Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M.

v.

IOOC

121st Session **Judgment No. 3592**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. M. against the International Olive Oil Council (IOOC) on 21 August 2013 and corrected on 16 September 2013, the IOOC's reply of 14 January 2014, the complainant's rejoinder of 2 May and the IOOC's surrejoinder of 12 August 2014;

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, whose letter of resignation effective as of 31 March 2013 has not been formally accepted, challenges the decision of the Executive Director of the IOOC requiring him, inter alia, to vacate his office on 24 April 2013.

The complainant, who was an official of the European Commission, was seconded to the IOOC on 1 April 2004 to serve for a five-year term as Financial Delegate of its Executive Secretariat. On 21 November 2008 his contract was extended until 31 March 2014. Having been recalled by the European Commission with effect from 1 January 2012, the complainant requested retirement in order to be able to continue his

duties at the IOOC. The Commission granted this request, but it authorised him to continue working with the IOOC while on early retirement status only until 31 March 2013 and not, as he wished, until his contract with the IOOC expired.

By a letter dated 25 May 2012 the complainant informed the Chair of the IOOC of his "irrevocable decision for personal reasons" to resign from his "duties as Financial Delegate" with effect from 31 March 2013. He said that he "nevertheless remained at the disposal of the IOOC to perform any other duties within it in a post matching [his] grade and abilities". In this connection he referred to his "rights under Article 9 of the Staff Regulations [of the IOOC]". He added that he was "entirely at the disposal" of the organisation should it wish him "to supply any additional information" and asked it "to be so good as to confirm its acceptance of [his] resignation as Financial Delegate of the IOOC with effect from 31 March 2013".

This letter went unanswered, as one of the delegations had vetoed "the adoption by correspondence of the draft decision on the letter in response to [this] letter of resignation". On 20 December 2012 the Executive Director of the IOOC drew the attention of the Heads of Delegation to the need to resolve this matter. On 11 and 21 March 2013 he reminded the Chair of this situation and pointed out that the Financial Delegate reported directly to the Council of Members, which had recruited him and signed a contract with him. As the complainant had requested leave for the period 1 to 5 April, in an e-mail of 27 March the Chair asked the Executive Director to apply the existing procedures under the Staff Regulations. On 28 March 2013 the latter informed the complainant that, since his appointment with the IOOC was ending "on [his] initiative" on 31 March, and since no other position had been assigned to him, his leave entitlement would expire on that date. It was therefore impossible to grant him the leave which he had requested.

The complainant continued to report for duty at his workplace after 31 March 2013. On 1 April his counsel sent a letter to the Chair and the Members of the IOOC in which he asserted that the decision of 28 March was null and void, because under the Rules of Procedure of the IOOC the Executive Director could not take any decision

whatsoever with regard to the Financial Delegate without explicit instructions from the Council of Members. He added that although the complainant had "offered to resign", he had never resigned by sending written notice thereof in accordance with Article 59 of the Staff Regulations, and that the failure to accept the resignation "proposed" by his client was tantamount to its refusal by the Council of Members.

On 10 April 2013 the Executive Director invited the complainant to "contact the administrative unit [responsible for] implementing the administrative procedures […] entailed by [his] letter [of 28 March]". The following day the complainant's counsel informed the Chair and the Members of the IOOC that his client who, on the one hand, was bound by the clauses of his contract with the IOOC and, on the other, had to ensure the continuity of a public service, would continue to perform his duties as Financial Delegate unless he received an instruction to the contrary from the Council of Members or any other proper authority, until his resignation was accepted by the Council. He received no reply. An acting Financial Delegate was, however, appointed with effect from 10 April.

On 23 April 2013 the Executive Director asked the complainant to return all the equipment placed at his disposal by the IOOC and to vacate his office by the next day at the latest. That same day, the complainant forwarded this decision, which he termed "unlawful", by e-mail to the Chair. He explained that he would be obliged no longer to report for duty as from 24 April, unless he was given an instruction to the contrary, which he never received.

On 15 May the complainant's counsel sent a letter to the Chair and Members of the IOOC in which he contended that the Executive Director's decision of 23 April constituted an "act equipollent to a breach", that his client's e-mail of the same date constituted a grievance contesting that decision and that his letter was a "further brief" in support of that grievance. He requested that the disputed decision be withdrawn, that the serial acts of misconduct committed in particular by the Executive Director be recognised and that a dialogue be opened in order to establish compensation for the injury sustained by his client.

As the complainant did not receive any reply within 60 days, he filed a complaint with the Tribunal on 21 August 2013 in which he impugns the implied decision to reject his grievance. He asks the Tribunal:

- to find that, by forbidding him to report for duty as from 24 April 2013, the Executive Director unilaterally and unlawfully terminated his employment contract with the IOOC and therefore to set aside the impugned decision and order the IOOC to pay him the remuneration ("principal, ancillaries and interest") which he would have received had he remained in office until 31 March 2014;
- to rule that the Executive Director committed an abuse of authority and misconduct for which the IOOC is liable;
- to order the IOOC and its Executive Director to pay him nominal damages in the amount of one euro in compensation for moral injury;
- to order the IOOC to pay him costs, estimated to amount to 5,000 euros at the complaint stage and 7,500 euros at the rejoinder stage.

The IOOC argues that, as a complaint may be directed only against an international organisation, the complainant's claims against the Executive Director are irreceivable. It adds that the complaint is irreceivable in its entirety, since in the instant case no impugnable act exists and, subsidiarily, because internal remedies have not been exhausted.

CONSIDERATIONS

1. The complainant tendered his resignation from his position as Financial Delegate as from 31 March 2013 in a letter which he addressed to the Chair of the IOOC on 25 May 2012. As his letter of resignation was not formally accepted, he continued to report for duty after the former date. On 23 April he was asked to vacate his office by the next day at the latest, which he did. On 21 August 2013 he filed his complaint, in which he seeks the setting aside of the implied decision

resulting from the IOOC's failure to respond to his grievance challenging the various measures taken against him.

2. The IOOC submits that the complaint is irreceivable on the grounds that none of these measures constituted a decision adversely affecting the complainant which could form the subject of a grievance. They were merely administrative procedures which had to be followed on separation from service.

The Tribunal notes that, in his grievance, the complainant contested the expiry of his employment contract on 31 March 2013, as he had done at least since 1 April 2013. In his opinion, the circumstances of the case showed that his resignation, which he had tendered in accordance with Article 59 of the Staff Regulations, had not been accepted and moreover that, from the outset, he had reserved the right to remain in the defendant organisation's service by virtue of the priority for vacancies conferred on him by Article 9 of those Regulations.

The IOOC did not accept this view. Without discussing its merits, it simply maintained the measures taken to ensure that the complainant left the premises in order to make room for his successor.

The objection to receivability raised by the IOOC will not be allowed, since the e-mail of 23 April 2013 must be regarded as an appeal within the meaning of Article 64 of the Staff Regulations, which the complainant confirmed and substantiated on 15 May 2013, challenging the defendant organisation's decision to consider that his employment had ended on 31 March 2013.

3. Moreover, the IOOC can hardly criticise the complainant for failing to exhaust internal remedies, given that it disregarded the provisions of its own Staff Regulations by ignoring his appeal. It is true that, according to the aforementioned Article 64, this appeal should have been addressed to the Joint Committee. However, consistent precedent has it that, although rules of procedure should ordinarily be strictly complied with, they must not set traps for staff members who are defending their rights and therefore they must not be construed with too much formalism. Consequently, an appeal submitted to the wrong

authority is not irreceivable on that account and it is for that authority, in such circumstances, to forward it to the one which is competent, within the organisation, to hear it (see, for example, Judgments 1832, under 6, 2882, under 6, 3027, under 7, and 3423, under 9(b)). The organisation's authorities should therefore have forwarded the complainant's appeal to the Joint Committee.

The failure to forward the appeal to that body gave rise to an implied decision of rejection in accordance with Article VII, paragraph 3, of the Statute of the Tribunal.

4. When a complaint is filed against an implied decision of rejection, the Tribunal may either rule on the merits of the case brought to it, or remit the case to the organisation.

The former solution would be tantamount to unduly depriving the complainant of his right to an internal appeal, which is an additional safeguard to that which judicial protection offers the staff members of international organisations which have recognised the Tribunal's jurisdiction (see, in particular, Judgments 2781, under 15, and 3067, under 20). The Tribunal will not therefore rule on the merits and the case will be remitted to the IOOC, which must submit the appeal that has not been considered to its competent bodies.

5. In the circumstances of the case there are no grounds for awarding compensation for moral injury to the complainant.

6. The complainant is entitled to costs which the Tribunal sets at 2,500 euros.

DECISION

For the above reasons,

1. The implied decision rejecting the appeal filed by the complainant on 23 April 2013, which he confirmed and substantiated on 15 May 2013, is set aside.

2. The case is remitted to the IOOC in order that the aforementioned appeal be submitted to the competent internal appeal bodies.

3. The IOOC shall pay the complainant costs in the amount of 2,500 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 11 November 2015, 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 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ