Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

106th Session **Judgment No. 2797**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. B. against the International Labour Organization (ILO) on 10 August 2007 and corrected on 4 October, the Organization's reply of 20 December 2007, the complainant's rejoinder of 15 February 2008, the ILO's surrejoinder of 24 April, the complainant's further submissions of 5 June and the Organization's final comments thereon of 23 September 2008;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant is a Spanish national born in 1960. Between 17 July 2000 and 14 October 2001 he worked as an unpaid intern at the ILO's Branch Office in Madrid. He was subsequently employed under ten successive external collaboration contracts covering the periods 15 October to 31 December 2001, 1 February to 31 July 2002, 1 September 2002 to 28 February 2003, 1 March 2003 to 1 January 2004, 1 January to 15 March 2004, 1 June to 27 June 2004, 28 June to

1 July 2004, 1 July to 31 December 2004, 28 July to 1 August 2004, and, finally, 1 February to 31 August 2005.

On 24 October 2005 the complainant filed a grievance with the Administration under Article 13.2 of the Staff Regulations; he alleged that he had been treated in a manner incompatible with the law applicable to the International Labour Office, the ILO's secretariat, and he requested the review of the "decision not to renew [his] contract", his reinstatement, the redefinition of his contractual relationship with the Office and compensation for the injury suffered. By a letter of 24 January 2006 the Director of the Human Resources Development Department informed him that his grievance was inadmissible as the provisions of the Staff Regulations were not applicable to him and he did not appear to have complied with the standard clauses appended to his contracts, which specified that any dispute arising out of the application or interpretation of these contracts must be referred to the Administrative Tribunal of the ILO.

On 6 March 2006 the complainant filed a grievance with the Joint Advisory Appeals Board. In its report of 26 March 2007 the Board found that the grievance was admissible and well founded, and it therefore recommended that the Director-General should redefine the contractual relationship between the complainant and the Office, replace the external collaboration contracts with an equal number of fixed-term contracts covering the period 15 October 2001 to 31 August 2005 and draw all the legal consequences. It considered that "in these circumstances the complainant should be reinstated or, failing this, granted adequate financial compensation". It also recommended that he be paid damages proportionate to the injury suffered. By a letter of 25 May 2007, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General rejected his grievance as inadmissible. Nevertheless, she drew the complainant's attention to the fact that the Office was prepared to seek a solution "through an informal and confidential dialogue".

In addition to pursuing the internal appeal procedure, the complainant initiated proceedings before the Labour Court of Madrid,

which delivered its judgment on 16 January 2006. This court found that the complainant had been wrongfully dismissed and ordered the ILO either to reinstate him "on the same conditions as those prior to dismissal" or pay him damages. It also ordered payment of the salary he should have received between 31 August 2005 and the date of its judgment.

B. The complainant asserts that his last contract was terminated without notice and for no valid reason. He contends that the Office failed to comply with the provisions of Circular No. 11, series 6, concerning external collaboration contracts, because it disregarded the conditions governing the award of this type of contract. In support of this contention he points out that his name appeared in the organisation chart of the Madrid office, that his activity was ongoing and that he had the use of an office, a computer, a telephone number, an e-mail account and a visiting card. In addition, at the very beginning of his employment he was handed a job description entitled "Project and Programme Officer", and in this capacity he had to perform a number of duties which go beyond those normally covered by external collaboration contracts and which are those of a permanent official; for example, he represented the ILO and wrote articles which were published in its name. He also regularly managed financial and human resources. He believes that within the Organization he was always considered to be an official, although he emphasises that he was a *de facto* rather than a *de jure* official.

He also contends that the provisions of Circular No. 630, series 6, concerning the inappropriate use of employment contracts in the Office were breached, because the external collaboration contracts offered to him were used for purposes other than those for which they are foreseen, and because he did the same work as officials of the Madrid office during his unpaid internship. Similarly, he claims that paragraph 13 of this circular was violated in that, in July and August 2004, he was employed simultaneously under two external collaboration contracts. He draws attention to the fact that, according to paragraph 2 of the circular, "[i]nappropriate contract usage is normally considered by the Office to have occurred when a person has

been engaged under a number of temporary contracts and has accumulated at 1 July 2002, at least 24 months of employment under such contracts with the Office within the past 36 months" and that any person identified as being in such a situation was eligible under paragraph 17 *et seq.* of the circular to apply for vacant jobs or to receive a lump-sum payment. These measures could not, however, be applied to him because on 1 July 2002 he was 17 days short of meeting the condition of 24 months of employment.

The complainant further submits that the ILO Declaration on Fundamental Principles and Rights at Work, in particular the principle of the right to decent work, has not been respected; in his view the ILO is in a paradoxical situation for, by employing a large number of people on inappropriate temporary contracts, it creates precarious employment situations.

He adds that he continued to work without being paid between two contracts, and that in December 2000 he was instructed to prepare a project on "changing the context of and modernising industrial relations in Morocco", for which he was supposed to be paid 700 United States dollars, but he never received this sum.

The complainant asks the Tribunal to quash the decision of 25 May 2007 and to "uphold" the findings of the Joint Advisory Appeals Board, which recognised that he was entitled to have his contractual relationship redefined – i.e. by replacing the unpaid internship and the various external collaboration contracts with the same number of fixed-term contracts for the period 17 July 2000 to 31 August 2005 – and to be reinstated in his former post "on the same conditions as those governing his contract before it ended, through the signature of an open-ended contract". He therefore claims the payment of the difference between the salary he received and that which he would have received had he been granted a fixed-term contract at grade P.4, step 5, together with "legally due interest" and "the relevant social benefits". In the event that the Tribunal does not order his reinstatement, he seeks the payment of an indemnity calculated on the basis of his length of service and equivalent to that for which provision is made in Article 11.4 of the Staff Regulations, namely

three months' salary. He further requests damages for the injury suffered. Lastly, he points out that payment of his fee for the project on "changing the context of and modernising industrial relations in Morocco" and of his salary for January and August 2002, March to May 2004 and January 2005 and the interest on these sums is still "outstanding".

C. In its reply the ILO raises an objection to the receivability of the complaint. It explains that external collaboration contracts stipulate that, in the event of a dispute concerning the performance of the contract, the Tribunal has jurisdiction. However, the complainant chose first to initiate proceedings before a national court and then to lodge an internal appeal, although as an external collaborator he could not avail himself of this procedure. It adds that insofar as it concerns the redefinition of the unpaid internship, the claim that fixed-term contracts should be granted for the period 17 July 2000 to 31 August 2005 is new and hence irreceivable. The Organization further contends that the issue of receivability is linked to the merits of the case and that, in asserting that the complaint is irreceivable, it intends to show that the complainant did not have the duties and responsibilities of an official and that the contracts offered to him were not designed to deprive him of certain rights or safeguards, but matched tasks which, on the whole, the complainant carried out to the satisfaction of his supervisors.

On the merits the ILO submits that the complainant did not have the status of an official within the meaning of Article 2.1 of the Staff Regulations. It recalls that according to Circular No. 11, series 6, an external collaboration contract may be used only where there is a specific well-defined task to be performed and the output can be considered as a specific end-product, or where the task is of an advisory nature. It maintains that the ten contracts offered to the complainant met these conditions, since on each occasion he was given either well-defined tasks or advisory missions. In addition, almost all of his contracts ended with the submission of a report. The diversity of the tasks covered by these contracts is sufficient to show that his alleged duties as "Project and Programme Officer" did not tally with

the reality of his contractual relationship. In this connection, it asserts that the job description produced by the complainant – a document which contains no indication of its author, addressee or date – is of no value. As for the complainant's assertion that he was a *de facto* official, this is contradicted by the curriculum vitae he circulated in 2005, in which he described himself as an external collaborator; the ILO appends this document to its reply. By giving the complainant several external collaboration contracts the Organization had tried to provide the Madrid office with temporary assistance, because its workload had been made heavier by events such as the Spanish Presidency of the European Union and Spain's funding of technical cooperation projects in Latin America.

In addition, the Organization emphasises that it did not terminate the complainant's appointment; his last contract simply came to an end, like the previous ones. It considers that the complainant has not proved that he was required to offer his services outside the periods covered by his contracts. Moreover, paragraph 13 of Circular No. 630, series 6, was not infringed as a person is not prohibited from holding several simultaneous external collaboration contracts. It explains that the two contracts concluded for periods already covered by other contracts concerned tasks which were linked to one-off events and related to the tasks to be performed under the two main contracts.

D. In his rejoinder the complainant acknowledges that disputes arising out of the application or interpretation of his contracts should have been referred to the Tribunal, but he points out that the dispute at the root of these proceedings concerns the inappropriate use of these contracts. He therefore considers that he was in a "situation without any legal protection whatsoever", which forced him to turn to the Spanish courts.

He enlarges on his pleas regarding the merits. He states that two witnesses who "always described and treated him as an official" could be heard by the Tribunal and that many officials can testify that he worked continuously at the Madrid office. He denies that he supplied the curriculum vitae produced as an annex to the ILO's reply which, he says, is in an electronic format that is "easy to tamper with". He

produces another version of this document which indicates that he worked for the Madrid office as a "Project and Programme Officer". Although he does not deny that almost all of his contracts ended with the submission of reports, he explains that his duties were not limited to the drafting of these reports; what he objects to is the fact that they extended to ordinary day-to-day duties of the Madrid office, which ought to have been carried out by officials on fixed-term contracts. In his opinion, he had a proper job within the meaning of Circular No. 407, series 6, and proper duties. He asserts that between 2001 and 2005 he simultaneously carried out the tasks covered by his external collaboration contracts and the duties contained in his job description. At the end of each contract the tasks in question disappeared but he continued to perform the duties assigned to him.

E. In its surrejoinder the Organization maintains its position. It contends that the complainant is trying to discount all the evidence which might be at variance with his position by suggesting that it might have been tampered with and by denying the obvious. It appends to its surrejoinder two affidavits written by the representative of a Spanish company at the request of the Director of the Madrid office. In the first, dated 26 December 2006, the representative states that he interviewed the complainant in May 2005 and offered him a job, which the latter refused. In the second, dated 11 April 2008, he states that during the interview the complainant described himself as an external collaborator and handed him the curriculum vitae produced with the reply. The Organization adds that this is the same version of the curriculum vitae which was sent, with the complainant's consent, to the ILO's International Training Centre in Turin and, by way of proof, it appends an e-mail dated 19 September 2005 to its surrejoinder.

F. In his further submissions the complainant challenges the value of the above-mentioned annexes on the grounds that the documents in question were drawn up after 31 August 2005, the date on which the dispute commenced. He asks the Tribunal not to take these two

annexes into account and to invite all the persons whom they concern to a hearing in order that it might question them.

G. In its final comments the Organization states that it does not wish the Tribunal to ignore the above-mentioned documents and it reiterates the arguments it put forward in their connection in its surrejoinder. It states that it would not be opposed to the Tribunal ordering a hearing, although it hopes that the complainant's request is not a delaying tactic.

CONSIDERATIONS

1. Between 17 July 2000 and 14 October 2001 the complainant worked as an unpaid intern at the ILO's Branch Office in Madrid. On 15 October 2001 the Director of this office issued an external collaboration contract under which the complainant was to identify potential donors among the Spanish Autonomous Communities and draw up the relevant contracts. This task was to be completed by 31 December 2001, the date on which the contract ended.

Nine external collaboration contracts were subsequently signed by the parties. They had different purposes, apart from the last contract signed on 1 February 2005, the purpose of which was the continuation of the previous one. The last contract ended on 31 August 2005 in accordance with its terms. There were breaks between some contracts.

2. On 10 October 2005 the complainant brought an action for wrongful dismissal before the Labour Court of Madrid. The Organization objected to this action on the grounds that the summons which had been served on it was null and void because it had not been transmitted through the appropriate channels. It contended that the Tribunal had sole jurisdiction to rule on issues related to external collaboration contracts. On 16 January 2006 the Labour Court of Madrid rendered a judgment against the ILO.

3. In addition to the proceedings before the Spanish court, on 24 October 2005 the complainant filed a grievance under Chapter XIII of the Staff Regulations of the ILO in which he requested a review of the "decision not to renew" his external collaboration contract which had ended on 31 August 2005.

As his grievance was deemed inadmissible, he submitted the case to the Joint Advisory Appeals Board on 6 March 2006. In its report of 26 March 2007 the Board took the view that the grievance was admissible and well founded and it recommended that the Director-General redefine the contractual relationship between the Office and the complainant, replace the external collaboration contracts with an equal number of fixed-term contracts for the period 15 October 2001 to 31 August 2005 and draw all the legal consequences of this redefinition.

By a letter of 25 May 2007 the Executive Director of the Management and Administration Sector informed the complainant of the Director-General's final decision rejecting his grievance as inadmissible.

4. The complainant's claims are set out under B, above.

5. The defendant submits that the complaint is irreceivable because the complainant, who held external collaboration contracts governed by special provisions which he accepted, has no *locus standi*. Nevertheless, it recognises that the issue of receivability is connected with the substantive issues raised by the dispute, without being one of them. The Tribunal therefore considers that it is necessary to examine the merits of the case.

6. The complainant first submits that the Organization has violated the provisions of Circular No. 11, series 6, which governs external collaboration contracts. He asserts that between 2001 and 2005 he performed the duties of an official of the Office. He did not merely develop the projects entrusted to him under his various external collaboration contracts, but also took on various duties which were part of the ILO's normal activities – such as representing the Organization

– and performed ongoing activities during working hours determined by the Madrid office. He used the office's equipment and human resources and he had an office, a computer, a telephone number, a fax number, an e-mail account and a visiting card which described him as "Project Officer" of the Madrid office.

He infers from the foregoing that the Organization made "inappropriate use of external collaboration contracts" and that "a fraudulent appointment was definitely made".

7. Circular No. 11, series 6, paragraph 1(b), provides that:

"The external collaboration contract should NOT be used where:

- the work is the same as or similar to that being done by other staff and requires the contractor's presence at the Office or other worksite during a prescribed period and during established working hours, on a continuous basis throughout the contract's duration;
- the work involves ongoing duties and responsibilities, a group of tasks (such as normally found in a job description) which continue throughout a period of employment;
- office space and other facilities and services are required or routinely provided during the period of employment;
- the work is supervised within an established hierarchical structure;
- and/or circumstances require that the person employed must be considered as an ILO official and as such is entitled to an attestation for residence in Switzerland, a laissez-passer for travel on mission, and is exempt from taxation on ILO earnings."

8. Having examined the evidence on file, the Tribunal finds that in the present case the defendant did not violate the text quoted above. It notes that the contracts signed by the complainant related to specific well-defined tasks or to advisory missions for the benefit of the Madrid office, as expressly stipulated in these contracts.

As the Organization points out, the diversity of tasks covered by these various contracts is sufficient to show that the title "Project Officer", which the complainant claims to have held, did not in fact match the tasks he performed. Almost all of the contracts ended with

the submission of reports written by the complainant on completion of his assignments.

Hence for five years the complainant carried out duties which were not identical or ongoing but diversified, and which met the immediate needs of the Madrid office. The facts of the case are not therefore similar to those considered by the Tribunal in Judgment 2708.

9. However, nothing in the file supports the complainant's claim that he represented the Organization other than occasionally. The documents he produces are no proof of this whatsoever. The same applies to the suggestion, by the Director of the Madrid office, that the complainant should stand in for him.

None of these documents shows that he "regularly" managed the Madrid office's financial and human resources. One of them supplies information about a decision taken by an official authorised to do so by the Organization's Financial Rules, and another one is a copy of an e-mail which furnishes no proof that the complainant took a decision entailing a commitment on behalf of the Organization.

10. With regard to the physical conditions in which the tasks forming the subject of the contracts signed by the complainant were carried out and on which he relies in order to claim that he had the status of an official, the Tribunal notes that the complainant supplies no proof that he carried out these tasks on the Madrid office's premises during working hours (9 a.m. to 7 p.m.) dictated by it. Moreover, the relevant texts indicate that the office was not forbidden to provide facilities enabling the external collaborator to perform his tasks, but that the Organization must not under any circumstances be deemed to have had an obligation to provide its external collaborators with these facilities.

11. The Tribunal considers that it must rule out any discussion of the document which is alleged to be the complainant's job description, as it contains no indication of its author, addressee or date.

12. The complainant further submits that he worked for the Organization during periods not covered by the contracts he signed, and he produces copies of e-mails and faxes bearing dates when he was not supposed to be working for the Madrid office. However, in this connection it must be found that the complainant supplies no proof that he worked outside the periods covered by his contracts at the Organization's request.

It follows from the foregoing that the plea that Circular No. 11, series 6, was violated, is unfounded.

13. The complainant contends that the Organization violated Circular No. 630, series 6, on inappropriate use of employment contracts in the Office, in that "'external collaboration' contractual arrangements" were used "for a purpose other than that for which they were designed, for a lengthy period of over four years", which gave rise to a situation of "precarious employment".

14. Circular No. 630, series 6, paragraph 12, reads as follows:

> "An External Collaboration Contract (Ex-Col) is task-based. Such a contract may be used only where there is a specific well-defined task to be performed and the output can be considered as a specific end-product (e.g. a research study, report, translation, or typed document) or where the task assigned is one that is advisory in nature (e.g. engaging an academic or other specialist to present a paper and be a discussant at a workshop). A person employed on an Ex-Col contract is not, and does not act in the capacity of an official of the ILO and is not authorised in any circumstances to undertake any commitment on behalf of the Office. The conditions under which the Ex-Col contract may be used are that the work to be carried out is not an ongoing activity; the work performed is to meet a specified deadline at working times determined by the contractor within the overall work plan set by the relevant Office unit and at any place of his/her choice; office space, facilities or services normally should not be provided; and full payment is normally made only when the work has been completed and judged satisfactory. As non-staff members, Ex-Cols do not enjoy the immunities of an official. Since they should not work on ILO premises, a carte de légitimation is not provided to them. However, if an Ex-Col needs to have consultations in Geneva, any relevant visa(s) may be obtained by the Office to facilitate official travel to Switzerland."

15. In the light of the text quoted above it appears that the ten external collaboration contracts signed by the parties complied with the rules applying to this type of contract and were used for the purposes for which they were intended. This is clear from the considerations set forth above relating to the Tribunal's examination of the first plea.

16. In the proceedings before the Tribunal the complainant requests the redefinition of his working relationship with the Office during his internship from 17 July 2000 to 14 October 2001. With regard to this period, the Tribunal observes that the complainant did not, within the applicable time limit, challenge the lack of remuneration for this internship.

17. The complainant taxes the Organization with also violating Circular No. 630, series 6, insofar as it specifies in paragraph 13 that:

> "[…] a person should not be employed under simultaneous contracts with the Office. Accordingly, before recruiting a person for temporary employment, a line manager should clarify whether s/he holds any other ILO contract. In such a case, the manager should seek advice from [the Administration] before a further contract is issued."

The complainant asserts that in July and August 2004 "two external collaboration contracts with the Office were in force simultaneously".

The Organization does not deny this fact. It explains that the aforementioned paragraph 13 is designed to avoid any abuse in the management of external collaboration contracts and that the text quoted prohibits the simultaneous holding of an employment contract and one or more external collaboration contracts, but not the simultaneous holding of several external collaboration contracts. It adds that the two contracts issued for periods already covered concerned short tasks (of four and five days respectively) connected with one-off events and relating to those undertaken in the context of the two main external collaboration contracts.

The Tribunal finds that the Organization's explanations are coherent and that the complainant has not suffered any injury from the issuing of two simultaneous contracts.

18. Referring to paragraph 2 of Circular No. 630, series 6, the complainant objects to the fact that the measures laid down in paragraphs 17 *et seq.* of that same circular were not applied to him. Paragraph 2 states, in relevant part, that:

> "Inappropriate contract usage is normally considered by the Office to have occurred when a person has been engaged under a number of temporary contracts and has accumulated at 1 July 2002, at least 24 months of employment under such contracts with the Office within the past 36 months."

The measures for which provision is made in paragraph 17 *et seq.*, namely eligibility to apply for vacant jobs and entitlement to a lump-sum payment, were reserved for persons who met the conditions of having been employed under several temporary contracts and having accumulated, at 1 July 2002, 24 months of employment within the previous 36 months.

The Tribunal finds that, even if there had been improper use of contracts – which has not been proved – the complainant did not meet one of the requisite conditions for benefiting from the measures referred to in paragraph 17 *et seq.* of Circular No. 630, namely 24 months of employment, as he himself admits.

19. Lastly, the complainant accuses the Organization of violating its own Declaration on Fundamental Principles and Rights at Work. He says that the Organization's mission is "to promote social justice and internationally recognised labour and human rights" and "to encourage the creation of decent work". However, the Tribunal finds on examining the evidence on file and the various arguments recalled above that the complainant has not supplied the slightest proof that the Organization violated fundamental principles and rights in the field of industrial relations.

20. Since none of the complainant's pleas succeeds, the complaint must be dismissed in its entirety without there being any need to order the convening of the hearing requested by the complainant.

21. After the Registrar had forwarded the Organization's surrejoinder to the complainant, the latter asked the Tribunal not to take account of two annexes to the surrejoinder and to invite the persons concerned by these annexes to testify.

It follows from the above considerations that the Tribunal has not taken into account the annexes in question and there is therefore no reason to grant the complainant's final request.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet