ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 24 February 2009

JUDGMENT IN CASE No. 63

Mrs. M.

v/ Secretary-General

Translation
(the French version constitutes the authentic text)

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JUDGMENT IN CASE No. 63 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Friday 13 February 2009
at 10 a.m. in the Château de la Muette,
2 rue André-Pascal, Paris

The Administrative Tribunal consisted of:

Mr. Jean MASSOT, Chairman,
Professor James R. CRAWFORD
and Professor Luigi CONDORELLI,

with Mr. Colin McINTOSH and Mr. Christophe FAVRE providing Registry services.

On 7 April 2008, the Joint Advisory Board, to which a referral had been made by Mrs. M., former translator at the OECD, gave its opinion. It considered that Mrs. M. had failed to prove the existence either of an unfair blocking of her career or of moral harassment, but suggested that the Secretary-General recognise the moral distress she had suffered by making her a symbolic gratuitous payment of 5 000 euros.

On 29 April 2008, the Secretary-General notified Mrs. M. of his decision to follow the Joint Advisory Board's recommendation of 7 April 2008 and to make her a symbolic gratuitous payment of 5 000 euros, not because of any legal obligation but on grounds of equity.

On 3 June 2008, Mrs. M. filed an application (No. 063) asking the Tribunal to find that she had been the victim of machinations on the part of the OECD, to call into question the Secretary-General's decision of 29 April 2008 and to order the OECD to compensate the prejudice she had suffered.

On 6 October 2008, the Secretary-General submitted his comments, requesting the Tribunal to dismiss the application as inadmissible or, alternatively, to dismiss all the submissions contained in the application.

On 5 November 2008, the applicant submitted a reply.

On 8 December 2008, the Secretary-General submitted his comments in rejoinder.

On 27 January 2009, the applicant submitted comments on the comments in rejoinder.

The Tribunal heard:

Maître Sandy Licari, barrister at the Strasbourg Bar, Counsel for the applicant;

and Mr. Nicola Bonucci, Head of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General;

It handed down the following decision:

On the procedure

The Tribunal took note that the applicant claimed that the Secretary-General's comments in rejoinder had been produced after expiry of the one-month time limit applicable. It accepted on this point the explanations of the Organisation that the reply of Mrs. M., although dated 5 November 2008, had not actually reached the Secretary-General until Monday 10. Consequently, the comments in rejoinder, produced on 8 December, were within the time limit.

The Tribunal also noted that Mrs. M. produced a new statement on 27 January 2009 which the Secretary-General claimed was after closure of the written procedure.

Inasmuch as, even after the date of the hearing has been decided by the Chairman under Rule 7a) of the Rules of Procedure and the file sent to the judges, the parties are given the opportunity to submit complementary arguments during the debate at the hearing, the Tribunal agreed to take into consideration this statement, the content of which the Secretary-General could have challenged.

The facts

Mrs. M. was recruited by the Organisation in October 1989 as a grade L2 translator on the basis of an initial contract of two years, then a contract of three years and lastly, as from 29 July 1994, on an indefinite-term contract.

As from 13 October 2004, she was placed on inactive status for medical reasons.

On 8 December 2005, an Invalidity Board of three doctors concluded that she was not suffering from permanent invalidity totally preventing her from performing her job, within the meaning of Article 13 of the Pension Scheme Rules. She was then invited by the Medical Service to a «back-to-work» consultation scheduled for 20 December 2005. Still being on sick leave, she did not attend.

On 7 June 2006, Mrs. M. first of all asked for the Joint Advisory Board to meet in order to challenge the refusal by the Secretary-General to grant her an invalidity pension. This request was refused by the Head of Human Resource Management who cited Instruction 13/3 *xi*) of the Pension Scheme Rules under which: «The findings of the Invalidity Board shall be determined by a majority vote. They shall be final except in the case of obvious factual errors». In the same letter, dated 30 June 2006, the Head of Human Resource Management suggested that given her worsening state of health, Mrs. M. should ask for a new Invalidity Board to meet.

Mrs. M. then withdrew her request for a meeting of the Joint Advisory Board and agreed that this new Invalidity Board should meet, which it finally did on 22 May 2007. The Board concluded that Mrs. M. was suffering from permanent invalidity which totally prevented her from performing her job but that this invalidity did not result from a cause recognised by the Organisation as falling within the scope of Article 14.2 of the Pension Scheme Rules giving entitlement to an increased rate of invalidity pension since it did not result from an accident in the course of the performance of her duties or from an occupational disease. Mrs. M. was informed that she would receive an invalidity pension at the normal rate as from 1 June 2007.

On 5 November 2007, Mrs. M. again asked for her case to be referred to the Joint Advisory Board, and this time the Organisation made no objection inasmuch as the decision taken in light of the conclusions of the Invalidity Board, although not giving full satisfaction to Mrs. M., was not the subject of her request. In fact, the applicant asked the Board to recommend that the Organisation be recognised liable, for an

amount of 148 000 euros, for the financial prejudice she considered resulted from the refusal of her requests for promotion to grades L3 then L4, that, consequently, the amount of her pension be recalculated on the basis of the salary equivalent to grade L4 since 22 May 2007 and that, lastly, the Organisation be recognised liable for an amount of 100 000 euros for the moral prejudice she claimed to have suffered.

On 11 February 2008, the Board refused all these requests, considering that Mrs. M. had not been the victim of any unjustified blocking of her career or of moral harassment and that the administrative mistakes from which she had suffered had been corrected. The Board only suggested that the Secretary-General should make a gesture in recognition of her years of loyal service in the form of a symbolic gratuitous payment of 5 000 euros.

By a decision of 29 April 2008, the Executive Director informed Mrs. M. that the Secretary-General was going to follow the Advisory Board's opinion and agreed to make her a symbolic gratuitous payment of 5 000 euros, not on the basis of any legal obligation but solely on grounds of equity.

In an application of 3 June 2008, Mrs. M. declared that she was contesting this decision and restated all of her submissions before the Advisory Board plus a request for reimbursement of her legal costs of 60 000 euros.

On the admissibility

While it is true that, as stated by the Secretary-General, Regulation 22 of the Staff Regulations offers two possibilities to a member of staff with an individual dispute with the Organisation, namely referral to the Joint Advisory Board or direct referral to the Administrative Tribunal, it is on the other hand in direct contradiction with the wording both of the Council Resolution on the Statute and Operation of the Administrative Tribunal and of the Tribunal's Rules of Procedure, to argue that when an applicant chooses the first option he must nevertheless have made a prior written request to the Secretary-General within two months. Article 3 a) of the Council Resolution only poses this requirement «subject to the provisions of Article 4 b) below», that is to say it applies except where the applicant has referred the dispute to the Advisory Board, in which case he must wait for the decision of the Secretary-General taken after the opinion of the Advisory Board before referring the matter to the Tribunal. The Secretary-General makes the same mistake when citing, in an incomplete fashion, Rule 2 b) of the Rules of Procedure which requires the production, in support of the application, of the written request addressed to the Secretary-General only «in cases other than those referred to in Article 4 b) of the Resolution of the Council», that is to say in cases other than those in which a referral has been made to the Advisory Board.

The Tribunal is well aware that inasmuch as no statutory text specifies the time limits within which a referral must be made to the Advisory Board and since, as pointed out by the Secretary-General himself, paragraph 5 of the Guide for Claimants and Members of the Board specifies «There is no time limit for referrals to the Board except under the disciplinary sanction», applicants may be able to challenge decisions that are extremely old. But first of all, it is a well-established procedural principle that time bars cannot be inferred and must result from express provisions; it is for the Organisation, if it feels this to be justified, to amend the texts in order to specify a time limit for referring cases to the Board. Secondly, and in any event, Mrs. M. is not asking for old decisions, such as the refusals of her requests for promotion, to be annulled but for monetary compensation for the prejudice she claims to have suffered as a result of these decisions. Regulation 22 of the Staff Regulations provides that the Tribunal «may also order the Organisation to redress the damage resulting from any irregularity committed by the Secretary-General». The Resolution of the Council does not lay down any time limits for requests for compensation of such irregularities and it is normal that any such time limit would not begin to run as from the first irregularity of which an official may have been the victim.

The application is therefore admissible as far as disputing the decision taken on 29 April 2008 by the Secretary-General after the opinion given by the Advisory Board is concerned, i.e. solely inasmuch as it requests compensation for various types of prejudice.

The Tribunal notes, in this respect, that its intervention in this dispute is formal proof that, contrary to the unpleasant and unhelpful allegations made by Mrs. M., the arrangements for the solution of disputes within the Organisation have not deprived her of the means to solicit compensation for the prejudice she alleges to have suffered.

On the substance

As regards the development of Mrs. M.'s career, the Tribunal arrives at the same conclusion as the Advisory Board. Even if she did not obtain the grade promotions she hoped for, Mrs. M. was given all the normal step increases. It is not for the Tribunal to compare her merits with those of other members of staff except in cases of manifest error, material error or misuse of power, no trace of any of which can be found in the file.

The Tribunal does not, on the other hand, share the Board's assessment of the conclusions the Secretary-General should have drawn from the irregularities which characterised several stages in the career of Mrs. M..

Apart from a few administrative errors of no great consequence, such as sending mail to the wrong address, the Tribunal notes several more serious mistakes.

In the first place, failure to establish an annual performance evaluation (in this case between 1999 and 2004) has already been criticized by the Tribunal -- for example the judgments in cases No. 20 of 16 June 1997 and 56 of 30 March 2004 – and constitutes a direct breach of the rule laid down in Instruction 110/6 according to which «An evaluation of each official's performance shall be carried out in an annual cycle of dialogue with his supervisor».

In the second place, the Organisation does not dispute that Mrs. M. was informed in writing of the decision taken by the Secretary-General following the opinion of the first Invalidity Board only after a long delay, contrary to the requirements laid down in Article 13/4 *iv)* of the Pension Scheme Rules, or that, immediately upon this meeting of the Board, Mrs. M.'s provident insurance was cancelled and only renewed several months later.

It is true that the other irregularities invoked by Mrs. M. have not been proved. In particular, there is nothing irregular about the Organisation's choosing the OECD medical adviser as the doctor appointed by it to the first Invalidity Board. Accordingly, the Tribunal finds no proof, in the mistakes made, moreover by different services, of all the types of harassment of which Mrs. M. claims to have been the victim

The Tribunal considers, on the other hand, that it is on the basis of the law, and not simply of equity, that Mrs. M. must be compensated for the prejudice, purely moral but altogether real, which the irregularities which have been proven caused her.

The Tribunal considers that a fair assessment of this prejudice is 10 000 euros and that, given the 5 000 euros already paid, the Organisation should pay the applicant a further sum of 5 000 euros under this heading.

On costs

The Tribunal points out that Mrs. M. cannot ask for costs under Article 13 of the Resolution of the Council unless they are justified by the procedure conducted before it and if they are within reasonable limits. It considers in the present case that the Organisation should be ordered to pay Mrs. M. the sum of 5 000 euros.

The Tribunal decides:

1) The Organisation shall pay Mrs. M., in compensation for moral prejudice, the sum of 10 000 euros, reduced to 5 000 euros in light of the gratuitous payment already made.

2) The Organisation shall pay Mrs. M. the sum of 5 000 euros in costs.

Done in Paris on 24 February 2009

The Chairman of the Tribunal:

(signed) Jean Massot

The Deputy Registrar of the Tribunal:

(signed) Christophe Favre