Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

E.

v.

South Centre

138th Session **Judgment No. 4816**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. E. against the South Centre on 15 June 2021 and the South Centre's reply of 8 October 2021, the complainant having chosen not to file a rejoinder;

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 contests the calculation of the compensation for the short notice, due by the South Centre, after the non-renewal of his short-term appointment as well as the calculation of his last salary.

After completing a six-month internship and working as a Consultant for eight months under a Special Service Agreement for the South Centre, the complainant was recruited by the organisation on 1 January 2020 as a Programme Officer, at grade P-1, in the Sustainable Development and Climate Change Programme under a short-term appointment expiring on 28 December 2020.

On 23 October 2020, the Head of Finance and Administration informed the complainant that the Executive Director had decided that his short-term appointment would not be renewed. Noting that under the rules governing short-term appointments, the complainant was

entitled to three months' notice, the Head of Finance and Administration also informed him that he would receive a payment in respect of the "shortfall of the notice period" at the same time as his final salary.

On 18 December 2020, the complainant received two payslips, one concerning the payment of his salary for December, which corresponded to 28 days of salary, and the other concerning a payment "in lieu of short notice" amounting to 24 days of salary.

On 21 December 2020, the complainant sent an email to the Head of Finance and Administration, contesting the calculation of these payments. The complainant noted that the payments he received did not match the salary paid for October and November 2020 and argued that he was entitled to the same amount for both his last salary and the compensation for the short notice. On the same day, the Head of Finance and Administration replied to the complainant and explained that his last salary was lower than the previous one because his contract covered only 28 days in December, and not 31 days. Concerning the compensation for the short notice, the Head of Finance and Administration noted that this payment corresponded to 24 days of salary – and not one whole month – since the notice of non-renewal of his contract had been given on 23 October 2020 instead of 29 September 2020.

On 22 December 2020, the complainant requested the Head of Finance and Administration to provide further clarification as he was not satisfied with the explanations he had been given. Having received no reply, on 23 December 2020, he urged the Head of Finance and Administration again to give an answer to his previous email and highlighted that there were multiple leave days that he had not taken that were not included in the contested calculations. The Head of Finance and Administration replied to the complainant later that day. He explained to the complainant that, first, concerning the payment of his last salary, his contract was for eleven months and twenty-eight days (that is, from 1 January to 28 December 2020) and not for twelve whole months, and that accordingly the calculation of his last salary was prorated "as per standard practices applied world over" and, second, concerning the complainant's untaken leave days, he stated that, as per Staff Regulation 5.1.2, short-term contract holders were not entitled to

the payment of any unused accrued leave days at the end of their contract.

On 12 January 2021, the complainant submitted a notification of intention to appeal to the Executive Director, copying the Chairperson of the Centre's Board. In his notification of intention to appeal, the complainant indicated that he was challenging "the decision communicated to [him] on 23 October and 23 December 2020 not renewing [his] contract as of 28 December 2020". He stated that "[he] believe[d] that the decisions [did] not apply correctly the provisions of the Staff [R]egulations and the terms of [his] contract, especially in respect of [S]taff [R]ule 4.1.6 and the calculation of [his] last month pay slip".

By email dated 13 January 2021, the Executive Director responded to the complainant and affirmed that his appeal against the decision of 23 October 2020 was irreceivable because it had been filed outside the one-month time limit established by the Staff Regulations. Regarding the calculation of his final salary, the Executive Director observed that the Administration had already provided him with detailed information on this matter, but invited the complainant to provide his own calculation and the legal basis thereof so that the Administration could consider the possibility of an amicable solution. The complainant replied to the Executive Director on 14 January 2021 and explained that his appeal concerned not only "the termination of contract" but also "[his] last payment of December", and asserted that "only the chair [was] competent to decide on [the] deadline or extension of deadline for appeal".

On 18 January 2021, the Chairperson of the Board informed the complainant that his notification of intention to appeal was time-barred and that, consequently, "it [was not] possible to establish the necessary Appellate Body to consider the matter of [his] contract". Noting that the Executive Director had invited the complainant to provide further explanations concerning the calculation of his final salary, the Chairperson of the Board encouraged him to do so.

In a letter of 29 January 2021 addressed to the Executive Director, the complainant insisted that his appeal filed on 12 January 2021 was receivable, since it was not directed against the termination of his contract but against the calculation of the payment that was due on 28 December 2020. However, he suggested that an amicable solution could be found "while [his] appeal [was] being processed". An exchange of correspondence ensued between the Executive Director and the complainant, but no settlement was reached. On 1 April 2021, the complainant forwarded that exchange of correspondence to the Chairperson of the Board, who replied on the same day. The Chairperson of the Board referred the complainant to a previous email dated 18 March 2021 in which he recalled the email sent on 18 January 2021 and stated that an ad hoc Appellate Body would not be established for his case and that "[their] position ha[d] not changed in [that] regard".

On 14 June 2021, the complainant filed a complaint before the Tribunal impugning the email sent by the Chairperson of the Board on 18 March 2021.

The complainant asks the Tribunal to set aside the Executive Director's calculation of the final indemnities allegedly due to him and to proceed with a correct calculation, to consider that he was not given the requisite three months' notice and that his contract could be deemed a fixed-term contract, and to award him moral damages in the amount of 3,000 Swiss francs and costs.

The South Centre asks the Tribunal to declare the complaint irreceivable or, in the alternative, to dismiss it as unfounded in its entirety.

CONSIDERATIONS

1. By email dated 23 October 2020, the Head of Finance and Administration informed the complainant that, on the instructions of the Executive Director, his short-term contract would not be renewed when it expired on 28 December 2020. The Head of Finance and Administration also informed the complainant that he would receive a payment in respect of the "shortfall of the notice period" in terms revealed by the

facts. Thereafter, in various communications with the Administration, the complainant questioned the decision not to renew his contract, as well as the calculation of the notice pay that was due to him. He also unsuccessfully attempted to negotiate a settlement of the matter with the Administration. Notably, in an email enquiry, dated 21 December 2020, the complainant informed the Head of Finance and Administration, among others, that he noted that two payments had been made to his account on 18 December 2020 as part of the December payroll run and that there was a shortfall compared to the salaries he received in October and November which he seemed to suggest was related to a miscalculation of his notice pay and his salary for December. He asked for further clarification and demanded to be paid his salary in full as soon as possible. By emails dated 21 and 23 December 2020, the Head of Finance and Administration explained to the complainant how the December salary and the notice pay were calculated.

2. In his notification of intention to appeal, dated 12 January 2021, which he sent to the Executive Director and to the Chairperson of the Board, the complainant stated, in effect, that pursuant to the Staff Regulations and having failed to reach an amicable solution, he intended to appeal the decisions communicated to him on 23 October 2020 and 23 December 2020 not to renew his contract. He further stated that he did not believe that the decisions had applied the provisions of the Staff Regulations and the terms of his contract correctly, particularly in respect of Staff Rule 4.1.6 and the calculation of his last payslip. By email to the complainant, dated 13 January 2021, the Executive Director informed the complainant that his appeal against the 23 October 2020 decision not to renew his contract was irreceivable as it was filed after the one-month deadline. He also stated that he would notify the Chairperson of the Board of “the non-compliance with the prescribed term for the admissibility of the appeal”. Regarding the calculation of his December 2020 salary, the Executive Director recalled that the Administration had provided him (the complainant) with details as to how it was done, asked him to provide his calculation and the legal basis for it, and informed him that the Administration would consider whether an amicable solution could be found.

3. By email, dated 18 January 2021, which was also copied to the Executive Director, the Chairperson of the Board replied in the following terms to the notification of intention to appeal:

> "I would like to advise you as follows:
>
> 1. As you know, Annex VII B.1, of the South Centre Staff Regulations says: '<u>A staff member wishing to appeal an administrative decision [...] must, within one month of the date of receiving notification of the decision in writing, notify the Board, through the Chair, of intention to appeal.</u>'
>
> 1.1. As your notice of your '<u>intention to appeal</u>' falls outside this prescribed period it will not be possible to establish the necessary Appellate Body to consider the matter of your contract.
>
> 2. With regard to the matter of your salary the [Executive Director] [...] has requested you to make your own detailed presentation about the matter to him. The Secretariat will then study your presentation and engage you as may be consistent with the Rules and Regulations of the Centre.
>
> 2.1. I suggest that you take up the offer made by the [Executive Director]." (Original emphasis.)

4. Before the Tribunal, the South Centre repeats its contention that the complainant's internal appeal was irreceivable, premised mainly on its submission that the notification of intention to appeal was filed out of time and was accordingly time-barred. On the other hand, the complainant states, in his complaint, that by his internal appeal he challenged the calculation and the amount of "indemnities" he received with his last payslip dated 18 December 2020 and that the Tribunal has accepted that a payslip could be considered as a challengeable decision (see, for example, Judgment 3833, consideration 2). The complainant states that his internal appeal was filed against the shortfall of his last salary and the compensation for the short notice within one month of receipt of his last salary and the emails of December 2020 explaining the organisation's calculation. However, whether or not the complainant had challenged the non-renewal of his contract, as the defendant contends, the calculation and the amount of "indemnities" he received with his last payslip, or the shortfall of his last salary and the compensation for the short notice are matters which were to be considered by an ad hoc Appellate Body, which should have been established pursuant to Staff Regulation 11.2.

5. Regarding appeals, Staff Regulation 11.2 relevantly states that an ad hoc Appellate Body shall be established by the Board according to the criteria and procedures set out in Annex VII to hear and adjudicate on appeals from staff members. As to the procedure for an appeal from an administrative decision, Annex VII.B. requires a staff member wishing to appeal an administrative decision to notify the Board, through the Chairperson, of intent to appeal within one month of the date of receiving notification of the decision in writing. Within one month of receipt of the staff member's notice of intent to appeal, the Chairperson of the Board is to refer the appeal to an ad hoc Appellate Body, consisting of three of its members, one of whom shall act as Chairperson. The ad hoc Appellate Body shall then receive the staff member's written appeal, and a written reply thereto by the Chairperson of the Board. The Appellate Body may also hear further observations on, or rebuttals to, the initial written submissions, orally or in writing. It may also call for oral testimony from the parties or witnesses, including from members of the Secretariat, and for supporting documentation. Under Annex VII.C, a decision of the ad hoc Appellate Body may be brought for review to the Tribunal. The expression "appeal" in Annex VII.B is a reference to an appeal whether it is receivable or not. The obligation of the Chairperson is therefore to refer to the ad hoc Appellate Body a matter even if it is arguably not a receivable appeal. Moreover, there is no express provision in the Annex conferring power on the Chairperson to reject an appeal if it is irreceivable.

6. It is obvious from the foregoing provisions that the Executive Director and the Chairperson of the Board erred by responding to the notification of intention to appeal in the way they did, given that they were not empowered to do so under the rules governing appeals. The notification of intention to appeal was to be considered by an ad hoc Appellate Body which should have been constituted for that purpose and the Chairperson of the Board was required to refer the notification of intention to appeal to that body. As this did not occur, the complainant was denied the benefit and possibility of having the decision he challenged effectively reviewed by the competent internal

appeal body, which was his right (see, for example, Judgments 4620, consideration 5, and 3067, consideration 20).

7. The foregoing considerations lead the Tribunal not only to dismiss the organisation's objections to receivability and to find that the impugned decision was unlawful, but also to note that the complainant has been unduly deprived of the benefit of an internal procedure for which provision is made in the Staff Regulations of the South Centre. It should be noted that, as the Tribunal's case law has long emphasised, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. Consequently, save in cases where the staff member concerned forgoes the lodging of an internal appeal, an official should not in principle be denied the possibility of having the decision which she or he challenges effectively reviewed by the competent appeal body. The Tribunal recalls its statement, in consideration 4 of Judgment 4027, that an internal appeal body's consideration of an appeal is vitally important and, in particular, enables the official to decide whether or not to bring further proceedings, notably before the Tribunal.

8. In the foregoing premises, the case will be remitted to the South Centre for the complainant's internal appeal to be considered in compliance with Staff Regulation 11.2 and procedures set out in Annex VII cited in consideration 5 of this judgment, unless the case is settled in the meantime.

9. Whatever the eventual outcome of this dispute, the failure to consider the complainant's internal appeal has had the effect of delaying its final settlement. That failure alone has caused the complainant moral injury that will be fairly redressed by ordering the organisation to pay him compensation in the amount of 3,000 Swiss francs, as claimed by the complainant. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 3,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision of 18 March 2021 rejecting the complainant's notification of intention to appeal is set aside.
2. The matter is remitted to the South Centre for the complainant's internal appeal to be considered.
3. The South Centre shall pay the complainant 3,000 Swiss francs as moral damages.
4. It shall also pay him costs in the amount of 3,000 Swiss francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER