Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F.

v.

CCC

134th Session **Judgment No. 4499**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. F. against the Customs Co-operation Council (CCC), also known as the World Customs Organization (WCO), on 3 June 2019 and corrected on 28 June, the WCO's reply of 29 October 2019, the complainant's rejoinder of 13 January 2020 and the WCO's surrejoinder of 21 April 2020;

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 may be summed up as follows:

The complainant challenges the decision to terminate her appointment following the abolition of her post.

The complainant joined the WCO on 18 May 2015 as a clerk at grade B2 in Central Services within the Division of Administration and Personnel. Her three-year fixed-term appointment included a six-month probationary period, which was extended until 18 May 2016.

On 15 June 2017 she was the victim of a violent knife attack that led to her being incapacitated for work for several months and required repeated stays in hospital. During her absence an organisational restructuring took place and the issue of whether to retain her post was examined by the Head of Central Services and the Head of Administration and Personnel in consultation with the Organization's Legal Service.

The procedure to be followed for suppressing a post, provided for under Article 19 of the Staff Manual, was then implemented. The Administration Committee – a body set up to advise the Secretary General on certain personnel matters – met on 12 October 2017 to deal with the complainant's case. The following day it decided that her post should be suppressed on the grounds of a significant decrease in her workload and the need to redistribute her tasks following the simplification of existing procedures. Since the Administration Committee was unable to identify any post to which the complainant could potentially be reassigned, it recommended that her contract be terminated early.

On 16 October 2017, the day on which the complainant returned to work "on an experimental basis" as advised by her doctor, she was handed a letter dated the same day containing the Secretary General's decision – taken pursuant to the Administration Committee's recommendation and in the interests of the Organization – to suppress her post and therefore to terminate her appointment with effect from 16 January 2018, that is to say, after a three-month notice period. The letter stated that she was exempt from work during that period, but would continue to receive her salary and emoluments until the end of her appointment, and that she would receive an indemnity for loss of employment equivalent to three months' salary.

On 21 December 2017 the complainant contacted Employee Services stating that she was unable to resume work and asking for more detailed information about her entitlement to health insurance coverage following the termination of her appointment and about her rights and obligations so that she could "defend her interests". As she received no reply, she repeated her request to the Head of Administration and Personnel on 12 January 2018. Her appointment ended on 16 January. The next day Employee Services sent her information regarding the scope of her health insurance coverage under both the Belgian insurance system and the private supplementary health insurance offered by the WCO. In February and March the complainant received, at her request, numerous documents as well as information relating to her situation, such as certificates of service, letters of recommendation and guidance on steps to be taken in respect of the national authorities. In June she

contacted the Organization again to ask questions and make further comments concerning, in particular, the documents relating to the end of her appointment, her status as a former official, the sums that had been paid to her and the scope of the health insurance coverage. Her questions were answered promptly.

On 28 September 2018 the complainant's lawyer requested that he be sent his client's personal file and the administrative documents on which the decision to suppress her post had been based. He also asked for a breakdown of the sums paid to the complainant on account of the termination of her appointment and details of her social security entitlements. He received a reply on 26 October. On 11 December 2018 and 4 January 2019 the lawyer repeated his request for a copy of the Administration Committee's recommendation and all of the documents that provided the basis for the decision to terminate his client's appointment. More specifically, in his letter of 4 January 2019 he expressed his intention to have the decision of 16 October 2017 withdrawn and the complainant reinstated in her post. On 9 January 2019 the administration replied that any appeal in connection with the decision of 16 October 2017 was time-barred and quoted the applicable provisions. Nevertheless, a copy of the Administration Committee's recommendation and a copy of the complainant's personal administrative file were appended to that reply.

On 24 January 2019 the complainant requested that the Appeals Board be convened so that she could seek, in particular, the setting aside of the decision to suppress her post and her reinstatement at the WCO. In a letter of 25 March 2019, which constitutes the impugned decision, the Head of Administration and Personnel reminded her that the Organization considered that any appeal in connection with the decision of 16 October 2017 was clearly time-barred and hence irreceivable and referred to the Tribunal's case law in that area.

The complainant filed this complaint on 3 June 2019. She requests the Tribunal to set aside the decision of 16 October 2017, confirmed by the impugned decision, and to order her reinstatement. If, however, that decision is not set aside, she requests that the WCO be ordered to pay her damages, including punitive damages, for the material and moral

injuries she considers she has suffered, and she requests that an expert be appointed to assess those damages conclusively. She also claims costs. The day after she filed her complaint, she contacted the Secretary General requesting information regarding reimbursement for days of leave unused when her appointment ended. She was sent a breakdown of the sums received on 11 June 2019.

The WCO submits that the letter of 25 March 2019 is not an administrative decision with a legal effect and that the complainant therefore has no cause of action. It argues that, even if the letter does constitute such a decision, it is purely confirmatory in nature. It requests the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal remedies and to comply with the applicable time limits and, subsidiarily, as entirely unfounded.

CONSIDERATIONS

1. The complainant impugns the decision contained in a letter from the Head of Administration and Personnel of the WCO of 25 March 2019 in which he refused to grant the request for the Appeals Board to be convened that the complainant's lawyer had sent to the Secretary General on 24 January with a view to challenging the decision of 16 October 2017 terminating her appointment with effect from 16 January 2018 owing to the suppression of her post.

That letter of 25 March 2019 was based on the view that "any appeal in connection with the Secretary General's administrative decision to suppress the [complainant's] post [...] [wa]s time-barred".

In substance this reason repeats the one previously stated in a letter of 9 January 2019 in which the Head of Administration and Personnel had replied to a letter sent by the complainant's lawyer to the Secretary General on 4 January seeking the withdrawal of the decision of 16 October 2017 and the complainant's reinstatement in her post.

2. Article 58.2 of the Staff Manual, which concerns the dispute resolution procedure, provides in paragraph (a) that:

> "Before an appeal is made to the Appeals Board against an administrative decision, a letter shall be addressed to the Secretary General, within 15 working days from the date of notification of the decision, requesting that it be modified or withdrawn.
>
> If the Secretary General has either rejected such request or has failed to reply within 30 working days, the appellant shall submit to the Secretary General, within 20 working days from the date of notification of the decision impugned, a request in writing that the Appeals Board be convened.
>
> Nevertheless, in exceptional cases and for duly justified reasons, appeals lodged after the time allowed may be admitted."

3. In the present case, the evidence shows that the decision of 16 October 2017 terminating the complainant's appointment after her post was suppressed was notified to her on the same day as it was taken. Thus, when that decision was challenged for the first time in the abovementioned letter of 4 January 2019, it appeared that the time limit of 15 working days provided for in the first subparagraph of aforementioned Article 58.2(a) of the Staff Manual for initiating an internal appeal against that decision had already expired some 14 months earlier.

4. However, in this regard it is important to take account of the quite exceptional circumstances in which the decision of 16 October 2017 was taken and notified.

The evidence shows that on 15 June 2017 the complainant was violently assaulted in the street by a stranger, subsequently identified and convicted of her attempted murder by a Belgian court, who had attempted to cut her throat with a knife. That assault, which led to the complainant being incapacitated for work for several months and repeated stays in hospital, had serious after-effects that were not only physical, such as a severely disabling injury to her vocal cords, but also psychological, on account of the post-traumatic stress from which she suffered.

Yet it was precisely on 16 October 2017 that the complainant was able to resume her duties at the WCO, and this return to work had, moreover, been decided "on an experimental basis" on her doctor's advice, partly in connection with her therapy for emotional difficulties.

It is thus plain that the complainant was in an extremely fragile condition when she arrived at work on the morning of that day and was informed of the termination of her appointment that had been decided a few days earlier while she was absent. That condition could only have been exacerbated by the notification of the termination of her appointment itself, which obviously dealt the complainant an additional psychological blow.

5. In these highly exceptional circumstances, the Tribunal considers that the complainant cannot be deemed – as officials of international organisations usually are – to have been fully aware of the means of redress available to her to challenge in due time the decision of which she had been informed and the applicable time limits. A medical certificate dated 15 January 2019 issued by the neuropsychiatrist responsible for the complainant's psychotherapeutic care, which was submitted as evidence, confirms that she was "incapable of performing her administrative duties as normal during the period [under consideration] on account of her emotional and cognitive difficulties". Furthermore, it is conceivable that the complainant, who had just resumed work for the Organization on the same day as she was notified of the decision in question, following a prolonged absence for the serious health reasons described above, was not able to keep in mind the content of the provisions of the Staff Manual concerning the dispute settlement procedure. Lastly, the Tribunal notes that the time limits for appeals set out in aforementioned Article 58.2 of the Staff Manual, particularly the period of 15 working days in which a request for review of the contested decision must be submitted to the Secretary General, are very short, not only in comparison with those normally specified in statutory provisions of this type, but also in absolute terms, making it especially difficult in this case for the complainant to challenge the disputed decision to terminate her appointment in due time.

6. In those circumstances, the Tribunal considers that, in order to ensure that the complainant had the opportunity to exercise effectively her right of appeal against that decision, which was clearly of paramount importance to her because it involved the termination of her appointment,

it was the WCO's responsibility to inform her explicitly about the means of redress available to challenge it and the time limits for so doing. Although the Tribunal's case law does not ordinarily place such an obligation on organisations, the WCO's duty of care towards the complainant required, in this case, that it provide her with the necessary information on this point (for a comparable case involving a failure to state the means of redress and applicable time limits in the notification of a decision sent to a former staff member with a serious disability, see Judgment 3012, consideration 6, or, for a case involving failure to provide such information to an elderly former staff member in fragile health affected by a decision significantly reducing the coverage of her costs of residence in a nursing home, Judgment 4517, consideration 8).

In the present case, the decision of 16 October 2017 did not mention the means of redress and time limits for lodging an appeal, and it is not apparent from the file that the decision was accompanied by any other document containing that information when it was notified.

In its submissions the Organization asserts that the Head of the Legal Service, who met with the complainant twice at the time when she was notified of the decision of 16 October 2017, informed her verbally of the means of redress and the applicable time limits, but that assertion is disputed by the complainant in her rejoinder and, although the Organization has produced an exchange of emails relating to the meetings in question, nothing in that exchange clearly shows that such information was provided during those discussions. In accordance with the principles governing the burden of proof when determining the receivability of complaints, it is of course up to the organisation to prove that formalities of this type were complied with (regarding proof of the date of due notification of a decision, for example, see Judgments 723, consideration 4, 2494, consideration 4, or 3034, consideration 13). The WCO's allegation must therefore be dismissed.

7. Since there is no evidence that the complainant was informed of the means of redress and relevant time limits as required in this case when the decision of 16 October 2017 was notified, the 15-day time limit specified in the first subparagraph of aforementioned Article 58.2(a) of

the Staff Manual within which a request for review of that decision could be addressed to the Secretary General, could not begin.

In view of this finding in particular, none of the WCO's four objections to the receivability of the complaint can be accepted.

8. Firstly, the WCO is plainly wrong to submit that the letter from the Head of Administration and Personnel of 25 March 2019 is not an administrative decision. Under the Tribunal's case law, any act by an officer of an organisation which has a legal effect constitutes such a decision (see, for example, Judgments 532, consideration 3, 1674, consideration 6(a), 2573, consideration 10, or 3141, consideration 21). The refusal conveyed in the letter in question to grant the complainant's request for the Appeals Board to be convened, which had the result of preventing her appeal against the termination of her appointment from being examined, plainly had a legal effect, which, it must be noted, would also have been the case if the refusal had been warranted.

9. Secondly, the WCO is not justified in submitting that the decision of 25 March 2019 merely confirmed the decision of 16 October 2017 and could not therefore have had the effect of setting off a new time limit for an appeal by the complainant. Indeed, the actual concept of a purely confirmatory decision, as referred to in the Tribunal's case law, is not applicable unless a new decision confirms a prior final decision (see, for example, Judgments 1304, consideration 5, 2449, consideration 9, 3002, consideration 12, and 4118, consideration 3). In this case, it is evident from the foregoing that the decision of 16 October 2017 was not final and, since the time limit for lodging an appeal against it had not, in fact, started, the Organization's argument that that time limit could not be re-opened is misconceived.

10. Thirdly, the WCO is not entitled to submit that the complaint was filed with the Tribunal in breach of the requirement that the internal remedies available to an organisation's staff members first be exhausted.

Contrary to what the Organization contends in its submissions, the complainant's request for the Appeals Board to be convened had been preceded, as prescribed under the first subparagraph of the aforementioned Article 58.2(a) of the Staff Manual, by the submission to the Secretary General of a written request for the modification or withdrawal of the contested decision. Indeed, the aforementioned letter of 4 January 2019 addressed to Secretary General by the complainant's lawyer, in which he stated that the decision of 16 October 2017 "appear[ed] [...] irregular", that he could infer from this that "[the complainant's] appointment [...] ha[d] never ended" and that "[c]onsequently, [the complainant] should be reinstated in her post", must be regarded as having constituted such a request since it clearly sought the withdrawal of the decision in question. The fact that this request was not submitted within the time limit of 15 working days usually prescribed for so doing did not make it late, in this case, since, for the reason already stated, that time limit had not started.

Moreover, the request submitted on 24 January 2019 for the Appeals Board to be convened was lodged, in accordance with the second subparagraph of the aforementioned Article 58.2(a), within 20 working days of the notification of the decision rejecting that withdrawal request, which was taken on 9 January 2019. The Tribunal further observes that, if that time limit had not been complied with, the Appeals Board could still have considered the complainant's appeal as receivable since the present case most certainly counts among the "exceptional cases" in which it could excuse such lateness in accordance with the provisions of the third subparagraph of the aforementioned Article 58.2(a).

Thus, the complainant did in fact satisfy the requirement that the two stages of the internal appeal procedure be completed within the prescribed conditions.

11. Lastly, the WCO is also wrong to submit that the complaint is time-barred. The complaint was in fact filed, in compliance with Article VII, paragraph 2, of the Statute of the Tribunal, within 90 days of the notification of the decision of 25 March 2019, bearing in mind

that, as has been stated, the time limit for an appeal to be lodged against the decision of 16 October 2017 had not started.

12. It is clear from the foregoing not only that the complaint is receivable, but also that the impugned decision of 25 March 2019 in which the Head of Administration and Personnel wrongly rejected as time-barred the request for the Appeals Board to be convened is unlawful. That decision must therefore be set aside for that reason, without there being any need to examine the other pleas against it.

13. In the circumstances of the case, it is appropriate for the Tribunal, rather than directly determining the lawfulness of the decision of 16 October 2017 in these proceedings, to remit the case to the Organization to allow the internal appeal procedure challenging that decision to be completed.

Firstly, since the decision of 25 March 2019 set aside above had the specific purpose of rejecting the complainant's request for the Appeals Board to be convened, its setting aside should naturally result in the Appeals Board being convened to hear the appeal that the complainant wished to submit to it.

Secondly, it should be recalled that, as the Tribunal's case law has long emphasised, 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 she or he challenges effectively reviewed by the competent appeal body (see, for example, Judgments 2781, consideration 15, and 3067, consideration 20). This is especially so in this case since, under settled case law, the Tribunal exercises only a limited power of review concerning decisions to abolish posts, in the context of which it will not supplant the organisation's assessment with its own (see, for example, Judgments 4099, consideration 3, or 4139, consideration 2), whereas the Appeals Board can undertake a more comprehensive review and can, in particular, issue recommendations on the basis of a different assessment or even on

grounds of fairness or advisability (see, in particular, Judgment 3732, consideration 2, and the case law cited therein).

Lastly, in the event that the internal appeal procedure does not result in a final settlement of the dispute, the consideration by the Appeals Board of the circumstances in which the decision was taken to terminate the complainant's appointment will be of great assistance by allowing the Tribunal to have before it the findings of fact and the items of information or assessment resulting from the deliberations of that body. Owing to its extensive knowledge of the functioning of the WCO and the broad investigative powers granted to it, the Appeals Board could provide valuable clarification of the circumstances of the instant case, which poses, beyond particular legal questions, sensitive questions of fact relating to the reasons for the contested abolition of post and possible opportunities for the complainant to be reassigned to a different post in the Organization.

14. As a result of the Tribunal's order that the case be remitted to the WCO, the Secretary General must, within 30 days of the public delivery of this judgment, adopt a decision convening the Appeals Board in order to allow the internal appeal procedure provided for in Articles 58 to 58.3 of the Staff Manual and in Annex XIV thereto to continue.

15. Given this remittal, the complainant's claims seeking her reinstatement within the WCO, the award of material and moral damages for the injury she suffered as a result of the termination of her appointment, and the appointment of an expert to assess that injury, which are connected to the consideration of the merits of the case, must, in the present circumstances, be dismissed.

16. However, the complainant is entitled to compensation for the moral injury that the decision of 25 March 2019 refusing to convene the Appeals Board caused of itself. That decision has had the adverse effect of unjustifiably delaying the final settlement of this dispute, no matter what solution may be found to it in due course. Moreover, the incorrect finding that the request for the Appeals Board to be convened was

irreceivable involved, as stated above, a breach of the Organization's duty of care towards the complainant, which also calls for redress.

In the circumstances of this case, the Tribunal considers that all the moral injury caused to the complainant by the decision in question will be fairly redressed by awarding her compensation in the amount of 10,000 euros.

By contrast, the award of punitive damages that she also claims is not justified.

17. As the complainant succeeds in part, she is entitled to an award of costs, which the Tribunal sets at 7,000 euros.

18. The complainant has applied for oral proceedings and justifies that request by her wish "to be able to be heard personally by the judges so as to direct their attention as much to the seriousness of her situation as to the factors that have hither-to prevented her from defending herself". However, since the Tribunal has considered it appropriate, on the basis of the written submissions alone, to set aside the decision refusing to convene the Appeals Board and to remit the case to the Organization for consideration on its merits, oral proceedings would not serve any purpose here. There is thus no need to accede to this request.

DECISION

For the above reasons,

1. The impugned decision of 25 March 2019 is set aside.
2. The case is remitted to the WCO in order that it may take the action indicated under consideration 14, above.
3. The Organization shall pay the complainant moral damages in the amount of 10,000 euros.
4. It shall also pay her 7,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ