

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

H.

v.

ITER Organization

124th Session

Judgment No. 3843

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. H. against the ITER International Fusion Energy Organization (ITER Organization) on 10 December 2014, the ITER Organization's reply of 7 April 2015, the complainant's rejoinder of 5 June and the ITER Organization's surrejoinder of 10 September 2015;

Considering Article II, paragraph 5, 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 challenges the decision to terminate his contract at the end of his probationary period.

Probationary periods in the ITER Organization are governed by Internal Administrative Circular No. 21 of 14 September 2010, which describes the probationary appraisal process in accordance with Article 6.2 of the Staff Regulations. The appraisal consists of two formal assessments of the staff member's performance occurring three and five months after the official start date at the ITER Organization. During the third month assessment, the line manager evaluates the staff member's capabilities and first achievements and proposes actions if necessary, whereas during the fifth month review, the line manager proposes to the Director-General to confirm the contract, extend the

probationary period or terminate the contract. The Human Resources Division notifies the staff member in writing and at least two weeks before the last day of her or his probationary period of the Director-General's final decision.

The complainant was appointed to a grade P4 post as from 6 January 2014 under a five-year contract, with a probationary period of six months. During the third month assessment of his probationary period, he was informed that improvements were expected of him in the following months. In the conclusions of the fifth month assessment, his line manager indicated that additional improvements were still required and recommended the extension of his probationary period for an additional six months so that he could "be assessed on his capacity to perform at the level of expectations for a P4 position".

By a letter from the Director-General dated 20 June 2014, which the complainant claims to have received on 24 June, the complainant was informed that, since it appeared from the probationary period assessment that "improvement and remedial action [were required] in some areas", his contract would be terminated as of 5 July 2014.

On 26 June 2014 the complainant submitted an appeal to the Director-General against the termination of his contract. On 25 July the Director-General confirmed his decision and offered the complainant financial compensation for the late notice of termination and for unexpended leave. He indicated that if the complainant did not accept the decision and the financial offer, he could either submit a request for mediation or bring the case to the Tribunal. On 1 August 2014 the complainant requested mediation.

The Mediator issued his report on 12 September 2014, recommending that the Director-General maintain his decision to terminate the complainant's contract and that financial compensation be granted to the complainant. By a letter dated 17 September 2014, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to follow the Mediator's recommendations.

On 22 September 2014 the complainant made a "counter-offer" to the compensation proposed by the Director-General. On 25 September 2014 he was informed that two non-negotiable possibilities were offered

by the Director-General: either to accept the compensation offered in the decision of 17 September 2014 or to refuse that offer and file a complaint with the Tribunal. The complainant accepted the compensation offered and on 2 October 2014 he received the amount proposed by the Mediator.

The complainant filed his complaint with the Tribunal on 10 December 2014, asking it to quash the impugned decision to the extent that it confirms the earlier decision to terminate his contract and to reinstate him in his previous position with retroactive effect from the date of his separation until the date of expiry of his five-year contract or, failing that, from the date of his separation for a probationary period of six months starting from the date of reinstatement. He seeks additional compensation for material and moral injury and he claims 5,000 euros in costs.

The ITER Organization invites the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant impugns the Director-General's decision dated 17 September 2014. In that decision the Director-General endorsed the Mediator's implicit recommendation to dismiss the complainant's appeal against the Director-General's earlier decision of 20 June 2014 to terminate his contract at the end of the six-month probationary period ending on 5 July 2014. The Mediator had also recommended that the Director-General award the complainant compensation in an amount equivalent to three months' salary and allowances, plus additional compensation of 5.5 days of salary and allowances, corresponding to the cancellation of untaken annual leave. This recommendation was also endorsed by the Director-General. The complainant made a "counter-offer", which was rejected in a letter dated 25 September 2014. In that letter it was specified that the Organization offered two non-negotiable options: either to accept the compensation offer contained in the decision of 17 September 2014 in the amount of 25,123.49 euros, or to refuse the offer and, if desired, file a complaint with the Tribunal.

On 26 September 2014 the complainant accepted to take the compensation offer in lieu of filing a complaint with the Tribunal. He received the compensation payment on 2 October 2014, and on 10 December 2014 he filed the present complaint.

2. The complainant bases his complaint on the following grounds:
 - (a) the Organization did not comply with the time limit laid down in Article 6.2(c) of the Staff Regulations, which requires that, in case of termination of contract, a staff member be notified “[a]t least two weeks before the end of the probationary period”. The complainant received the Director-General’s decision not to confirm his contract eleven days prior to the end of his probationary period;
 - (b) the Organization violated Article 6.2(e) of the Staff Regulations according to which the termination decision “shall be taken on the basis of a report made by the supervisor of the staff member”, as the complainant’s supervisor had recommended extending his probationary period for a further six months;
 - (c) the Organization violated the adversarial principle in the performance appraisal procedure;
 - (d) the Organization did not provide itself sufficient time to evaluate the complainant’s performance properly, failed to support him adequately during the probationary period and the complainant was not given sufficient warning that his contract might not be extended;
 - (e) the complainant was unable to utilize 8.5 of his remaining days of leave and he was only compensated for 5.5 of them; and
 - (f) he suffered financial and moral damage because of the abrupt termination of his five-year contract.

3. The Tribunal considers that, as the complaint fails on the merits, there is no need to address any issue stemming from the complainant’s breach of his own acceptance of the compensation offer.

4. The Director-General recognized that the termination notice was not given within the prescribed time limit of two weeks before the day of the termination of the six-month probationary period and accordingly followed the Mediator's recommendation to compensate the complainant with the payment of "an amount equivalent to three months of the salary, including allowances, paid to him during his employment". The complainant's assertion that the lateness of the termination notice had the effect of an implicit confirmation of his contract is unfounded. He cites Judgment 3070 to support his assertion but this judgment is not applicable in the present case. Judgment 3070 concerned a situation in which a staff member was put on a six-month probationary period although the Staff Rules provided only for a three-month probationary period. Therefore, the Tribunal found that the notice of termination had to be considered as dismissal before the expiry of the complainant's contract. In the present case, the termination notice was given prior to the end of the probationary period expiring on 5 July 2014. The fact that it was given three days after the time limit provided by Article 6.2(c) of the Staff Regulations ("[a]t least two weeks before the end of the probationary period the staff member shall receive notice in writing that his contract is confirmed or terminated") does not imply that the complainant's contract should have been considered as automatically confirmed. The wording of Article 6.2(c) ("confirmed or terminated") excludes the possibility of an automatic or implied confirmation or termination. The Tribunal finds that the payment of compensation in an amount equivalent to three months' salary and allowances, as recommended by the Mediator and endorsed by the Director-General, was sufficient to remedy the late notification.

5. The plea that the Director-General's decision was not "taken on the basis of a report made by the supervisor of the staff member" is unfounded. Articles 6.2(d) and (e) of the Staff Regulations provide that:

"(d) In exceptional cases, the Director-General may extend the probationary period by a maximum of six months with a written notice to the staff member concerned.

- (e) The decisions of the Director-General under (b), (c) and (d) above, shall be taken on the basis of a report made by the supervisor of the staff member.”

It is consistent case law that the decision to confirm or terminate a contract on completion of a probationary period is a discretionary decision. The Tribunal will not intervene except in cases where the decision was taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority (see Judgments 2646, under 5, 3440, under 2, and 3678, under 4, among others). Furthermore, the Tribunal will not replace an organization’s assessment with its own in cases where unsatisfactory performance is the basis for the refusal of confirmation (see Judgment 2916, under 4). The complainant’s supervisor had recommended an extension of the complainant’s probationary period for a further six months, but that recommendation was not binding on the Director-General. In the decision dated 20 June 2014, the Director-General observed that “[the complainant’s] probationary period assessment mentions ‘areas for improvement – performance against the requirements of the job position need[ed] improvement and remedial action in some areas’” and he consequently decided to terminate the complainant’s contract at the end of his probationary period under Article 6.2(d) [*recte* 6.2(b)] of the Staff Regulations. The Director-General’s evaluation of the complainant’s needs for improvement in contrast to the needs of the Organization excluded the complainant’s situation from being considered an “exceptional case” justifying an extension of the probationary period for a further six months. The Tribunal finds that this decision is not vitiated by any of the elements listed above which would require the Tribunal to intervene. Moreover, the Mediator noted in his report that “the Director for General Administration and the Director of Department for Administration had had further discussions with the Head of the PCD [Procurement and Contracts Division (which was the complainant’s Division)], in which it was concluded that the gap between the expectations and the results was quite high considering that the achievement of the team objectives required a fully operational staff member”.

The Mediator noted “there was a clear risk that the [complainant] would not, at the end of a six-month extension, achieve the autonomous, solution-oriented and proactive P4 level of performance required by the job description and, in particular, to be in a position to safely meet the requirement of substituting the Section Leader on a regular basis”. He observed that it did not seem unreasonable for the management to decide that they could not take the risk that the complainant would not have achieved the objectives by the end of the extension, considering the crucial importance of procurement activities for the ITER Project. He therefore recommended that the Director-General maintain the 20 June decision to terminate the complainant’s contract. The Tribunal finds no flaws in the impugned decision which endorsed the Mediator’s report in full and considered all aspects of the complainant’s work situation against the needs of the Organization.

6. The plea that the Organization violated the adversarial principle in the performance appraisal procedure is unfounded. The complainant argues that the Mediator’s report noted that the Director for General Administration and the Director of Department for Administration had had further discussions with the Head of the PCD (as noted above) and claims that these discussions violated the adversarial principle, as the complainant was not involved. The Tribunal points out that those discussions were made after the performance appraisal procedure and did not change or affect any element of the performance appraisal report resulting from that procedure, in which the complainant had participated, and approved, as evidenced by his signature on the report. Furthermore, the Tribunal considers that it is not unreasonable for the above-mentioned Directors to have spoken with the Head of the PCD, and the complainant was given the opportunity to view and respond to all information included in the mediation procedure prior to the finalization of the Mediator’s report and the Director-General’s taking of the final decision.

7. The pleas that the Organization did not provide sufficient time to evaluate the complainant’s performance properly, failed to support him adequately during the probationary period, and did not give the complainant sufficient warning that his contract might not be extended,

are unfounded. The standard allowed by the Staff Regulations stipulates a six-month probationary period, with an extension of the probationary period of up to six months allowed only in exceptional cases. Generally, staff members have no right to extension of probationary periods, and the complainant presents no convincing justification as to why his case should have been considered as qualifying for an exceptional extension of the probationary period. Moreover, as the standard is a six-month probationary period for all employees, it can reasonably be assumed that the Organization is accustomed to evaluating employees properly within that time frame. The Tribunal notes that the complainant's supervisor recommended that his probationary period be extended for another six months, which is the maximum allowed. This indicates that the supervisor had doubts as to the complainant's ability to reach the expected level for a P4 staff member. As already mentioned above, the Tribunal does not find it unreasonable that the Director-General, in exercising his discretionary authority, decided that the risk of the complainant not reaching the expected level of performance was too high in comparison to the needs of the Organization.

8. The Tribunal considers that the complainant was given ample warning that his performance needed improvement. According to the complainant's three-month review, he was not working at the P4 level, and his production of procurement activities was considered "slow" in comparison with the production standard of the PCD team. The complainant commented *inter alia* that he understood that there was still some gap between his current capacity and the objectives set. In his five-month assessment, the complainant's supervisor again noted deficiencies in his performance and decided to recommend an extension of his probationary period for an additional six months as at that time he was still not performing at the level expected. The Organization has provided convincing evidence that the complainant was given guidance and training through various meetings, both informal and formal, throughout his probationary period. Moreover, the Tribunal notes that the two performance assessments gave him ample notification that he was not working at the expected level and that consequently he knew that he was at risk of not having his contract confirmed.

9. The complainant's claim for compensation for three unexpended days of leave, as he was unable to utilize 8.5 of his remaining days of leave and was only compensated for 5.5 of them, is unfounded. Article 18.1(c) of the Staff Regulations, entitled "Leave unexpended on departure of staff members", provides that "[l]eave unexpended at the time staff members depart from the ITER Organization shall be cancelled". The complainant had no entitlement to compensation for any unexpended days of leave and the Tribunal notes that the Director-General's decision to award the complainant compensation for 5.5 unexpended days of leave, as recommended by the Mediator, was a voluntary gesture of goodwill on the part of the Organization. It can be added that the complainant had the opportunity to use seven days of leave prior to separating from the Organization and chose to take only five (as noted in the 26 June 2014 email to the complainant from the Administration).

10. The claim that the complainant suffered financial damage because of the abrupt termination of his five-year contract is unfounded. As the termination of the complainant's contract was lawful, he has no right to claim compensation for any financial damage stemming from that decision.

11. Considering the above, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ