The Administrative Tribunal,

Considering the complaint filed by Miss M. M. against the International Labour Organization (ILO) on 5 April 2007 and corrected on 7 May, the ILO's reply of 8 August, the complainant's rejoinder of 5 November and the Organization's surrejoinder of 28 November 2007;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian national born in 1972, worked for the International Labour Office, the secretariat of the ILO, under external collaboration contracts as from July 2000 onwards. She was appointed as an associate expert in the International Labour Standards Department on 1 November 2001. Her initial fixed-term contract of 12 months, which was extended for one year at its expiry on 31 October 2002, was funded by the Italian Government. She was transferred to the Programme on HIV/AIDS and the World of Work (hereinafter "the Programme on HIV/AIDS") on 1 November 2003 under a two-year cost-sharing agreement between Italy and the ILO. Her appointment was funded by Italy from 1 November 2003 to 31 October 2004 and by the Organization's technical cooperation funds between 1 November 2004 and 31 October 2005. According to her last letter of extension of November 2004, her contract as an expert under the ILO technical cooperation programme was extended for one year and all other conditions of her contract remained unchanged.

By a letter of 11 July 2005 she was given instructions on debriefing and repatriation as her appointment was due to expire in October 2005. That same month another associate expert funded by Italy was assigned to the Programme on HIV/AIDS. The Director of the Programme had informed the complainant by a minute of 4 August 2005 that the extension of her contract was not possible due to budgetary constraints.

On 20 December 2005 the complainant asked the Human Resources Development Department to review the decision not to extend her contract. By a letter of 4 April 2006 the Director of that Department replied that her tenure as an associate expert had come to an end in accordance with the terms and conditions of the associate expert programme. She added that, contrary to the complainant's assertion, there was no indication that the non-extension of her contract was due to any bias against her. On 4 May the complainant filed a grievance with the Joint Advisory Appeals Board against the decision of 4 April, alleging inter alia that the budget of the Programme on HIV/AIDS had increased, that the decision not to extend her contract was tainted with bias and that she had been discriminated against on the grounds of her nationality with regard to her applications for vacant posts. In its report of 20 November the Board held that the Office was under no obligation to extend her contract and that there was no evidence of bias. It considered that the claim concerning discrimination was moot because, as from January 2006, nationality quotas were no longer used to determine eligibility for participation in a competition. It consequently recommended that the grievance be dismissed. By a letter of 9 December 2006 the complainant was informed of the Director-General's decision to endorse the Board's recommendation. That is the impugned decision.

B. The complainant asserts that there was no valid reason for not renewing her contract. She contends that, contrary to the reasons given to her in the minute of 4 August 2005, namely the lack of funding, the budget of the Programme on HIV/AIDS had increased in 2005. Moreover, the Italian Government had offered to finance her contract for an additional year as an associate expert but her supervisor had not replied in a timely manner to that offer. Instead, he had asked the Government in March 2005 if it would accept that another Italian associate expert, who was at the time serving in the field, be transferred to the Programme on HIV/AIDS in Geneva; the Italian authorities had allowed the transfer of that person, having been assured that she would perform tasks different to those then assigned to the complainant. Referring to the Tribunal's case law, the complainant explains that there is no valid reason not to renew a fixed-term contract when funds are available, the position is maintained and the staff member's performance is satisfactory. Since these criteria were met, she argues that her status of associate expert

could not by itself justify the non-renewal decision. She further argues that her status had changed under her last contract extension and that, at the time of the non-renewal of her contract, she was no longer an associate expert but an “expert” under the ILO technical cooperation programme. As such she was entitled to be given valid reasons for the decision not to renew her contract.

In her view, the aforementioned decision was motivated by bias. She submits that from the outset her supervisor had shown hostility towards her. The situation deteriorated following his appointment as Director ad interim of the Programme on HIV/AIDS in March 2005. Thereafter she was given fewer responsibilities, was not invited to meetings and was no longer allowed to go on missions. She points out that she received no performance appraisal for 2005 despite her repeated requests and that a new associate expert funded by Italy took over her duties as from 1 October 2005. She was subsequently transferred to another department and was asked to perform tasks which corresponded neither to her terms of reference nor to her work experience.

In addition, she alleges that she was discriminated against on the grounds of nationality. She explains that prior to January 2006 only internal candidates or external candidates who had the nationality of one of the countries listed in a vacancy notice could apply for advertised vacancies. Being employed under a technical cooperation contract, she could apply only as an external candidate. She argues that her candidatures were not examined because she was a national of a country not listed in the vacancy notices for the posts for which she applied. She contends that the Joint Advisory Appeals Board mistakenly held that her claim in that respect was moot. Indeed, when she had submitted her applications the requirements concerning nationality had not yet been abolished; they were withdrawn as from January 2006.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement as from 1 November 2005. She claims 250,000 euros in damages and 10,000 euros in costs.

C. In its reply the ILO asserts that, being an associate expert, the complainant had no legitimate expectancy of extension of her contract. The complainant’s initial offer of appointment provided that “[a]n appointment as associate expert may be extended under certain conditions up to the limit of duration imposed by the donor government. Subject to ILO policy and regulations it may be followed by an appointment to a regular technical cooperation or other position but carries no formal expectation of such an appointment.” In the subsequent extensions of her contract, reference was made to that provision. In its view, the status of associate expert should be assimilated to that of an official under secondment. Citing the Tribunal’s case law on that issue, it contends that the expiry date of the complainant’s appointment is governed by the terms of the agreement between the Organization and the Government funding her. Beyond 31 October 2005 there was no agreement between the ILO and the Government of Italy concerning the complainant’s participation in the associate expert programme.

According to the defendant, the fact that it financed the complainant’s fourth year of appointment, as agreed with the Italian Government, did not in any way alter her contractual status of associate expert. To support its view, it provides a copy of the letter of extension dated 1 November 2004 according to which the conditions of her contract remained unchanged. It adds that in her last extension of contract she was referred to as an “expert” because the term “associate expert” could not be maintained for “financial accounting purposes”, but this did not imply that from 1 November 2004 she was no longer part of the associate expert programme. It argues that associate experts retain their status until the end of their appointment irrespective of the source of funding.

The defendant submits that the allegation of bias is unsubstantiated and without merit. It points out that many of the incidents mentioned by the complainant in that respect took place after May 2005 when she was informed that her contract would come to an end on 31 October 2005. However, after that date she continued to work for the Office under external collaboration contracts for a few months. With regard to her supervisor’s alleged lack of cooperation with the Italian authorities, the ILO states that the Government participating in the associate expert programme is responsible for notifying the Organization in a timely manner of its intentions in that respect. It argues that although it did not owe the complainant any particular explanation as to the reasons for not extending her contract as an associate expert, it did provide her with timely explanations; it has therefore showed no bias against her.

With regard to the complainant’s applications for vacant positions before 1 January 2006, the defendant denies any discrimination on the basis of her nationality. It stresses that she applied for several technical cooperation positions for which no nationality requirements existed and for positions funded from the regular budget for which the vacancy announcements merely indicated that “applications from nationals of non- and under-represented member States [were] particularly encouraged”, but this did not mean that others were excluded.

D. In her rejoinder the complainant maintains her pleas. She rejects the Organization's argument that the status of associate expert should be assimilated to that of an official on secondment and contends that such a view is not supported by the case law.

In support of her allegation of discrimination she submits that the vacancy notices of interest to her provided that:

"The following are eligible to apply:

- Internal candidates […]

- External candidates: nationals of countries listed in Appendix I".

In her view, this provision lays down a mandatory requirement and not an "encouragement", as indicated by the defendant. Since she was considered an external candidate and Italy was not listed in Appendix I, she was not eligible to apply for the said vacancies because of her nationality.

The complainant indicates with regard to her claims that she seeks reinstatement or compensation, but not both.

E. In its surrejoinder the Organization reiterates its arguments. It maintains that the allegation of bias is not substantiated and that the complainant has no cause of action with regard to her claim of discrimination. It develops its argument concerning the similarities existing between officials seconded from their government and associate experts. It notes the complainant's clarification with regard to her claims.

CONSIDERATIONS

1. The complainant, an Italian national who had been affiliated with the ILO since July 2000 by means of external collaboration contracts, was appointed as an associate expert on 1 November 2001. The Italian Government funded her appointment for a period of two years under the ILO associate expert programme. Her initial appointment was for 12 months and her employment contract provided:

"[a]n appointment as associate expert may be extended under certain conditions up to the limit of duration imposed by the donor government. Subject to ILO policy and regulations it may be followed by an appointment to a regular technical cooperation or other position but carries no formal expectation of such an appointment."

The complainant's appointment was extended on 1 November 2002 for a further period of 12 months. The conditions of her contract were unchanged.

2. On 1 September 2003 the Italian Government notified the ILO that it was prepared to fund the complainant's associate expert contract for another year from 1 November 2003 on the basis that the ILO would finance a further year. In consequence, the complainant's contract was extended for another 12 months on 1 November 2003 and, again, on 1 November 2004. The conditions of her contract were unchanged save that it was said in the last extension that she was employed as an expert under the ILO technical cooperation programme. That programme is financed from voluntary funds and is not part of the Organization's regular budget.

3. The complainant was informed on 4 May 2005 that her "contract […] under a cost-sharing arrangement" would finish on 31 October of that year. That was confirmed in writing on 11 July 2005. Shortly thereafter the complainant spoke to the newly appointed Director of the department in which she was then placed, the Programme on HIV/AIDS, and was informed by a minute in August, amongst other things, that the budget did not make it possible for the extension of her contract. In the context of the minute provided to the complainant, it is clear that that was a reference to the creation of a budgeted post for her. She was also informed in that minute that there was a possibility of a consultancy for two months. In the event, she worked for the ILO on external collaboration contracts from 1 November 2005 until January 2006.

4. On 20 December 2005 the complainant lodged a grievance with the Human Resources Development Department in relation to the non-renewal of her contract. She was told that her contract had come to an end in accordance with the conditions of the associate expert programme. Thereafter, she filed a grievance with the Joint Advisory Appeals Board. In accordance with the Board's recommendation, the Director- General dismissed her grievance on 9 December 2006. That is the impugned decision.

5. The complainant contends that the decision not to renew her contract further was not based on budgetary considerations but resulted from bias on the part of the person who was her supervisor from 1 November 2003 until July 2005 and Director ad interim of the Programme on HIV/AIDS from March to July 2005. In this regard she claims, amongst other things, that he failed to "cooperate with the Italian authorities who were keen to support [her] in her position for one more year, by increasing the funding of the ongoing Italian Government funded project". The ILO submits that this argument is irrelevant by reason that the complainant was employed pursuant to the associate expert programme. In particular, it contends, by analogy with the case law relating to secondment, that in the absence of any agreement as to further funding between it and the Italian Government, there was no basis for the complainant's continued employment and cites Judgment 2184 in which it was said:

"[u]nlike the expiry of fixed-term appointments of staff members of an organisation, the expiry of the period of appointment of an official under secondment is governed by the terms of the agreement between the releasing and receiving agencies".

6. The fact that the complainant's last extension classed her as an expert under the technical cooperation programme did not alter the nature of her employment. That was merely the manner in which the ILO gave effect to the agreement with the Italian Government and the complainant, thus, remained employed under the associate expert programme. And although the complainant contends otherwise, persons employed pursuant to that Programme are not in precisely the same position as officials employed in posts funded out of the regular budget. In both cases, "there must be a valid reason for [the] decision not to renew a fixed-term contract" (see Judgments 1911 and 2499). However, subject to one qualification to be dealt with shortly, just as the absence of agreement as to continued secondment is a valid reason for the non-renewal of the contract of a seconded employee, so, too, the absence of agreed funding as to the post of an associate expert is a valid reason for the non-renewal of his or her contract.

7. The qualification earlier referred to is that, if a donor government offers to fund the post of an associate expert for a further period, there is an obligation on the organisation in question to consider that offer in good faith. So much is implicit in the general duties of care and good faith owed by an organisation to its staff. That is not to say, however, that an organisation is bound to accept any such offer. It is simply to say that a person in the position of the complainant is then entitled to have his or her contract renewed unless there is a valid reason for rejecting the offer. The same duty of good faith requires that an organisation not do anything to prevent such an offer being made.

8. It is clear that in 2005 the Italian Government was concerned to reaffirm its support for the complainant and to explore the possibility of her remaining with the ILO. It is also clear that, after August 2005, the new Director of the Programme on HIV/AIDS was prepared to explore the possibility of further funding by the Italian Government and prepared terms of reference to this end. For some reason, the terms of reference were not submitted officially to the Italian Government. The Deputy Permanent Representative of Italy to the international organisations in Geneva has stated in a letter annexed to the complaint that:

"in the context of the annual review of the technical co-operation programmes financed by Italy, the Italian delegation has been informed that the [Programme on HIV/AIDS] did not need additional funding for the year 2005. The issue of [the complainant's contract] renewal was discussed and Italy was also ready to accept that part of the Italian funds would have been used to pay [her] salary for an additional year."

It was also stated in that letter that the Italian contribution was not allocated until a very late date pending resolution of the issue.

9. The letter from the Deputy Permanent Representative of Italy does not establish either that the Italian Government offered to further fund a post as associate expert for the complainant or that the ILO prevented the making of an offer to that effect. It merely shows that the Government was prepared to have its contributions to the technical cooperation programme used to pay the complainant's salary for another year. It is not apparent that this was made clear to the defendant but, even if it was, the Organization's obligations extended only to the consideration of an offer made within the context of the associate expert programme. That being so, the fact that there was funding available for the Programme on HIV/AIDS and that another associate expert, also Italian, took over the work of the complainant is irrelevant to the question whether her contract should have been renewed. So too is the fact that the complainant's work performance was more than satisfactory.

10. Further, it may be noted that, although the relationship between the complainant and her supervisor for the period November 2003 until July 2005 appears to have been marked by communication difficulties, particularly in relation to the expiry of the complainant's contract, there is no evidence of actual bias. Certainly, none is to be found in the placement of another associate expert in the Programme on HIV/AIDS in October 2005 pursuant to another cost-sharing agreement with the Italian Government.

11. The complainant also contends that she was discriminated against by reason of her national extraction in that the vacant positions for which she applied specified that applicants should be from named countries that did not include Italy. Whatever the merits of that claim, the proper course for the complainant was to file a grievance with respect to the particular decisions relating to the posts for which she applied. More to the point, the argument does not provide any basis for holding that there was error or any illegality in the decision not to renew her contract.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Agustín Gordillo

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.