 May 2021 is unfounded. Her assertion that the Organisation had set a procedural trap for her is not borne out by the submissions and the evidence, and the Tribunal cannot accept the complainant’s argument that this letter had the effect of setting a fresh time limit for challenging the decision not to renew her fixed-term contract. Moreover, the documents in the file show that the complainant was well aware of the relevant provisions of the Staff Rules.

As the Tribunal has repeatedly stated in its case law, officials are expected to know their rights and the rules and regulations to which they are subject, and ignorance or misunderstanding of the law is no excuse (see, in this regard, Judgments 4673, consideration 16, 4573, consideration 4, 4324, consideration 11, and 4032, consideration 6).

Furthermore, it must be noted that the Organisation's reply of 11 May 2021 came shortly after the complainant's appeal of 4 May had been submitted, and that on the date of the reply the complainant was not yet time-barred from bringing the matter before the Tribunal. This may be seen as evidence that the Organisation did not seek to mislead the complainant or lead her into a procedural trap and, on the contrary, duly informed her of her rights at a stage when she could still file a complaint.

14. Lastly, concerning the complainant's argument that her appeal of 4 May 2021 was in fact an *ex gratia* appeal to request a re-examination by the Director General of the decision not to renew her contract and on which his reply of 11 May 2021 was intended as a final decision dismissing that appeal, the Tribunal finds that it is unfounded as the documents in question do not support such an inference.

15. It follows from the foregoing that the complaint must be dismissed as irreceivable, without there being any need to rule on the pleas relating to the substance of the dispute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER