K.

v.

ILO

127th Session **Judgment No. 4102**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. K. against the International Labour Organization (ILO) on 4 November 2016 and corrected on 25 November 2016, the ILO's reply of 6 March 2017, the complainant's rejoinder of 7 April and the ILO's surrejoinder dated 10 May 2017;

Considering Articles II, paragraph 1, 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 contests the ILO's failure to take a final decision on her job grading appeal and the failure to grant her a contract without limit of time.

The complainant joined the International Labour Office, the ILO's secretariat, in June 1995. After a series of short-term contracts, in June 2003 she was granted a fixed-term contract at the G.3 level.

In September 2009 she submitted a request to have her job graded at the G.4 level. Having received no reply, in October 2009 she filed an appeal with the Independent Review Group (IRG) against the implied rejection of her request. In May 2010, upon exhaustion of her sick leave entitlements, she was placed on special leave without pay and was

granted a temporary disability benefit from the United Nations Joint Staff Pension Fund.

A few months earlier, in February 2010, the complainant had filed a grievance with the Human Resources Development Department (HRD) because her name was not on the list of staff members who were granted a contract without limit of time. She was informed on 23 July 2010 that she would be granted a contract without limit of time upon her return to work. However, since the complainant's fixed-term contract was terminated for health reasons effective 1 August 2011, she never returned to work and hence was never granted a contract without limit of time. The complainant states that the decision of 23 July 2010 is "an impugned decision".

Concerning her job grading appeal, the complainant was heard by the IRG in March 2012. She contacted the IRG in January 2013 to enquire if her appeal was being processed. The IRG replied the same day that it was.

On 29 July 2013 the complainant filed a grievance with HRD explaining that her job grading appeal with the IRG had not yet been examined and she requested compensation for the delay. HRD rejected the grievance and the matter was referred to the Joint Advisory Appeals Board (JAAB). In its report of 25 March 2014, the JAAB recommended to the Director-General inter alia to pay the complainant 2,500 Swiss francs in compensation for the delay in the IRG's examination of her job grading appeal, and to ensure that a final decision on her job grading appeal would be taken within three months. In the event that no final decision was taken within that period of time, the JAAB recommended that she be paid 5,000 Swiss francs in moral damages. On 26 May the complainant was informed that the Director-General had decided to endorse these recommendations.

On 10 June 2014 she was informed that the IRG had made a recommendation to dismiss her job grading appeal and that the Director-General had decided to endorse that recommendation. In July 2014 she filed a grievance with the JAAB against that decision. In its report of 11 June 2015, the JAAB concluded that the IRG had not examined all the facts and that it had not applied the required job grading methodologies. Its recommendation was consequently flawed.

The JAAB therefore recommended that the contested decision be set aside and that a new examination of the complainant's job grading appeal be undertaken.

By letter of 9 July 2015, the complainant was notified that the Director-General had decided to set aside the decision of 10 June 2014 and that the IRG would undertake, by 12 December 2015 at the latest, a new review of the job grading appeal she had filed in October 2009. She was also informed that that decision was a final decision within the meaning of Article 13.3, paragraph 4, of the Staff Regulations.

On 1 and 10 February 2016 the Vice Chairperson of the ILO Staff Union wrote to the Administration on behalf of the complainant. She pointed out that the complainant had not received any information on the review of her job grading appeal by the IRG and asked that the appeal be reviewed immediately. Having received no reply, on 4 November 2016 the complainant filed a complaint with the Tribunal.

The complainant asks the Tribunal to order her retroactive titularisation, the retroactive reclassification of her post to grade G.4 with effect from 10 October 2009, and the payment of the 5,000 Swiss francs that the ILO had offered to pay her with respect to undue delay. She also seeks an award of material and moral damages as well as costs.

The ILO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress concerning the refusal to grant the complainant a contract without limit of time and to award her 5,000 Swiss francs. It submits that her complaint is time-barred insofar as she claims retroactive review of the grading of her post, and that it is otherwise unfounded.

CONSIDERATIONS

1. The present complaint, filed on 4 November 2016, addresses two main issues: the non-reclassification of the complainant's post and the failure to convert her fixed-term contract into a contract without limit of time.

2. With regard to the second issue (titularisation), the Organization held a titularisation exercise in 2008, and in 2010 the complainant became aware of a list of staff members who had been granted contracts without limit of time. She filed a grievance on 17 February 2010, contesting the fact that her contract had not been converted during the exercise, noting in particular that staff members who had joined the Organization after her had been granted titularisation. By letter dated 18 March 2010, the complainant was informed by HRD that there had been "an error in the system" with regard to her start date and that, consequently, her application for titularisation would be re-examined and she would be titularised retroactively if necessary. The complainant exhausted her sick leave entitlements in May 2010 and was placed on special leave without pay. By letter dated 23 July 2010, she was informed that she would be titularised upon her return to work. The complainant's fixed-term contract was terminated for health reasons with effect from 1 August 2011. As she had not returned to work, her contract was never converted into a contract without limit of time. The complainant did not appeal the 23 July 2010 decision which did not grant her a retroactive titularisation, nor did she contest the decision to terminate her fixed-term contract with effect from 1 August 2011, prior to filing this complaint.

3. Regarding the issue of post classification: on 24 September 2009 the complainant requested that her G.3 post be graded at G.4. Having not received a response to her request, she submitted an appeal to the IRG, dated 27 October 2009, against the implied rejection of her job grading request. The complainant filed a grievance with the JAAB on 26 November 2013, citing excessive delays by the IRG in reviewing her job grading appeal, which should normally take three months from receipt of the appeal. In its report of 25 March 2014, the JAAB recommended that the Director-General compensate the complainant for the delay in the IRG's examination of her appeal, by paying her 2,500 Swiss francs in moral damages, and that a final decision regarding her appeal be made within three months, failing which she should be paid 5,000 Swiss francs in moral damages. On 26 May 2014 the Director-General endorsed these recommendations.

On 10 June 2014 the Director-General endorsed the IRG's recommendation to dismiss the complainant's job grading appeal. The complainant appealed that decision before the JAAB on 9 July 2014. In its report dated 11 June 2015, the JAAB recommended in particular that the contested decision be set aside and that a new examination of the job grading appeal be undertaken. By letter dated 9 July 2015, the complainant was informed of the Director-General's decision to endorse that recommendation. He notified her that the IRG would complete a new review of her job grading appeal by 12 December 2015 at the latest. By emails dated 1 and 10 February 2016, the Vice Chairperson of the ILO Staff Union wrote to the Administration on behalf of the complainant. She stated that the complainant had not yet received any notification regarding her job grading appeal, and asked that the complainant's appeal be reviewed immediately "so that she obtain[ed] the grade of G4 retroactively as compensation for the material and moral damages she ha[d] suffered due to excessive delays". Having received no reply, on 4 November 2016 the complainant filed the present complaint against the Administration's failure to render a decision concerning the new review of her job grading appeal.

4. The complainant requests the Tribunal to direct the Organization to: reclassify her post to G.4 with retroactive effect from 10 October 2009; retroactively titularise her; pay her 5,000 Swiss francs in accordance with the JAAB's recommendation of 25 March 2014, endorsed by the Director-General on 26 May 2014; award her material and moral damages in the amount of 30,000 Swiss francs; and award her costs in the amount of 3,000 Swiss francs.

5. On 6 March 2017 the Deputy Director-General for Management and Reform wrote to the complainant. He stated that the Director-General had become aware of "a series of administrative oversights [which had] regrettably prevented [her] job grading appeal from being brought to a conclusion, despite the clear and unambiguous terms of his decision of 9 July 2015", and that "the Director-General ha[d] referred [her] job grading appeal [...] to the [...] IRG [...] to be treated as a matter of utmost priority". He added that the Director-General "ha[d] decided that, as an

exceptional measure, the amount of 20,000 Swiss francs should be paid to [her] immediately in recognition of the responsibility of the Office for the failure to implement his decision of 9 July 2015". He further stated that the "Director-General offer[ed] [her] his sincere apologies for the unreasonable delay in completing the procedure with respect to [her] job grading appeal of 27 October 2009".

In its surrejoinder dated 10 May 2017, the Organization indicates that the IRG has concluded, in its report of 5 May 2017, that the position held by the complainant was correctly classified at grade G.3 at the time she made her job grading request. The defendant also states that the Director-General had not yet taken a final decision based on the report of the IRG.

6. The complaint insofar as it challenges the failure to grant the complainant a contract without limit of time (titularisation) is irreceivable. As noted above, the complainant did not formally contest internally the 23 July 2010 decision which did not grant her a retroactive titularisation, nor did she contest the decision to terminate her fixed-term contract with effect from 1 August 2011. Thus, the complainant has failed to exhaust the internal means of redress available to her under the applicable rules, as required by Article VII, paragraph 1, of the Statute of the Tribunal. Moreover, considering the number of years that have passed since those decisions were communicated to the complainant, any claims in that regard are time-barred.

7. Regarding the complainant's claim that her post be reclassified by the Tribunal, the Tribunal cannot order the Organization to reclassify the complainant's post since this is a discretionary decision to be made by the Organization. However, the complaint is receivable and founded insofar as the complainant alleges that the ILO has failed to render a decision on her job grading appeal. The chronology of events presented in consideration 3 above demonstrates that the Organization failed to take a decision on this issue despite its commitments to do so. The requirement to exhaust internal means of redress has had the effect of paralyzing the exercise of the complainant's right to have her job grading appeal reviewed and, as an exception to the requirement of

Article VII, paragraph 1, of the Statute, the complainant had the possibility to file a complaint with the Tribunal (see Judgment 3558, under 9). In awarding moral damages, the Tribunal takes into consideration that the Administration, in its letter of 6 March 2017, recognized its egregious administrative oversights and therefore decided to pay the complainant immediately 20,000 Swiss francs, and that the Director-General offered his sincere apologies.

Taking into account that the complainant requested in 2009 that her job be graded at the G.4 level, that on 10 May 2017 a final decision had not yet been taken, that there was a failure to exercise a duty of care on the part of the Administration, which has failed to act for a long time, and that the issue was of great importance for the complainant, the Tribunal decides to award her 16,000 Swiss francs in moral damages in addition to the 20,000 Swiss francs already paid by the Organization. The complainant is also entitled to an award of costs in the amount of 1,000 Swiss francs.

DECISION

For the above reasons,

1. The ILO shall pay the complainant moral damages in the amount of 16,000 Swiss francs, in addition to the 20,000 francs already paid to her.
2. The ILO shall pay the complainant costs in the amount of 1,000 Swiss francs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2018, Mr Giuseppe Barbagallo, 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 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ