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

104th Session **Judgment No. 2715**

The Administrative Tribunal,

Considering the complaint filed by Mr M. Z. against the Customs Co-operation Council (CCC), also known as the World Customs Organization (WCO), on 3 October 2006 and corrected on 27 November and 12 December 2006, the Organization's reply of 2 April 2007, the complainant's rejoinder of 3 May and the WCO's surrejoinder of 10 August 2007;

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

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian national born in 1961, was seconded from the Italian Customs Agency in Rome to the WCO in Brussels, where he held a grade A3 post of Technical Officer in the Compliance and Facilitation Directorate. His appointment, which began on 4 November 2003, was for five years and was subject to a six-month probationary period in accordance with Staff Regulation 9.

On 12 May 2004, after the end of the probationary period, the Deputy Director of Compliance and Facilitation, the complainant's immediate supervisor, proposed a six-month extension of the probationary period, without however informing the complainant. The Director of Compliance and Facilitation initially agreed to this proposal but, after talking to the complainant, changed his mind and recommended that his appointment should be confirmed. On 5 July 2004 the Administration Committee, which had been consulted by the Secretary General, expressed the opinion that the complainant's appointment should be terminated because of his insufficient language skills and it recommended that the Secretary General should inform the Italian authorities accordingly.

By a letter of 10 August 2004 the Secretary General informed the complainant that, owing to his insufficient language skills, his appointment would be terminated on 30 September 2004, upon payment of one month's salary in accordance with Staff Regulation 9(b)(iii). On the same date the Secretary General informed the Italian Customs Agency of his decision not to confirm the complainant's appointment at the end of the extension of his probationary period and he explained the reasons for this decision. On 23 September the Agency announced that the complainant would be returning to his duties there on 1 October 2004.

On 1 September 2004 the complainant requested the withdrawal of this decision, but the Secretary General confirmed it on 30 September. By a letter of 4 November 2004 the complainant asked the Secretary General to convene the Appeals Board. In its report of 15 June 2006 the Board concluded that the Organization had been right to terminate the complainant's appointment owing to his inadequate language skills and emphasised that the Secretary General alone had discretion to assess them. However, the Appeals Board noted that this decision had been taken after the end of the probationary period, which had not been validly extended. It considered that rather than relying on Staff Regulation 9 – which provides that the Secretary General may terminate an official's appointment at the end of his or her probationary period, after consultation with the appropriate advisory body and subject to one month's notice or upon payment of one month's emoluments – the Organization could have applied Staff Regulation 12 and Staff Rule 12.1 concerning termination of appointments; in that case the complainant's appointment could have been terminated only after consultation of the appropriate advisory body and subject to four months' notice. The Board recommended that the Secretary General should "rectify the procedure" by paying the complainant emoluments equivalent to the missing three months' notice and to grant him one month's pay, including benefits, in compensation for the injury suffered.

By a letter of 5 July 2006, which constitutes the impugned decision, the Secretary General informed the complainant that he had decided to follow the Appeals Board's recommendations. By a letter of 2 October 2006, he asked him to renounce all claims against the Organization before receiving the payment of 27,701.68 euros due to him under these recommendations.

B. The complainant asserts that the Organization caused him considerable injury by deciding on 10 August 2004, that is to say after he had been in his job for nine months, to terminate his appointment without giving him the notice provided for in Staff Regulation 12. He submits that he was not informed of any decision at the end of his six-month probationary period, although according to Staff Regulation 9 it could be extended only "with the consent of [the] official and after consultation with the appropriate advisory body". Furthermore, according to Staff Rule 9.2, a report on his competence, efficiency and conduct should have been transmitted to the Secretary General before the end of the fifth month of his probationary period. After the end of the probationary period, he therefore believed that his contract would run its full term.

The complainant emphasises that it was not until 10 May 2004 that the Deputy Director told him that he intended to submit an unfavourable report on him, giving "insufficient linguistic proficiency as a pretext". He points out that his work had not been criticised prior to the letter of 10 August 2004. The complainant considers that his contract has therefore been terminated, but that the requirements of Staff Regulation 12 have been disregarded.

He disputes the Organization's reasons for terminating his appointment and provides several examples of his past achievements to prove that he has a good command of English. Furthermore, the complainant believes that the real reason his contract was ended was that his supervisor wanted an English-speaking assistant. With regard to the decision of 10 August 2004, he contends that the Secretary General did not follow the correct procedure and that, rather than exercising his discretion, he acted arbitrarily, thereby violating his right of defence. He is of the opinion that "no reason [had] to be given" for this decision. The complainant also takes the Organization to task for having informed the Italian Customs Agency of the decision and the reasons for it, without notifying him.

He endeavours to show that he suffered injury by losing his post at the Organization, which meant that he had to leave Belgium and return to Italy where he then held a post which was not as good as his previous one. He adds that the Appeals Board's recommendations have not been implemented.

The complainant requests the setting aside of the "decision of 5 July 2004" to terminate his contract, which was confirmed by the decision of 5 July 2006, damages in the amount of 164,636.88 euros for material injury and 50,000 euros for moral injury, as well as legal counsel's fees in the amount of 5,000 euros and the costs of the proceedings.

C. In its reply the Organization first submits that the complaint is irreceivable for failure to comply with the time limit of 30 days allowed for the correction of a complaint under Article 6(2) of the Rules of the Tribunal, since the translations which the complainant was asked to supply were sent one month after the expiry of this deadline. It then points out that the complainant is requesting the setting aside of the decision of 5 July 2004 to terminate his contract, but that since this "decision" was in fact no more than an opinion issued by the Administration Committee, it is not challengeable. It further holds that the complainant did not ask the Appeals Board to set aside the decision to terminate his appointment and he cannot therefore request the Tribunal to set it aside.

On the merits the defendant asserts that the procedure laid down in Staff Regulation 12 and Staff Rule 12.1 was duly followed, because the Administration Committee issued its opinion on 5 July 2004 and the emoluments equivalent to four months' salary have been paid, as is clear from the letter which the Secretary General sent to the complainant on 5 July 2006.

It observes that, contrary to the complainant's submissions, the Deputy Director expressed numerous written and oral criticisms of the complainant's command of English; it annexes to its reply documents which, it says, were drafted by the complainant and corrected by his immediate supervisor. Furthermore, the complainant was informed that confirmation of his appointment was jeopardised by his shortcomings in English, because the application form, in which he had indicated that he spoke English "very well", made it clear that any misrepresentation or material omission might result in the annulment of any subsequent appointment.

The Organization contends that it was obliged to inform the Italian authorities of its decision, since secondment constitutes a tripartite relationship, and that it played no part in the decision of these authorities regarding the post to which the complainant was to be assigned. It holds that the damages claimed by the complainant are excessive.

D. In his rejoinder the complainant presses his pleas. He asserts that the submission of translations after the time limit does not affect the receivability of his complaint. He also asserts that he used all the means at his disposal to express his disagreement with the decision to terminate his appointment, and that he asked the Appeals Board to

award him only damages because reinstatement was impossible. The complainant contends that he has still not been paid the sum of 27,701.68 euros due to him pursuant to the decision of 5 July 2006.

E. In its surrejoinder the WCO reiterates its position.

CONSIDERATIONS

1. The complainant, who was an official of the Italian Customs Agency, was seconded to the WCO on 4 November 2003. He was taken on as a Technical Officer at grade A3 in the Compliance and Facilitation Directorate, on the basis of a five-year contract providing for a six-month probationary period in accordance with Staff Regulation 9.

No decision about the complainant's situation after this probationary period was taken before its expiry on 3 May 2004.

On 12 May 2004, after a discussion with the complainant, the Deputy Director of Compliance and Facilitation, who was his immediate supervisor, drew up a probation report indicating that the complainant's work was not entirely satisfactory. The author of this report therefore suggested that the probationary period should be extended for a further six months, as authorised by Staff Regulation 9. In a further report, dated 19 May, the Deputy Director explained his reasons in greater detail and mentioned in particular the complainant's insufficient language skills. Although he had initially recommended an extension of the probationary period, the Director of Compliance and Facilitation changed his mind after talking to the complainant. In the end, on 30 June, he recommended that the complainant's appointment should be confirmed. The Head of the Division of Administration and Personnel recommended that the Secretary General should consult the Organization's Administration Committee with a view to either extending the probationary period or terminating the appointment. On 5 July 2004 the Committee recommended that the Secretary General should terminate the appointment. By a decision of 10 August 2004, which was preceded by a conversation between the complainant and the Head of the Division of Administration and Personnel, the Secretary General terminated the complainant's appointment with effect from 30 September 2004 upon payment of emoluments equivalent to one month's notice, in accordance with Staff Regulation 9.

In response to the complainant's request of 1 September 2004 that this decision be withdrawn, the Secretary General confirmed it by a letter of 30 September. In consequence of his dismissal, the complainant returned to the Italian Customs Agency, which assigned him to a post in the Regional Directorate of Emilia-Romagna.

The Appeals Board, to which the complainant referred the matter, considered that, while the Organization had been right to end his appointment, this decision had been taken after the expiry of the probationary period, because that period had not been validly extended. The Board deduced from this that it would have been possible in this case to apply, instead of the rules on the follow-up to a probationary period, those to be found in Staff Regulation 12 and Staff Rule 12.1, which govern the termination of appointments and which stipulate, in particular, that category A officials must be given four months' notice. The Board therefore recommended that the complainant should receive emoluments equivalent to the missing three months' notice, plus emoluments corresponding to one additional month in compensation for the injury suffered.

By a letter of 5 July 2006 the Secretary General informed the complainant that he had decided to follow the Appeals Board's recommendations and thus to pay him four months' emoluments.

It must be noted that by a letter of 2 October 2006 the Secretary General notified the complainant that he nevertheless intended to make payment of the compensation awarded to him on 5 July subject to an undertaking from the complainant that he would renounce the exercise of all means of appeal against the WCO.

It was at this stage that the complainant asked the Tribunal to set aside the "decision of 5 July 2004" terminating his contract, as well as the decision of 5 July 2006 by which the Secretary General endorsed the Appeals Board's recommendations, and to order the Organization to pay him, inter alia, 24 months' remuneration and 50,000 euros, respectively, in compensation for the material and moral injury which he claims he has suffered.

Application for a hearing

2. The complainant has requested the convening of a hearing. The submissions and appended items of

evidence produced by the parties are, however, sufficiently enlightening for the Tribunal to consider that there is no need for such a hearing.

Receivability of the complaint

The Organization contends that the complaint is irreceivable for two reasons.

3. First, it submits that the complaint is irreceivable because the complainant did not supply the certified translation into French of certain appended items of evidence, which were written in Italian, within the thirty-day period he was allowed under Article 6(2) of the Rules of the Tribunal.

It is indeed clear from the file that this time limit for correction of the submissions, which ran from 12 October 2006, the date of a letter sent to the complainant by the Registrar of the Tribunal, was not met, because the requested translations were not supplied until 27 November and 12 December. It must be noted that the complainant did not ask for an extension of the time limit under Article 14 of the Rules of the Tribunal, which he should have done.

However regrettable this late correction might be, it does not render the complaint irreceivable. It must be stressed that, as was stated in Judgment 2439, the possibility of correcting a complaint which does not comply with the formal requirements of Article 6(1) of the Rules is given to international civil servants as a means of protecting them against the strict implications of a procedure with which they are not necessarily familiar. It is therefore inadvisable to be too pedantic about the conditions for making such a correction.

It would be excessively formalistic to endorse the Organization's view that a complaint registered within the time limit laid down in Article VII, paragraph 2, of the Statute of the Tribunal is irreceivable merely because the translation of some appended items of evidence was supplied only after some delay. The only consequence thereof should be that the Tribunal should disregard the items not produced in time.

4. The Organization also submits that the claim to set aside the decision to dismiss the complaint is irreceivable for two reasons: firstly, it is mistakenly directed against the Administration Committee's preliminary opinion, which is not challengeable; secondly, it has not been submitted to the Appeals Board and hence internal means of redress have not been exhausted in respect thereof.

On the first point, it is true that the complaint incorrectly states that it seeks the setting aside of the "Organization's decision of 5 July 2004" to end the complainant's employment contract, whereas the Secretary General's decision to that effect is in fact dated 10 August 2004, and 5 July 2004 is the date of the Administration Committee's opinion, which is not challengeable. However, the complainant's intention, which must be ascertained without taking into account this purely factual error, was plainly to challenge the Secretary General's decision of 10 August 2004.

Moreover, since the complainant also challenged the decision of 5 July 2006 by which the Secretary General confirmed the decision of 10 August 2004 terminating his appointment, while granting him compensation, he must be deemed to have intended also to impugn this earlier decision, albeit indirectly.

On the second point, there is no merit to the Organization's argument that the complainant did not request the setting aside of the decision of 10 August 2004 before the Appeals Board, because it is clear from the file that this was the essential purpose of the appeal lodged with that body.

In this regard, the Organization relies on a written statement submitted to the Board by the complainant in which he indicated that he intended to focus his request on the award of compensation, since in practice it was impossible to annul the decision terminating his appointment. But this statement, the sole aim of which was to draw the consequences from a situation which was in fact difficult to reverse, should not be construed as a waiver of his right to challenge this decision. This was also the position taken by the Appeals Board, because in its recommendations it examined the validity and merits of the decision.

Lastly, the Tribunal observes that this is also how the Organization itself has interpreted the scope of the dispute so far, because the Secretary General's letter to the complainant of 5 July 2006 expressly referred to the Appeals Board's report "concerning the appeal […] filed against [the] decision of 10 August 2004 to terminate [his] appointment".

Consequently, neither of the objections to the receivability of the complaint can be accepted.

Lawfulness of the decision to terminate the complainant's appointment

5. As the Tribunal has consistently held, the decision of an international organisation's executive head not to confirm a staff member's appointment is a discretionary one. But although the Tribunal will review such a decision only on limited grounds, it will nevertheless set the decision aside if it rests on a mistake of fact or of law, if it was taken in breach of a rule of form or of procedure, if some essential fact has been overlooked, if clearly mistaken conclusions have been drawn from the evidence or if there has been abuse of authority (see for example Judgment 1183, under 7).

In this case the Tribunal considers that the decision of 10 August 2004 to terminate the complainant's appointment was tainted with two flaws.

6. Firstly, on the basis of the evidence on file, it cannot be said with certainty that the complainant was clearly warned in good time that there was a serious likelihood that his appointment would be terminated at the end of the probationary period.

The facts set out above indicate that, contrary to his submissions, the complainant was given the right to be heard before the decision was taken to terminate his appointment, because the officials who were responsible for issuing an opinion on his case met with him on at least three occasions. But these meetings were held after the probationary period had expired and shortly before the decision was taken.

As the Tribunal stated in Judgments 1386, 1817 and 2529, an international organisation has a duty to ensure that an official on probation is given due warning, in sufficient time and in specific terms, that his appointment might be terminated at the end of his probationary period.

In this case, the reports of the complainant's supervisors and the corrections and annotations made to the documents he drafted, which have been submitted by the Organization, do convince the Tribunal that he was criticised during his probationary period and, in particular, that he could not be unaware that his language skills were deemed insufficient. These documents do not, however, establish that he was told plainly – and this goes much further than just making observations – that these criticisms could result in the outright termination of his appointment at the end of the probationary period.

In view of the facts set out above, the Tribunal is very sceptical that such a warning was clearly given. The reports issued at the end of the probationary period by the complainant's immediate supervisor and by the Director of Compliance and Facilitation rather suggest that they were undecided whether to extend the complainant's probationary period, as proposed by the former, or immediately to confirm his appointment, as advocated by the latter. Thus, it was not until the final stage in the decision-making process within the Organization that the idea of terminating the appointment took shape and finally prevailed after the Administration Committee had been consulted. In these circumstances the Tribunal cannot take the view that the complainant was cautioned in good time that he should seriously contemplate the possibility of such an outcome.

7. Secondly, the decision to terminate the complainant's appointment was taken, in breach of the Organization's internal rules, in particular of Staff Regulation 9, well after the expiry of the six-month probationary period which commenced on the date on which his appointment took effect.

The report of the complainant's supervisor was not drawn up during the fifth month of the probationary period, as stipulated in Staff Rule 9.2, and since the internal advisory bodies responsible for giving an opinion on the complainant's situation can hardly be said to have displayed any particular alacrity, the decision to terminate the complainant's appointment was not reached until 10 August 2004, in other words more than three months after the end of the probationary period.

While the complainant certainly cannot infer from this that his contract should continue for its full term, it is clear that the probationary period was not properly extended in the manner laid down in Staff Regulation 9 – which would have required the complainant's express consent.

By thus keeping the complainant in his post after the expiry of the probationary period, the Organization committed

a further breach of its rules on top of that identified above.

This second breach was all the more injurious to the complainant precisely because, as he had not been clearly warned of the unfavourable final decision which would be taken concerning him, the fact that he was kept in his post for more than three months encouraged him to believe that his appointment had been confirmed, or at least that his probationary period had been extended.

8. The conclusion is that the decision of 10 August 2004 to terminate the complainant's appointment was taken in breach of the safeguards relating to the completion of a probationary period on the conditions laid down in the applicable rules and regulations and in the Tribunal's case law.

Consequently, and without there being any need to examine the other pleas entered with respect to this decision, the latter must be set aside.

The same applies to the decision of 5 July 2006, inasmuch as it confirmed the previous decision.

9. In the circumstances of the case, if only because of the time which has elapsed since the termination of the complainant's appointment, this setting aside of the decision cannot reasonably result in his reinstatement. The Tribunal considers, on the other hand, that the complainant is entitled to full compensation for the injury resulting from the unlawful termination decision.

Evaluation of the injury suffered

10. The uncertainty in which the complainant was kept regarding his situation at the end of the probationary period, for more than three months after its expiry, together with the sudden nature of the final announcement of his dismissal without any sufficiently clear prior warning, caused the complainant undeniable moral injury.

In addition, the fact that this decision was taken on 10 August 2004, in other words at a date which left the complainant little time to prepare as well as possible for his return to the Italian Customs Agency after the summer holidays and to organise his family's move back to Italy before the start of the new school year, caused a serious disruption of his life for which compensation should likewise be provided.

11. The Tribunal considers on the other hand that the complainant has no grounds to seek compensation for any injury he allegedly suffered on account of the disclosure of the reason for the termination of his appointment to the Italian Customs Agency or the announcement of the decision within that agency.

With regard to the criticism of the complainant's language skills, it must be recalled that the description of the post to which he was appointed stressed that he must be able to "draft and express himself fluently in one of the Organization's official languages (English or French) and that he should also possess a good knowledge of the other". The evidence convinces the Tribunal that the complainant's language skills, however creditable they may be, were not quite as good as he had said they were when he was recruited. In these circumstances, the complainant naturally laid himself open to the criticism that his language skills were not up to the required level, and he cannot really complain about the fact that he received an unfavourable assessment in this area – the implications of which he greatly exaggerates by regarding it as an "indelible stain" on his career and curriculum vitae.

Contrary to the complainant's submissions, the Organization cannot be criticised in any way for having stated the grounds for its decision. On the contrary, since the decision concerned the termination of an official's appointment, both Staff Regulation 12 and the case law made it absolutely necessary to state the reasons for it.

Nor did the Organization commit an error by notifying the Italian Customs Agency that the complainant's appointment had been terminated – it was obviously obliged to do so in order to enable him to go back to his original employer at the end of his secondment – or by informing it of the reasons for this decision, if only for the sake of courtesy. In this connection the Tribunal points out that, if these authorities had not been informed of the grounds for the decision, they might have thought that it was based on reasons far more serious than inadequate language skills. This information in itself in no way harmed the complainant.

Lastly, the Tribunal holds, in accordance with its case law, that the Organization cannot be held responsible for the complainant's treatment by the Italian Customs Agency on his return to it – if indeed it was injurious in any way. In this case this statement should, however, be qualified somewhat, because the circumstances in which the decision

which has been set aside was announced were likely to render the complainant's smooth return to the Agency more difficult, especially with regard to the post he could be offered. But this injury forms part of the disruption of his life which was mentioned above.

12. All in all, even though the claims of injury put forward by the complainant can be accepted in part only, the compensation equivalent to four months' remuneration, which was awarded to him pursuant to the Secretary General's decision of 5 July 2006 in accordance with the Appeals Board's recommendations, cannot be deemed sufficient to redress all the injuries he has suffered.

In this case the Tribunal considers that it is fair to award the complainant compensation under all heads equivalent to six months' emoluments, in other words two months in addition to the sum already granted in principle, each month's remuneration being calculated in the same way as in the decision of 5 July 2006 without the Organization being entitled to deduct therefrom other income received by the complainant since the termination of his appointment.

13. With respect to the compensation already awarded by the decision of 5 July 2006, which allegedly had not been paid when the rejoinder was filed, the Tribunal draws attention to the fact that the Secretary General's letter of 2 October 2006 contained an unlawful clause which should definitely be censured, in that its purpose was to make the actual payment of the sum in question subject to an undertaking from the complainant that he would renounce all means of appeals.

An international organisation commits a serious breach of the general principles of law by violating, through such conduct, international civil servants' right of appeal, especially to the Tribunal.

14. Since the complainant succeeds in part, he is entitled to costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The decision of the Secretary General of 10 August 2004 to terminate the complainant's appointment and that of 5 July 2006, inasmuch as it confirmed the former decision, are set aside.

2. The Organization shall pay the complainant compensation equivalent to six months' emoluments, in other words two months in addition to the amount of compensation already awarded by the decision of 5 July 2006, in accordance with the conditions stipulated in consideration 12 of this judgment.

3. It shall also pay him costs in the amount of 5,000 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet