Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

D.

v.

GCF

136th Session **Judgment No. 4652**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. D. against the Green Climate Fund (GCF) on 8 March 2022, the GCF's reply of 12 August 2022, the complainant's rejoinder of 10 September 2022, supplemented on 26 September, and the GCF's surrejoinder of 7 October 2022;

Considering Articles II, paragraph 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 not to pay him compensation equal to the difference between his remuneration as a consultant and the value of the salary and benefits received by staff members performing similar functions.

The complainant worked for the GCF from 25 February 2019 until 20 June 2021 as a consultant providing legal support to the Office of the General Counsel. His first contract was for a period of 12 months ending on 24 February 2020, but the parties signed an amendment in December 2019 extending its duration until 24 February 2021. His second and last contract covered the period from 26 February 2021 to 25 August 2021. However, the complainant left the GCF in June 2021, prior to its expiry, having exercised his right to terminate the contract

by giving at least 30 days' written notice. Both of these contracts expressly provided that they created an "independent contractor relationship" and not a "relationship of employer and employee"; that, except as provided in the contracts, the consultant would not be entitled to any staff benefits; and that any dispute arising out of or in connection with the contracts was to be settled by arbitration.

On 10 May 2021, the complainant sent an email to the Procurement Unit in which he asserted that his role and responsibilities were substantially similar to those of a staff member serving as Associate Counsel at the IS-1 level. On that basis, he requested "compensation for [his] work performed at the GCF corresponding to the level of compensation and benefits applicable to an IS-1 Associate Counsel". The Head of the Procurement Unit replied that, according to the guidelines governing procurement, there was no basis for equating a consultancy contract with a staff contract, but that he had nevertheless forwarded the complainant's request to the General Counsel as "budget holder".

On 18 May 2021, the complainant notified the GCF in writing that he wished to terminate his consultancy contract with effect from 20 June 2021, in accordance with Clause G-14(b) of the contract. Before leaving the GCF, he sent an email to his immediate supervisor, the General Counsel, entitled "Initiation of a grievance review procedure", by which he sought to challenge "a decision of the Head of Procurement to deny [him] compensation and benefits applicable to an IS-1 Associate Counsel", as well as "a decision of [the Division of Support Services] to pay the compensation for [his] work in April 2021". By an email of 6 July 2021, the Deputy Legal Counsel replied that, as the complainant was not a former staff member appointed by the Executive Director by letter of appointment, the administrative review and appeal procedures were not applicable to him. She referred him to Clause G-21 of his consultancy contract, which provided for the settlement of disputes by arbitration.

On 2 August 2021, the complainant filed an appeal with the Appeals Committee. In its report dated 20 December 2021, the Committee found that the complainant was a consultant and not a staff member. It noted that both of his contracts clearly stated that any dispute was to be settled by arbitration and that the resulting award was to be "final and binding on the parties" and would "replace other remedies". It also noted that the challenged decision of the Head of the Procurement Unit was "not a decision against the terms of appointment and, therefore, non-observance of the terms of appointment [was] not applicable". The Committee concluded that the appeal procedure was not applicable to the complainant's appeal and it unanimously recommended that the appeal be rejected.

By an email of 17 January 2022, to which the Appeals Committee's report was attached, the Head of Human Resources notified the complainant of the Executive Director's decision, dated 14 January 2022, to accept the Committee's findings and recommendations and to reject his appeal in its entirety. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the GCF to pay him compensation equal to the difference between the salary and benefits applicable to an IS-1 Associate Counsel and the payments made to him by the GCF, with interest at the rate of 8 per cent per annum. He also claims 30,000 United States dollars in moral damages, 3,000 dollars in compensation for the Appeals Committee's delay in submitting its report, and costs. Lastly, he requests that the information in his personal file be "corrected" to reflect his legal status as an Associate Counsel at the IS-1 level.

The GCF requests that the complaint be dismissed because the Tribunal has no jurisdiction to hear it and it is irreceivable.

CONSIDERATIONS

1. The complainant indicates on the complaint form that he "had a formal legal status of a consultant", but he centrally argues that the work he performed for the GCF was identical to that of a staff member appointed as an Associate Counsel at the IS-1 level. He submits that his

contractual relationship as a consultant should be redefined as a *de facto* employment relationship identical to that of a regular staff member and he seeks compensation for the difference in pay and benefits.

2. For two consecutive periods, the first commencing on 25 February 2019, the complainant provided legal support to the Office of the General Counsel of the GCF in the Republic of Korea. Each period was regulated by a contract. The first contract was signed by the complainant on 7 February 2019 and amended by a document signed by him on 27 December 2019. The second contract was signed by the complainant on 22 February 2021.

3. The decisive legal issue to be determined is whether the complainant was an "official" for the purposes of Article II of the Tribunal's Statute. The complainant contends that he had this status and, accordingly, this Tribunal has jurisdiction to entertain and adjudicate on his complaint. To the opposite effect, the GCF contends he was never an official and the Tribunal has no jurisdiction.

4. Under both contracts with the GCF, the complainant was explicitly retained to work as a consultant. Also explicitly, the contracts stated they did not create the relationship of employer and employee. For present purposes, it is sufficient to refer to two clauses which appeared in both contracts.

Clause G-19 was headed "Relationship of the Parties; Legal Status". It provided, in part:

> "a. The [GCF] and [the complainant] agree that this Contract creates an independent contractor relationship. Nothing contained in this Contract shall be construed as establishing or creating between the [GCF] and the Consultant a relationship of employer and employee or principal and agent. Except as may be provided in the Contract, the Consultant acknowledges and agrees that he or she will not be entitled to any staff benefits, including without limitation, medical or pension benefits.
>
> b. [...]"

Clause G-21 was headed “Settlement of Disputes”. It provided, in part:

> “a. [...]
>
> b. Any dispute or difference arising out of or in connection with this Contract, which cannot be amicably settled between the parties under (a) above shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules then in force by one (1) arbitrator appointed under the said Rules. The place of arbitration shall be Songdo, Incheon City, Republic of Korea. The resulting award shall be final and binding on the parties and shall replace other remedies. The language of arbitration shall be English.”

5. It is appropriate to consider at this point the subject matter of the complaint. It was initially identified in correspondence in the middle of 2021, primarily between the complainant and the Procurement Unit. By email dated 10 May 2021, the complainant wrote to the Administration “to request a compensation for [his] work performed at the GCF corresponding to the level of compensation and benefits applicable to an IS-1 Associate Counsel”. This request was not met and by email dated 9 June 2021 the complainant said he wished to “formally initiate a grievance review procedure in relation to two administrative decisions: (i) a decision of the Head of Procurement to deny [him] compensation and benefits applicable to an IS-1 Associate Counsel [...]; and (ii) a decision of [the Division of Support Services] to pay the compensation for [his] work in April 2021”. The response from the Administration was in an email of 6 July 2021 saying, in substance, the Administrative Review and Appeal Procedures were inapplicable to him though he could not be prevented from submitting an appeal to the Appeals Committee. The complainant did so by email dated 1 August 2021, forwarding a statement of appeal to the Chair of the Appeals Committee which identified the subject matter of the appeal as the two administrative decisions referred to in his email of 9 June 2021.

6. The statement of appeal was accompanied by a brief which identified the relief he sought. That relief was limited to compensation equal to the difference between “the value of salary and benefits applicable to an IS-1 Associate Counsel and the remuneration paid to

[him]" and other ancillary payments. He also sought moral damages for alleged moral injury suffered as a result of the GCF's conduct and, in particular, the characterization of his role as a consultant with its consequential effects on him. By a report dated 20 December 2021, the Appeals Committee determined it lacked competence to consider the appeal and recommended to the Executive Director that the appeal be rejected. This occurred on 14 January 2022, and this is the decision impugned in these proceedings. Without descending into detail, the relief sought in these proceedings generally aligns with that sought in the internal appeal.

7. The complainant lists 24 indicia of his status being that of a *de facto* employee. His train of reasoning is that the GCF's recognition of the jurisdiction of the Tribunal was, expressly, in respect of members of staff; as a *de facto* employee his status was that of a member of staff; and the right to access the jurisdiction of the Tribunal was recognised under the GCF's Human Resources Guidelines.

8. The Tribunal is aware that in many States there is an ongoing debate as to whether the existence of an employment relationship can or should be recognised in certain situations where, although such a relationship is not expressly provided for in the contract, other factors support a conclusion that the person concerned is, in fact, an employee and must be treated as such.

9. The written submissions before the Tribunal set out in detail the divergent views of the parties, in particular as to their respective intentions in concluding the two contracts referred to above.

10. As noted earlier, the GCF argues that the Tribunal has no jurisdiction to hear and determine this complaint because the complainant was not an official, within the meaning of Article II of the Statute of the Tribunal, but a consultant working under the consultancy contracts discussed above. Reference should also be made to an argument advanced by the GCF founded simply on one of the clauses of the contract referred to earlier, namely Clause G-21(b). The argument is expressed

as follows in the GCF's surrejoinder: "the [GCF] maintains that, in accordance with the consistent case law of the Tribunal, when a clause of the contract provides for arbitration, the Tribunal clearly has no jurisdiction to hear the complaint".

11. The Tribunal's jurisdiction is established and defined by its Statute. It is bound to exercise the jurisdiction so conferred. Centrally, it is to hear complaints of officials having regard to the terms of Article II. Pursuant to Article II, paragraph 5, of its Statute, "[t]he Tribunal shall [...] be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials". The Tribunal's jurisdiction does not therefore extend to complaints filed by individuals who do not have the status of an official in the defendant organisations (see Judgment 3049, consideration 4).

12. Although the determination of that status does not depend exclusively on the wording of the contract or the staff regulations and the Tribunal may need to rely on other documents (see, for example, Judgment 3359, consideration 13), in the present case each contract contains a very clear definition of the relationship between the parties.

13. In Clause G-19 it is clearly indicated that the contract "creates an independent contractor relationship" and that nothing contained in it "shall be construed as establishing or creating between the Fund and the Consultant a relationship of employer and employee [...]". Although certain other clauses in these contracts are not incompatible with the existence of an employer-employee relationship, they cannot be construed as negating the clear indication in Clause G-19 as to the legal status of the complainant.

14. Whilst the complainant argues that offering the contracts to him as an "independent consultant" was an abuse of power, because they were offered in those terms for an ulterior purpose, namely, to disguise the true nature of the employer-employee relationship which was intended to be created, there is nothing in the file to suggest that the terms of the contracts did not reflect the parties' true intentions.

15. There is no basis on which the complainant can claim that he should be retroactively assigned a different contractual status, given that he had freely signed both contracts (see, for example, Judgments 2734, consideration 1, 2415, consideration 4, and 2308, consideration 17).

16. Moreover, it is noteworthy that Clause G-21 provides specifically that any dispute not resolved amicably shall be finally settled by arbitration. The Tribunal has already had occasion to rule that it has no jurisdiction to hear a dispute relating to a contract concluded with an independent contractor or collaborator which contains such an arbitration clause (see Judgment 2888, consideration 5, and the case law cited therein).

17. In Judgment 2888, consideration 6, the Tribunal further explained that:

> "It is true that the direct application of this case law might give rise to misgivings in a case such as this, where the controversy hinges on whether the disputed contract should be reclassified as a contract appointing an official. In such circumstances, the question of the Tribunal's jurisdiction in fact touches on the merits of the case, since were the complainant to be recognised as an official by the Tribunal, he would be entitled to bring his claims before the Tribunal. It might therefore seem logical not to decide this issue until the merits of the request for reclassification have been examined. However, this line of reasoning cannot be applied where, as in the present case, jurisdiction to hear any dispute concerning the contract is expressly attributed to another judicial or arbitral body. A request that a contract be reclassified constitutes by its very nature a dispute relating to that contract. The Tribunal will not overstep the limits of its jurisdiction, as defined in Article II of its Statute, by giving a ruling of any kind on the merits of claims which it should not entertain at all."

18. These considerations apply, in the same way, to the present case.

19. The existence of an arbitration clause in some contracts has been treated by the Tribunal as evidencing an agreement to exclude the jurisdiction of the Tribunal (see Judgments 3705, consideration 4, 2688, consideration 5, 2017, consideration 2a, and 1938, consideration 4).

It is obvious that the inclusion of an arbitration clause in the contract of an official would be contrary to the Statute of the Tribunal and the basis on which organisations recognize the Tribunal's jurisdiction. Indeed, if a person is or was an official of an organisation which has recognized the Tribunal's jurisdiction, that person has a right to commence and maintain proceedings alleging non-observance of the terms of appointment or of the staff regulations and can do so notwithstanding the existence of an arbitration clause in a contract between that person and the organisation concerned.

20. The inclusion of an arbitration clause in the contract of a non-official is not unlawful in itself. In this case, as noted above, the arbitration clause specifically provides for arbitration by a single arbitrator in the Republic of Korea.

The Tribunal notes that there appears to be no time limit in the contract for the submission of the dispute to arbitration and the complainant may, if he so wishes, advance all his arguments before the arbitrator.

21. The Tribunal would be competent to hear disputes concerning the execution of a contract of a non-official where the contract itself provides for the Tribunal's competence, as provided for by Article II, paragraph 4, of its Statute (see Judgments 967 and 803).

22. In these circumstances, the Tribunal concludes that it does not have competence to hear this case and the complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2023, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

CLÉMENT GASCON

DRAŽEN PETROVIĆ