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

110th Session **Judgment No. 2960**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. B. against the ITER International Fusion Energy Organization (the ITER Organization) on 2 March 2009 and corrected on 16 March, the Organization's reply of 23 June, the complainant's rejoinder of 1 October 2009 and the Organization's surrejoinder of 8 January 2010;

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 ITER[*] Organization was provisionally established after the signature on 21 November 2006 of the Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project. It recruited the complainant – a German national born in 1950 – as a plant designer at

[*] International Thermonuclear Experimental Reactor

grade G5. The complainant's contract, which began on 1 January 2007, stipulated that it would be terminated within 60 days after the entry into force of the above-mentioned agreement. In the event, the agreement entered into force on 24 October 2007. As from 1 January 2008 the complainant was thus granted a five-year contract, the first six months of which constituted a probationary period.

On 12 June the Director-General sent the complainant a letter informing him that, as his annual performance appraisal – dated 15 April – contained three unsatisfactory marks, he had been advised that the complainant's contract could not be confirmed, but that he was willing exceptionally and on an *ex gratia* basis to extend his probationary period for six months until 31 December 2008. During that period another appraisal was carried out, but the report drawn up on 27 November showed that the complainant's overall performance was still unsatisfactory. The Director-General informed the complainant by a letter of 2 December that, in these circumstances, his contract would expire on 31 December 2008 under Staff Regulation 6.2(c). That is the impugned decision.

B. The complainant contends that a fixed-term contract may be concluded only for the performance of a specific, temporary task and "only in cases for which express provision is made by the applicable labour law". As in his opinion none of these conditions was met in this case, he considers that his first contract was concluded for an indefinite period.

Furthermore, he submits that there is no rule under which he could be required to complete a six-month probationary period at the start of his second contract, nor was there any legal basis for extending that period. He explains that he always performed the same duties within the ITER Organization and that it therefore had no justification for requiring him to serve a probationary period at the beginning of his second contract.

The complainant asks the Tribunal to find that no probationary period was agreed to by the parties, that no extension of that period was validly provided for by the parties, that the Organization did not

comply with the dismissal procedure, that he has suffered moral and material injury of no less than 100,000 euros, and to order the Organization to pay him that sum as well as costs.

C. In its reply the Organization submits that the complaint is irreceivable because internal means of redress have not been exhausted. It states that by a letter of 13 February 2009 the complainant challenged the decision to terminate his contract and that the Director-General replied to him, in a letter of 18 February 2009, that the matter could be referred to the Tribunal "in accordance with the procedure stipulated by the Staff Regulations". The complainant did not, however, follow the procedure set out in Article 26 of the Regulations, which provides that a staff member who considers that he has suffered an infringement of his rights as laid down in the Regulations must submit a reasoned request for an appeal to the Director-General within two months of the challenged decision. The decision delivered by the Director-General within 30 days of receiving the request in question constitutes the final decision which may be submitted to the Tribunal for review.

On the merits, the ITER Organization comments that the complainant's arguments rest on considerations drawn from French law, which cannot be applied by the Tribunal. It explains that, under Article 6.2(a) of the Staff Regulations, initial contracts offered to staff members after the entry into force of the Agreement of 21 November 2006 began with a six-month probationary period. Citing the Tribunal's case law, in particular Judgment 2558, it points out that the purpose of a probationary period is to "inform the Administration regarding the ability of the probationer to perform his duties and regarding his efficiency and conduct in the service"; the complainant's appointment was not confirmed because, despite several warnings, his performance remained unsatisfactory. It emphasises that the legal basis of the decision to extend the complainant's probationary period was "the Director-General's willingness to offer [the complainant] on an *ex gratia* basis another opportunity for improvement and remedial action" and that it was therefore a "particularly favourable measure".

In this connection, it draws attention to the fact that, at its session on 17 and 18 June 2008, the Council of the ITER Organization decided to amend Article 6.2 to provide for the possibility of extending a probationary period. Lastly, the Organization notes that, according to its case law, the Tribunal exercises only a limited power of review over decisions to terminate a contract at the end of a probationary period and it asserts that the complainant's appointment was terminated in accordance with international civil service law.

D. In his rejoinder the complainant submits that the global assessment "unsatisfactory" contained in his performance appraisal report of 27 November 2008 was defined as follows: "Below the acceptable level of performance regarding the position. The employee's contract shall be terminated at the end of probationary period." He infers from this that the report in question constituted the decision to end his appointment and states that he challenged that decision the very same day by means of comments that he attached to the report. Since the Director-General nevertheless confirmed the decision in question by his letter of 2 December, he holds that this letter constitutes the final decision. The complainant therefore considers that he followed the internal appeal procedure and that he complied with its time limits, but he observes that, in view of his technical background, it is not reasonable to expect that he should "be able to understand the full implications" of the Staff Regulations, which are, moreover, in English. He adds that the version of the Staff Regulations which he was given on signing his second contract made no mention of the need to submit an internal appeal. Relying on Judgment 1450, he states that, even if the Tribunal were to consider that internal means of redress have not been exhausted, it could still award him damages.

On the merits, the complainant reiterates his arguments. He states that he made no reference to French law in his complaint and that the general principles of international civil service law and the Staff Regulations must be applied in the instant case. In this regard, he explains that he hopes that the version of the Staff Regulations to be

applied will be that which was handed to him when he signed his second contract – a document which he annexed to his complaint – for it was impossible for him to keep abreast of all the subsequent amendments to this text.

He points out that the performance appraisal report of 27 November 2008 shows that his first probationary period ended on 31 December 2007 and he states that it was inconceivable that he should be required to undergo another six-month probationary period on top of a one-year probationary period. In his view, that decision reflects the Organization's determination to keep him in a precarious situation. He argues that, when his contract was terminated, he was no longer serving a probationary period and that the Organization ought therefore to have given him the six months' notice for which provision is made in Article 6.2 (*recte* 6.3) of the Staff Regulations in the version dated 21 November 2006. He underlines that on 12 June 2008 the Staff Regulations did not contemplate the possibility of extending a probationary period, because they were amended to that effect only at the Council's session of 17 and 18 June 2008.

The complainant reiterates his claims and formulates new ones, namely that the ITER Organization should be ordered to pay him his salary up to the date on which the judgment is delivered in this case and to pay him six months' compensation in lieu of notice and two years' salary in compensation for the injury suffered.

E. In its surrejoinder the Organization maintains its position. In its opinion, the report of 27 November 2008 should under no circumstances be regarded as a decision terminating the complainant's contract and his comments should not be construed as a request for review of this decision. It points out that the document produced by the complainant in his complaint was not the Staff Regulations but only a résumé thereof. It submits that the complainant was kept informed of all the amendments made to the said Regulations and that he may not plead that they are in English as this is the ITER Organization's working language. It holds that the reference to Judgment 1450 is irrelevant in this case and cites the Tribunal's case law to challenge the receivability of the complainant's new claims.

On the merits, the Organization explains that the first contract signed by the complainant did not correspond to a probationary period. Unlike the first contract, the second was not signed with a provisional body and, given that a new international organisation had come into being, the completion of a probationary period was perfectly consonant with the Staff Regulations.

CONSIDERATIONS

1. The complainant entered the service of the nascent ITER Organization on 1 January 2007. Having been officially established, the Organization concluded a new, five-year employment contract with the complainant on 4 December 2007, which included a six-month probationary period ending on 30 June 2008. In view of the complainant's unsatisfactory performance as evidenced by his performance appraisal report, the probationary period was extended for six months until 31 December 2008.

On the basis of a new performance appraisal report of 27 November 2008, which the complainant had criticised through comments appended to the report on the same date, the Director-General informed the complainant on 2 December 2008 that he had decided to terminate his appointment with effect from 31 December 2008. On 13 February 2009 the complainant wrote to the Director-General to challenge this decision and to inform him that he wished to seek an amicable settlement "before referring the matter to the *conseil de prud'hommes*". When acknowledging receipt of this letter on 18 February 2009, the Director-General did no more than inform the complainant that, under the Headquarters Agreement between the Government of France and the ITER Organization, the dispute was not subject to the jurisdiction of the *conseil de prud'hommes*, but to that of the Administrative Tribunal of the International Labour Organization (ILO), "to which the case c[ould] be referred in accordance with the procedure stipulated by the Staff Regulations of the ITER Organization". On 2 March 2009 the complainant therefore filed a complaint with the Tribunal in which he stated that the

impugned decision was that of 2 December 2008, of which he had been notified on 3 December 2008.

2. There are no grounds for holding the hearing requested by the complainant, because the parties have had every opportunity in their written submissions to state their position in full on the issues raised by their dispute.

3. The Organization submits that the complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal.

According to this provision, a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. The only exceptions to this requirement allowed under the Tribunal's case law are cases where staff regulations provide that decisions taken by the executive head of an organisation are not subject to the internal appeal procedure, where there is an inordinate and inexcusable delay in the internal appeal procedure, where for specific reasons connected with the personal status of the complainant he or she does not have access to the internal appeal body or, lastly, where the parties have mutually agreed to forgo this requirement that internal means of redress must have been exhausted (see, for example, Judgments 2912, under 6, and 2939, under 9).

4. The internal appeal procedure at the ITER Organization is governed by Article 26 of the Staff Regulations. At the time the complaint was filed, the provisions of Article 26 read, in part, as follows:

"**Appeals**

Serving or former staff members, or their heirs and assigns, may appeal against decisions made by the Director-General. Such appeals or procedures arising from them shall not stay the execution of the decisions being complained of.

26.1 Internal administrative appeals

a) An internal administrative appeal is a procedure whereby a staff member who considers that he has suffered an infringement of his rights as laid down in these Regulations submits a reasoned request;

b) Such a request shall be submitted to the Director-General within two months of the challenged decision;

c) When the Director-General does not respond in writing within 30 calendar days in response to a written claim, the above-mentioned period shall run from the 30th day;

d) The Director-General shall acknowledge this appeal and reply within 30 calendar days of the date of the receipt;

e) In the event of a negative reply, the staff member may request mediation. Such mediation is not obligatory and will not suspend the time periods set in the present Article as well as in the Statute and the Rules of the ILO Administrative Tribunal.

26.2 Mediation

a) The mediator shall be a qualified, independent legal expert appointed by the Director-General and approved by the Council for a renewable period of three years;

b) He shall be provided by the Director-General and the staff member concerned with all documents he considers necessary for an examination of the case within 5 calendar days of the date of the negative reply mentioned in paragraph 26.1 e) above;

c) He shall submit his conclusions within 15 calendar days of the date on which he has been apprised of the case;

d) These conclusions shall not be binding on either the Director-General or the staff member;

e) However, the Director-General will have to take a final decision within 10 calendar days of the findings of the mediator, or within 30 calendar days of the date of the request submitted to him by the staff member.

26.3 Date of the final decision

The date of the final decision allowing the staff member to bring his case before the ILO Administrative Tribunal is:

a) either the date of the negative reply if the staff member does not wish to request mediation, or if the Director-General does not reply within 30 calendar days, the 30th one,

b) or the date of the decision of the Director-General taken within 10 calendar days of the findings of the mediator, or within 30 calendar

days of the date of the request, or if the Director-General does not take such a decision within the allowed time period, the 30th day of the date of the request.

26.4 Contentious appeals

Having exhausted all the internal remedies open to them under the present Article, staff members shall be at liberty to bring their case before the ILO Administrative Tribunal under the Statute and the Rules of the said Tribunal, notably within the time periods set in such Statute and Rules.

[…].”

5. Staff members of the Organization who are adversely affected by a decision thus have two months within which they may ask the Director-General to reconsider this decision. It is only after the Director-General has taken a fresh decision and any attempt at mediation has failed that the case may form the subject of a complaint filed with the Tribunal within the time limit set in Article VII, paragraph 2, of its Statute.

In the instant case, the decision which could be reconsidered in accordance with the procedure set forth in Article 26 of the Staff Regulations of the ITER Organization is that taken by the Director-General on 2 December 2008, of which the complainant was notified the following day. The complainant wrongly submits in his rejoinder that this decision was final within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal, because it was taken at the end of an internal procedure which he initiated on 27 November 2008 by adding comments to his performance appraisal report of the same date. That report, including the said comments, was not a decision adversely affecting him but one of the factors on which the Director-General had to base his decision whether or not to continue to employ the complainant at the end of his second probationary period.

6. It is necessary to determine whether an internal appeal was lodged against the decision contained in the letter of 2 December 2008 within the two-month time limit set by Article 26.1b) of the ITER Organization’s Staff Regulations.

The complainant challenged this decision for the first time in the letter which he sent to the Director-General on 13 February 2009,

in which he announced that he would refer the matter to the *conseil de prud'hommes* if no amicable settlement were reached. The question whether this letter should be deemed to be an internal appeal within the meaning of Article 26 of the Staff Regulations may remain undecided, because it was sent to the Director-General after the time limit for filing an appeal laid down in that article.

7. It may be concluded from the foregoing that, although it was filed within the ninety-day time limit set in Article VII, paragraph 2, of the Statute of the Tribunal, the complaint is not receivable because internal means of redress have not been exhausted. Indeed, none of the exceptions mentioned above in consideration 3 is applicable here. It would be of no advantage to the complainant to consider that the letter of 18 February 2009 exempted him from exhausting internal means of redress, because this exemption would have been granted *post factum* after the appeal had become time-barred. Nor may the complainant plead ignorance of the provisions of the Staff Regulations, since every staff member is deemed to be familiar with the rules and regulations governing his/her appointment. Lastly, it is of no avail that he refers to Judgment 1450, for that judgment, in which the Tribunal recalled that it may decide to award damages if it deems reinstatement impossible, did not concern a case where a complainant had neglected to use internal means of redress which he had to exhaust before filing a complaint with the Tribunal.

It follows that the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2010, Mr Seydou Ba, Vice-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 2 February 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet