Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

A.

v.

ACP Group

124th Session **Judgment No. 3845**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Y. K. A. against the African, Caribbean and Pacific Group of States (ACP Group) on 30 December 2015, the ACP Group's reply of 26 February 2016, the complainant's rejoinder of 14 April and the ACP Group's surrejoinder of 18 May 2016;

Considering Articles II, paragraphs 1 and 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision to terminate his appointment at the end of his probationary period.

The complainant was recruited by the Secretariat of the ACP Group on 1 October 2013 to perform, on a temporary basis, the duties of Expert at grade P4 in the Department of Sustainable Economic Development and Trade. His six-month contract was later extended until 30 September 2014. When his post was advertised, he applied successfully and was awarded a fixed-term contract from 1 September 2014 to 31 December 2020. In accordance with Article 11 of the Staff Regulations, the contract stipulated a probationary period lasting a maximum of 12 months.

Shortly after taking up his functions on 1 April 2015, the Assistant Secretary General in charge of the above-mentioned department, in his capacity as the complainant's supervisor, asked the complainant to draw up various documents and admonished him on several occasions. On 21 May the complainant was sent an assessment form for his performance in 2015, which he was invited to complete by 2 June.

On 30 July the complainant met with his supervisor and the Secretary General to discuss his performance assessment. In a letter of 31 July 2015, the Secretary General, referring to the relevant provisions of Article 11 of the Staff Regulations, informed him that an "in-depth appraisal of [his] performance" had shown that it was "below the acceptable minimum level" and that he had decided to dismiss him. The complainant was told that he would receive one month's basic salary as a separation grant, that he would be paid his salary for August and that he would also be paid for any accrued leave that he had not taken as at 31 August. On 14 August the complainant submitted an appeal to the Secretary General requesting the cancellation of the decision to dismiss him.

In the days that followed, the complainant received a series of memoranda dated 13 or 15 August from his supervisor. In one of the memoranda of 13 August, the Assistant Secretary General complained that, despite several reminders, the complainant had not completed the assessment form sent to him on 21 May, and requested him to return it by 24 August. He informed the complainant that in view of his "lack of cooperation" and the need to assess his performance during his probationary period, he had had to carry out an "independent assessment" dated 3 July that covered the period 1 April to 30 June, which was attached to his memorandum and which was negative overall. In the four other memoranda, the Assistant Secretary General noted that the complainant had not submitted several documents and asked him to produce them by 28 August.

On 22 August the complainant wrote to the Secretary General inquiring what action he intended to take in respect of his appeal and complaining about his supervisor's conduct which, according to him, showed "singular determination in respect of the dismissal procedure".

The complainant met with the Secretary General on 28 August and again on 31 August. During the second meeting, he was given a document written by his supervisor in which the latter made several criticisms of him. Also on 31 August, the Secretary General wrote to the complainant confirming the decision to dismiss him with effect from the same date.

On 11 September, citing paragraph 3 of Annex VIII of the Staff Regulations governing the "Internal Grievance Mechanism", the complainant wrote to the Chairperson of the Committee of Ambassadors challenging the decision to dismiss him and requesting her to take "all appropriate measures to restore compliance with the procedural rules laid down in the Regulations and to avoid the institution [...] of arbitrary decision-making". In a letter of 4 November 2015, which is the impugned decision, the complainant was informed that the Chairperson of the aforementioned committee had decided to "refer the issue to the Secretary General and his team for settlement". The sums due on separation from service were paid on 11 November 2015.

In his complaint filed on 30 December 2015, the complainant seeks, as his main claim, his reinstatement in the post of Expert with effect from 1 September 2015. Subsidiarily, he asks the Tribunal to award compensation equivalent to the remuneration that he would have received had his contract not been terminated, including the "residence allowance", and the deletion of the reason stated in the letter of 31 July 2015. More subsidiarily, he claims 300,000 euros in damages. He also seeks an award of 10,000 euros in costs. In his rejoinder, he withdraws his request for reinstatement.

The ACP Group submits that the complaint is irreceivable because it is time-barred, and requests that the complainant be ordered to pay it 1,500 euros in costs. Should the Tribunal find the decision of 31 July 2015 unlawful, it asks that damages be limited to the sums already paid to the complainant following his separation from service and that costs be limited to 1,500 euros. In its surrejoinder, the ACP Group adds that the Tribunal is not competent because its Staff Regulations provide that a complaint may only be filed with the Tribunal in disciplinary cases.

CONSIDERATIONS

1. In its surrejoinder, the ACP Group challenges the competence of the Administrative Tribunal of the International Labour Organization (ILO) on the grounds that it has recognised the jurisdiction of the Tribunal only in respect of disputes of a disciplinary nature arising between the ACP Group and its staff.

Under Article II, paragraphs 1 and 5, of the Statute of the Tribunal:

> "1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.
>
> 5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules, and which is approved by the Governing Body."

It follows from those provisions that, as the Statute of the Tribunal does not provide for the right to formulate reservations concerning the scope of the Tribunal's competence, organisations recognising the Tribunal's jurisdiction accept that all disputes arising between them and their officials may be submitted to the Tribunal.

While it is true that in the letter of 25 October 2004 by which it asked to recognise the Tribunal's jurisdiction, the ACP Group specified that its request pertained to the provisions of Title IX of the Staff Regulations governing disciplinary proceedings, it ensues from the foregoing that such a request could not be approved in that form. Consequently, the acceptance by the Governing Body of the International Labour Office of the request must be understood as intending to empower the Tribunal to hear all disputes between the ACP Group and its officials.

It follows from the above that the Tribunal is competent to hear the present case.

2. The dispute concerns the decision of 31 July 2015 by which the Secretary General of the ACP Group ended the employment relationship between the organisation and the complainant with effect from 31 August 2015.

On 14 August 2015 the complainant challenged that decision by means of what he called an "appeal to a superior to retract a dismissal decision". He thereby implicitly referred to Article 22 of the Staff Regulations, which confers on any member of staff the right to lodge a request or complaint with the Secretary General concerning his or her personal situation within the Secretariat in accordance with the internal grievance mechanism stipulated in Annex VIII to the Staff Regulations. Under Article 22(2), the Secretary General is to give his or her reasoned decision in accordance with Annex VIII after having, if he or she sees fit, sought the advice of the Grievance Committee. In the present case, the Secretary General did not see fit to seek that advice and issued his decision on 31 August 2015, rejecting the grievance and confirming his decision of 31 July 2015.

The complainant did not file his complaint with the Tribunal until 30 December 2015, after the 90-day time limit stipulated in Article VII, paragraph 2, of the Statute of the Tribunal had expired.

The defendant concludes that the complaint is thus time-barred.

3. The complainant challenges that view on the ground that on 11 September 2015 he filed an appeal against the decision of 31 August 2015 with the Chairperson of the Committee of Ambassadors on the basis of paragraph 3 of the aforementioned Annex VIII, which reads as follows:

> "In the case where the complaint is about the Secretary General, the member of staff shall first submit his/her complaint to the Secretary General, in writing stating his/her complaint. If a satisfactory response is not received from the Secretary General within thirty calendar days the member of staff may file his/her complaint with the Chairman of the Committee of Ambassadors."

The defendant counters that this remedy was not available since it is provided only for cases where the Secretary General is personally involved in the dispute. It is not therefore, in the ACP Group's view, an internal means of redress within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal as far as the present case is concerned.

4. The way in which the internal means of redress are organised in the Staff Regulations and its annexes is rather unclear. Since the decision of 31 August 2015 did not specify what remedies were available to challenge it, it is understandable in any event that, even with a lawyer's assistance, the complainant was hesitant to file a complaint directly with the Tribunal without first submitting the appeal to the Chairperson of the Committee of Ambassadors provided for in Annex VIII, paragraph 3, of the Staff Regulations.

In the Tribunal's view, it is hence justified to apply the firm precedent that while rules of procedure should be strictly complied with, they must not set traps for staff members who are trying to defend their rights and must not be construed with too much formalism, thus allowing the authority to avoid, unlawfully, addressing the merits of the case (see Judgments 1832, under 6, 2882, under 6, 3407, under 19, 3423, under 9(b), and 3759, under 6).

The defendant's objection to receivability based on the late filing of the complaint must therefore be dismissed.

5. Article 11 of the Staff Regulations provides:

"**Article 11 – Probationary Period**

1. All newly recruited members of staff shall serve a maximum probationary period of twelve (12) months.
2. The performance of the new recruit shall be assessed after the sixth and ninth months during the probationary period. Subject to satisfactory assessment the member of staff shall be given a letter of confirmation a month before the end of the probationary period.
3. If the assessment of the recruit is not satisfactory, the provisions on separation from service shall apply and he/she shall be paid one-month's basic salary as terminal pay."

6. After having been in the defendant's service for one year, from 1 October 2013 to 30 September 2014, under two six-month temporary employment contracts, the complainant successfully applied for the same post, which was now to be held by an official with a fixed-term contract. On 1 August 2014 a contract was therefore concluded with the defendant for the period 1 September 2014 to 31 December 2020.

Clause 4 of the contract reads:

> "As per Article 11 of the Staff Regulations of the ACP Secretariat, you shall serve a maximum probationary period of twelve (12) months starting on 1st September 2014 and ending on 31 August 2015.
>
> Subject to satisfactory assessment of your performances, you shall be given a letter of confirmation one month before the end of the probationary period. If the assessment is not satisfactory, the provisions on separation from service shall apply."

7. The Tribunal does not agree with the complainant's view that this clause is unlawful in that it effectively doubles the probationary period stipulated in Article 11 of the Staff Regulations. It is true that the complainant had already demonstrated his abilities in the 12 months during which he had occupied the post in question and that his appointment resulted from a competition held after that period, which raises a question as to whether it would not have been possible, or even appropriate, to exempt the complainant from serving the probationary period prescribed in his new fixed-term contract.

However, that question, and the question of whether such an exemption would have been compatible with Article 11 of the Staff Regulations, may remain undecided. The complainant agreed quite freely to sign the new contract including the clause which he now alleges is unlawful, and it was not unjustified, to say the least, to stipulate a trial period, given that the newly agreed appointment was for a period of just over six years.

8. The Tribunal has consistently found that an organisation which employs staff members on a probationary basis must not only provide guidance, instructions and advice on carrying out duties; it must also set objectives for such staff members so that they know what criteria will be used to appraise their performance. It must, in good time and in clear language, inform a staff member of any aspects of her or his performance that are deemed unsatisfactory and warn her or him of the risk of dismissal after the probationary period so that both parties can take appropriate steps to remedy the situation sufficiently early. These requirements flow from the general principles applicable in

international civil service law, in particular the principle of good faith, the duty of care and the employer's duty to respect the dignity of its employees (see Judgments 3481, under 6 and 7, 3482, under 11, and 3678, under 2).

The aforementioned Article 11(2) of the Staff Regulations specifically requires the defendant to assess the performance of probationers twice during the period concerned. The first of those assessments must take place at the end of the sixth month, and the second at the end of the ninth month. In the present case, the first of those assessments should therefore have taken place at the end of February 2015 and the second at the end of the following May.

9. A thorough review of the case file shows that those principles and that specific requirement were not observed in this case. The complainant was not informed in a timely and satisfactory manner of the aspects of his performance that were deemed deficient. Moreover, the ACP Group did not carry out adversarial interim performance assessments at the end of either the sixth or the ninth month of the probationary period. Events between April and June 2015 as set out in the defendant's submissions show that the AGP Group had failed to grasp the scope of its duties in respect of a staff member who, having been in its service for a year and a half, could hardly have expected to be dismissed at the end of the probationary period, given that his performance had never previously been subjected to criticism that would warrant such a final measure.

It follows that the complaint is well-founded and that the dismissal decision of 31 July 2015 and the decision of 4 November 2015 must be set aside, without there being any need to examine the complainant's remaining pleas.

10. The complainant having withdrawn his claim for reinstatement, it suffices for the Tribunal to order compensation for the material damage and moral injury that he has suffered.

Having regard especially to the complainant's age, his qualifications, his experience and the length of time that he spent in the ACP Group's

service, it is reasonable to award him damages under all heads equivalent to the salary and benefits that he would have received in the 24 months from 1 September 2015, the date on which he left the organisation, less his professional earnings from other sources over that period. The ACP Group must also pay the complainant the equivalent of the employer's and employee's contributions that would have been due to the Provident Fund if his employment had continued during that same period.

11. The complainant is also entitled to an award of costs, which will be set at 5,000 euros.

12. However, it is unnecessary to grant his claim concerning deletion of the reason stated in the decision of 31 July 2015, as in any event that decision has been set aside in its entirety.

13. The defendant seeks an award of costs against the complainant, assessed at 1,500 euros. Given the outcome of the complaint, that claim must be dismissed.

DECISION

For the above reasons,

1. The dismissal decision of 31 July 2015 and the decision of 4 November 2015 are set aside.
2. The ACP Group shall pay the complainant damages calculated as indicated in consideration 10, above, in compensation for all injury under all heads.
3. The ACP Group shall pay the complainant 5,000 euros in costs.
4. All other complainant's claims are dismissed, as is the ACP Group's counterclaim for costs.

In witness of this judgment, adopted on 25 April 2017, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ