Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3127**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs V. C. against the Centre for the Development of Enterprise (CDE) on 1 October 2010 and corrected on 4 November 2010, the CDE's reply of 14 February 2011, the complainant's rejoinder of 24 March, the Centre's surrejoinder of 3 June, the complainant's additional submissions of 15 June and the CDE's final observations of 10 October 2011;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Greek national born in 1963, joined the Centre for the Development of Industry (CDI), which was later replaced by the CDE, in 1987. From 1 March 2008 she held the post of Coordinator, under a contract for an indefinite period of time. She was employed in the Operations Management Department at the Centre's headquarters.

The CDE is an institution jointly administered by the African, Caribbean and Pacific Group of States (ACP) and the European Union (EU). In 2007 a study on the future of the Centre was conducted at the initiative of the European Commission. On the basis of the conclusions of the study, a joint ACP-EU task force was set up to discuss, in particular, the reorganisation of the CDE. At the same time, the Centre produced a strategy document setting out new priorities for its work, and drew up a budget for the year 2009 which included a planned staff reduction at headquarters. In the light of the ongoing discussions and the documents it had produced, the Centre concluded that it was necessary to increase its efficiency and it undertook a study with the main aim of "reviewing the competencies and skills of [its] teams". This study was entrusted to a firm of consultants, which then invited all the staff members of the Centre to prepare for a personal skills assessment of their individual competencies, as had been announced to them on 28 August 2009.

By a letter dated 2 December 2009 the Director of the Centre informed the complainant that, as a result of the meeting held on the same day by the CDE Executive Board on the restructuring of the Centre, her post had been suppressed. Her employment would cease after a notice period of nine months, and she would receive an indemnity in accordance with Article 34 of the Staff Regulations. On 7 December 2009 the complainant asked the Deputy Director for a copy of her personal skills assessment. He replied that the consultancy firm could provide her with comments and recommendations, but not with a copy of the assessment itself.

In an e-mail dated 20 January 2010 the complainant told the Director that she could not understand the decision of 2 December 2009, which she considered to be illogical, illegal, unethical and lacking reasons. On 6 May 2010 she wrote to the Director ad interim seeking explanations. She told him that the former Director and the former Deputy Director had assured her that, if she improved "certain aspects" of her work, the CDE might review its decision. She stated that no grounds had been given for the decision, and asked for it to be

reviewed. On 18 May she sent the members of the Executive Board a request for the appointment of a conciliator, in accordance with Article 4 of Annex IV to the Staff Regulations, stating that she had not received a reply to her "internal complaint" of 20 January within the two-month time limit specified in Article 66 of the Staff Regulations.

On 16 July 2010 the Director ad interim informed the complainant that her request was inadmissible, because she had not lodged an internal complaint, in the meaning of Article 66(2) of the Staff Regulations, against the decision of 2 December 2009 within the required time limit of two months. Indeed, he considered that her e-mail of 20 January 2010 was not an internal complaint, either in form or in substance. Noting that on 22 June she had sent the Administration a copy of a letter dated 25 January 2010 in which she challenged the suppression of her post and which she claimed to have delivered by hand to the former Director, he stated that no trace of the original letter had been found in the Centre's records, and he questioned its authenticity given that her request of 18 May 2010 made no reference to it. In her complaint before the Tribunal, the complainant states that she is impugning the decision of 2 December 2009.

B. The complainant asserts that she has exhausted the internal remedies available to her. She explains that her e-mail of 20 January 2010 had not taken the form of a "quasi-contentious statement of case", particularly because she did not have the assistance of a lawyer, but that it was indeed an internal complaint within the meaning of Article 66 of the Staff Regulations. Having received no reply from the Centre, on 18 May she filed a request for conciliation, which was rejected on 16 July 2010. She also asserts that, since the decisions of 2 December 2009 and 16 July 2010 adversely affected her, the Tribunal is competent to deal with her case. Moreover, according to Article 4(3) of Annex IV to the Staff Regulations, the appointment of the conciliator should have taken place within 45 days of her request of 18 May, i.e. no later than 2 July 2010. As the CDE did not reply to that request until 16 July 2010, she considers that the time limit for her

to file a complaint with the Tribunal must run from 2 July, and having filed her complaint on 1 October 2010, in her view she has complied with the time limit.

On the merits, the complainant contends that the restructuring process took place in a completely non-transparent manner. She complains inter alia that she was given no useful information as to the exact scope of the restructuring, which, in her opinion, was conducted in the absence of any predetermined objective criteria. She also argues that the reason given for the decision of 2 December 2009 – that her post was being suppressed – was mistaken, since she continued to perform her duties for several months. She questions why the suppression of her post should result in the termination of her contract, and she queries the criteria used in order to reach the latter decision. She also points out that she has never received her personal skills assessment, although, in her view, this was a key factor in the restructuring process. The CDE ought to have placed that document in her personal file, as required by Article 25 of the Staff Regulations.

Subsidiarily, the complainant emphasises that she attended an interview for the post of Chief of the Pacific Regional Office, but was not offered the post even though she was placed first on the list of candidates. She concludes that, contrary to the Tribunal's case law, the Centre did not contemplate appointing her to a vacant post. She also contends that the restructuring of the CDE was based on an obvious error of judgement, since the process began before the joint ACP-EU task force had completed its work.

The complainant asks the Tribunal to set aside the decisions of 2 December 2009 and 16 July 2010 and to order her reinstatement in her previous post, or in an equivalent post, together with the reconstitution of her career. Failing this, she asks to be paid an indemnity for material injury comprising, on the one hand, the sum of 1,274,277.51 euros corresponding to the remuneration she would have received until the age of retirement, to be "multiplied by the annual cost-of-living index", and, on the other hand, the sum of 404,372.43 euros in respect of the pension rights she would have accumulated until the age of retirement. She indicates that the sum

of 83,954.43 euros paid to her when her employment came to an end should be deducted from the amount of this indemnity. She also seeks an indemnity of 10,000 euros for moral injury, as well as an award of costs, and she claims interest on all sums awarded to her.

C. In its reply the CDE argues that the complaint is irreceivable, given that the complainant did not file an internal complaint against the decision of 2 December 2009, as required by Article 66(2) of the Staff Regulations. The complainant's e-mail of 20 January 2010 was not a complaint within the meaning of that article because it did not meet the substantive and formal criteria laid down in Internal Rule No. R 30/CA/05, although at the time of signing her last contract she had stated that she had taken note of that rule. The defendant also denies that the letter of 25 January 2010 constituted a complaint, and questions its authenticity. It emphasises that the complainant has failed to prove that she transmitted it to the Director of the Centre.

On the merits, the CDE contends that the complainant was "perfectly" well informed of the background to the decision of 2 December 2009, which was taken following a restructuring process which had been made known to all the staff and which was based on objective criteria, namely the reduction of the budget and the plan to decentralise the activities of the CDE. It also affirms that an assessment was made of the needs of the Centre and of the abilities and experience of the complainant, and that after weighing up all the factors involved it was found that she could not continue to be employed at the Centre. The defendant also explains that the reason why she was not given her personal skills assessment – which is available to the Tribunal – was that it constituted merely an advisory opinion and may thus be regarded as an internal management tool. The document was not placed on her personal file because it was not a performance evaluation. Further, the CDE claims to have examined the possibility of assigning the complainant to another post, either at headquarters or in the field, but her profile did not match any post that was then vacant or likely to become vacant in the short term. Lastly, the reason why the restructuring began while the joint ACP-EU task

force was still deliberating was that the deliberations were taking too long, and in September 2009 the European Commission had urged it to bring the process to an end.

The CDE requests the Tribunal to order the complainant to pay its costs.

D. In her rejoinder the complainant asserts that her complaint is receivable. She states that her e-mail of 20 January 2010 was in fact a complaint, since it proves that she intended to challenge the decision of 2 December 2009 in order to have it amended. She adds that the requirements of Internal Rule No. R 30/CA/05 are not consistent with the spirit of the informal dispute resolution procedure. As for the letter of 25 January 2010, this was not her internal complaint, but a reminder that it had been lodged. On the merits, she submits that the communications from the Centre about the restructuring were inadequate, and that her personal skills assessment – of which she seeks disclosure – was a document "concerning her administrative status" within the meaning of Article 25 of the Staff Regulations, and should therefore have been placed on her personal file. She also states that she was assured by her superiors that she would be "redeployed". She adds that, since she has found a new job, the amount of her current salary should be deducted from the sum which she is claiming as compensation for material injury.

E. In its surrejoinder the CDE reiterates its arguments that the complaint is irreceivable. On the merits, it maintains its position and affirms that the complainant was merely promised that every effort would be made to redeploy her, provided a post matching her qualifications became vacant or was created.

F. In her additional submissions the complainant refers to a letter, which she has produced, from the Ambassador for the Republic of Vanuatu to the European Union and the Kingdom of Belgium, addressed to the Director of the Centre, confirming that she was promised appointment as Chief of the Pacific Regional Office and

suggesting that her case should be reconsidered. He took the view that the principles of transparency and good governance were not respected in the restructuring process.

G. In its final observations the CDE explains that the complainant had applied for the post of Chief of the Pacific Regional Office, but her application had not been successful because the Evaluation Committee considered that she did not have all the necessary qualifications for the post.

CONSIDERATIONS

1. The complainant, who joined the CDE on 1 January 1987, was appointed on 1 March 2008 under a contract for an indefinite period of time.

2. By a letter dated 2 December 2009 the Director of the Centre informed her that, following a meeting that day of the Executive Board on the restructuring of the CDE, it had been decided that her post would be suppressed. Her period of notice would begin on 4 December 2009 and end on 3 September 2010. Having queried the reasons for that decision, she was allegedly informed, in the course of a meeting with the Director and the Deputy Director which was attended by the Centre's Head of Human Resources, that the personal skills assessment by a firm of consultants in the context of the restructuring of the CDE was "not bad", and that if she improved in certain respects the decision would be reviewed. The complainant requested a copy of her assessment, but her request was denied.

3. On 20 January 2010 the complainant sent the Director an e-mail stating that she could not understand the decision of 2 December 2009, which seemed to her to be "illogical, illegal, unethical and lacking reasons". She asserts that she also wrote to him on 25 January 2010 to obtain clarification of the grounds for the decision, inter alia.

She did not receive any reply, and on 6 May she sent a memorandum to the Director ad interim, primarily to request a review of the decision in question.

4. As the Director ad interim failed to respond to that request, the complainant decided on 18 May 2010 to seek the appointment of a conciliator, in accordance with Article 4, Annex IV, of the Staff Regulations.

By a decision of 16 July 2010, which she impugns before the Tribunal, the Director ad interim informed her that her request for the appointment of a conciliator was not admissible, because she had not lodged an internal complaint against the decision of 2 December 2009 within two months of being notified of it, contrary to Article 66, paragraph 2, of the Staff Regulations.

5. On 1 October 2010 the complainant filed her complaint with the Tribunal, requesting it to set aside the decisions of 2 December 2009 and 16 July 2010 and to order her reinstatement and the reconstitution of her career, failing which she claims payment with interest of an indemnity for the material injury suffered. She asks "in any event" an amount of 10,000 euros for the moral injury suffered and costs.

6. The defendant argues that the complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal, because the complainant has not exhausted the internal remedies available to her. It asserts that she did not lodge an internal complaint, in the meaning of Article 66, paragraph 2, of the Staff Regulations, within two months of being notified of the contested decision. It considers that the e-mail of 20 January 2010 addressed to the Director is clearly not an internal complaint, either in form or in substance. It adds that neither does the letter of 25 January 2010 constitute an internal complaint within the meaning of the above-mentioned paragraph 2, and in any event the complainant has not proved that it ever reached the Director.

7. In reply to this objection to receivability, the complainant contends that according to the Tribunal's case law an internal complaint is simply an appeal seeking the quashing or amendment of a decision (see Judgment 500, under 3). She also contends that, although the formal rules have to be strictly observed, they must not set traps for staff members defending their rights, or be construed too pedantically, and if staff members break such a rule, the penalty must fit the purpose of the rule (see Judgment 2882, under 6).

She asserts that in this case the various formal requirements for an internal complaint would, if followed to the letter, result in a litigious statement of case, whereas in her view "the very purpose of […] an internal complaint is to avoid litigation in a given situation by resolving out of court a dispute between an employer and an employee, and it does not have to follow the formal requirements of contentious proceedings". She concludes that the requirements imposed by Internal Rule No. R 30/CA/05 are not in conformity either with the spirit of the informal dispute resolution procedure or with the literal wording of Article 66 of the Staff Regulations, which states merely that "[a] complaint is a written document requesting that an amicable solution be found to the dispute in question".

The complainant asserts that her e-mail of 20 January 2010 does show that she intended to appeal against the contested decision in order to have it amended, and this must suffice to define the message as an internal complaint. She points out that she was in a difficult situation at the time and that she "did not have the assistance of a lawyer in preparing that document, which may explain why it was not presented in any particular format". In her view, the brevity of the document is also due to the fact that she had to follow up a suggestion by the Director and the Deputy Director to discuss the undertakings she had been given to place her in another post.

8. According to the Tribunal's case law, for a communication addressed to an organisation to constitute an appeal, it is sufficient that the person concerned clearly expresses therein his or her intention to challenge the decision adversely affecting him or her and that the

request thus formulated may be granted in some meaningful way. The grounds for such appeals therefore have to be stated only when the provisions of the staff rules and regulations governing them expressly require this (see Judgment 3068, under 16, and the case law cited therein).

9. In the present case, the relevant provisions are the following:

The first part of paragraph 2 of Article 66 of the Staff Regulations:

> "Staff members, the Deputy Director and the Director may submit to the competent authority a complaint against an act adversely affecting them, either where the competent authority has taken a decision, or where it has failed to adopt a measure prescribed by these Regulations. A complaint is a written document requesting that an amicable solution be found to the dispute in question. The complaint must be lodged within a period of two months, failing which the complaint is void."

Internal Rule No. R 30/CA/05:

> "2.3 [The complaint] shall contain an explicit reference to Article 66 (2) of the staff rules and the decision at issue, a copy of which shall be annexed to the complaint. It shall comprise a detailed description of the facts and indicate the legal grounds. The claimant shall also indicate whether he seeks a withdrawal of or an amendment to the contested decision.
>
> 2.4 […] It shall indicate the date and carry the signature of either the plaintiff or his legal counsel.
>
> 2.5 A complaint is deemed to have been lodged on the day it is received by the competent authority, i.e. delivered either personally by the claimant, or by post or internal or external courier."

10. The Tribunal considers that, where an internal appeal is lodged within the required time limit but fails to comply with the formal requirements set down in the applicable rules, it is for the organisation, in the exercise of its duty of care, to enable the complainant to correct the appeal by granting him or her a reasonable period of time in which to do so.

11. Regardless of whether the Director of the Centre could establish, by means of an internal rule, further conditions for the

admissibility of complaints, additional to those laid down in the Staff Regulations, the Tribunal observes that the CDE failed in its duty of care by not giving the complainant a chance to correct the complaint submitted in her e-mail of 20 January 2010, which indicated that she intended to challenge the decision to suppress her post.

12. The foregoing considerations lead the Tribunal not only to dismiss the objection to receivability raised by the defendant and to find that the impugned decision was unlawful, but also to note that in this case the complainant was unduly deprived of the conciliation procedure provided for in the Staff Regulations.

13. In its case law the Tribunal has long held that 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. Thus, except 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 he or she challenges effectively reviewed by the competent appeal body (see, for example, on that point Judgments 2781, under 15, and 3068, under 20).

14. The Tribunal will therefore remit the case to the CDE so that the conciliation procedure requested by the complainant in her letter of 18 May 2010 can take place.

15. The unjustified refusal to initiate this conciliation procedure when requested to do so has had the result of delaying a final settlement of the dispute, whatever its eventual outcome. Accordingly, this decision in itself caused the complainant injury, which is to be properly compensated by ordering the Centre to pay her an indemnity of 2,000 euros.

16. As she partly succeeds, the complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

17. The CDE, by way of a counterclaim, has requested the Tribunal to order the complainant herself to pay its costs. It is plain from the foregoing that this counterclaim must be dismissed.

DECISION

For the above reasons,

1. The decision of 2 December 2009 is set aside.
2. The case is remitted to the CDE, as stated under 14 above.
3. The Centre shall pay the complainant 2,000 euros for moral injury.
4. It shall also pay her 2,000 euros in costs.
5. The complainant's other claims are dismissed, as is the CDE's counterclaim.

In witness of this judgment, adopted on 4 May 2012, 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 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet