Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

109th Session **Judgment No. 2922**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms P.-M. H. against the International Labour Organization (ILO) on 11 November 2008 and corrected on 17 December 2008, the Organization's reply of 6 April 2009, the complainant's rejoinder of 7 July and the ILO's surrejoinder of 12 August 2009;

Considering Articles II, paragraph 1, and VII 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, a French national born in 1955, was initially employed by the International Labour Office, the ILO's secretariat, under a short-term contract for the period from 1 May to 31 July 2000. She was assigned to the Regional Office for Europe of the

International Social Security Association (ISSA)[*] in Paris as a secretary-administrative assistant. On 1 August 2000 she was granted a fixed-term contract.

By a letter of 13 February 2007 the Director of the Human Resources Development Department informed the complainant that, following the decision to close down the ISSA Regional Office in Paris at the end of 2007, her contract would not be renewed when it expired on 31 December 2007. The Director stated that her letter constituted formal notice of the decision not to renew her contract. She further notified the complainant that she would be entitled to payment of her accumulated days of annual leave but that, given the "special circumstances of [her] contractual relationship with the ISSA, the Staff Regulations ma[de] no provision for any other supplementary indemnity".

On 27 July 2007 the complainant filed a grievance with the Director of the above-mentioned department, asserting that as from 1 August 2001 her appointment had been "extended indefinitely" and that its termination was incompatible with Article 11.5 of the Staff Regulations – entitled "Termination on reduction of staff" – which reads as follows:

> "(a) The Director-General, after consulting the Joint Negotiating Committee, may terminate the appointment of an established official if the necessities of the service require a reduction of staff involving a reduction in the number of posts. An established official whose appointment is terminated under this paragraph shall, during the two years after the date on which its termination becomes effective, be offered appointment to any vacancy for which the Director-General, after consulting the Joint Negotiating Committee, considers that he possesses the necessary qualifications.
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> (b) When such appointments have to be terminated because the necessities of the service require a reduction of staff involving a reduction in the number of posts, due consideration shall be given to competence,

[*] The ISSA is a non-profit international organisation consisting of institutions, government departments, agencies and other entities administering one or more aspects of social security. Its objective is to cooperate, at the international level, in the promotion and development of social security throughout the world. Its General Secretariat is in Geneva, at the ILO.

efficiency and official conduct, to length of service, to the prospective needs of the Organization and to the factor of geographical distribution.

(c) When an appointment is terminated under this article the period of notice shall not be less than three months.

(d) An official whose appointment is terminated under this article shall be paid the indemnity provided for in article 11.6 (Indemnity upon reduction of staff).

(e) An official whose appointment it is proposed to terminate under paragraph (a) above shall be entitled to appeal to the Joint Advisory Appeals Board on the grounds that the termination is proposed without due consideration having been given to his competence, efficiency and official conduct, and to his length of service. Such an appeal to be receivable must be submitted to the Joint Advisory Appeals Board not later than one month after the official has received notice of the proposed termination."

The complainant requested a review of the decision of 13 February 2007 "with a view to the payment of indemnities". She was informed by a letter of 29 October that Article 11.5 was applicable only to established officials – i.e. those with an appointment of unlimited duration – and that her grievance was unfounded since she had never acquired the status of an established official.

On 30 November 2007 the complainant referred the matter to the Joint Advisory Appeals Board. She contended that Articles 11.5 and 11.6 of the Staff Regulations should have been applied to her and that she had been treated unfairly, since she had not received the "departure indemnity" which, according to her, the Office paid, in accordance with its consistent practice, to officials who had served for more than six years and whose contract was not renewed or whose appointment was terminated. She also asserted that the Office had made no effort to find an alternative solution and that it had not complied with the Joint Negotiating Committee's Guidelines on Managing Change and Restructuring Processes. In further submissions dated 14 March 2008 the complainant affirmed that numerous posts corresponding to her qualifications – including a post of secretary at the ISSA office in Geneva – had been advertised since her departure, but that the Office had not considered assigning her to one of them. She further accused the Office of failing to explore fully and actively all training and/or redeployment opportunities, in breach of its

"established practice" and its job security policy. She also claimed to have been treated unfairly because a colleague at the ILO Office in Paris, who had worked under the same conditions and for about the same length of time as herself, had received an indemnity when her contract had not been renewed.

In its report of 12 June 2008 the Board pointed out that Articles 11.5 and 11.6 of the Staff Regulations were not applicable to the complainant since she was not an established official. It added that the applicable rules did not provide for the payment of an indemnity in the event of non-renewal of a contract. With regard to the pleas that the Office had made no effort to find an alternative solution and had failed to explore fully and actively all training and/or redeployment opportunities even though posts corresponding to the complainant's qualifications had been advertised during the same period in Geneva, the Board declined to consider them on the grounds that they had not been raised in the initial grievance. It therefore recommended to the Director-General that he dismiss the grievance. By a letter of 11 August 2008, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to endorse the Board's opinion and to dismiss her grievance as groundless.

B. The complainant submits that, following her recruitment without a competition, she was assigned to a post established by the Organization's regular budget. She asserts that no written contract was drawn up after 1 August 2001 and that her appointment had therefore been "extended indefinitely". It follows, in her view, that certain procedures should have been followed when her appointment was terminated. She accuses the ILO of violating the applicable provisions, namely Articles 11.5 and 11.6 of the Staff Regulations, as well as the Joint Negotiating Committee's Guidelines, which stipulate inter alia that "[i]n line with ILO policy on job security, managers should ensure that any issues around employment security are addressed with a clear commitment to minimising the impact of the change or restructuring

on job security and ensuring that all opportunities for training and/or redeployment are fully and actively explored".

The complainant requests the setting aside of the impugned decision. She also claims compensation for moral and material injury, and costs.

C. In its reply the ILO states that it shares the opinion of the Joint Advisory Appeals Board, which considered that the plea to the effect that the Office had made no effort to find an alternative solution was irreceivable for failure to exhaust internal remedies, since the complainant did not raise that plea in her grievance of 27 July 2007.

On the merits, the Organization maintains that Articles 11.5 and 11.6 of the Staff Regulations are applicable only to established staff members. During the period from 1 August 2000 to 31 December 2007 the complainant held a fixed-term contract that was extended several times. She was notified of the extensions, in accordance with the practice in force at the ISSA Regional Office in Paris, by means of a notice of personnel action. It emphasises that the complainant's appointment was therefore not terminated; rather, her contract was not renewed. She was given more than ten months' notice of this decision, in accordance with the applicable rules and the Tribunal's case law.

The ILO also submits that it was under no obligation to redeploy the complainant, particularly because she had been recruited locally. It points out that the Guidelines cited by the complainant are not binding but are intended to provide "guidance to managers, staff representatives and officials on managing change in a positive and constructive way". Moreover, they stipulate that "[s]olutions to any problems that may arise during a change or restructuring process, such as training or transfers or redeployment, should be sought […] as required by the staff member" concerned. The complainant does not, however, appear to have requested such measures when she was informed of the closure of the Regional Office.

D. In her rejoinder the complainant explains that it was during the internal appeal proceedings that she was informed of the fact that posts

for which she would have been suitable had been filled while provision was concurrently being made for her "dismissal". She therefore decided, in the interests of procedural economy, to include this new plea in the grievance that she had filed with the Joint Advisory Appeals Board. She considers that she cannot be accused of having failed to exhaust internal remedies because the Office became aware of this plea "at a very early stage of the proceedings" before the Board and the plea "supported the purpose" of her grievance.

On the merits, the complainant admits that it is clear from the Organization's reply that her contract "should in fact have been a fixed-term contract", but she argues that, "[a]ccording to a general principle of law", the lack of a written contract creates a presumption that the appointment is of unlimited duration. In her view, a notice of personnel action cannot be assimilated to a contract.

The complainant further claims to have been treated unfairly inasmuch as her colleague at the ILO Office in Paris was granted a "departure indemnity" equivalent to three months' salary in respect of the non-renewal of her contract. While this was partly intended to compensate for the lack of notice, it is not disputed that it was also granted partly "in the light of other circumstances". The fact that her colleague held a fixed-term contract demonstrates, in her view, that the Office does have a practice of paying an indemnity in the event of non-renewal of such a contract.

E. In its surrejoinder the Organization maintains its position in full. On the issue of receivability, it adds that the allegations of unfair treatment and those concerning the existence of a practice of granting an indemnity are irreceivable on the grounds of non-exhaustion of internal remedies, because they were not raised in the grievance of 27 July 2007.

On the merits, the ILO contends that the complainant's failure to react on receiving the notices of personnel action constituted tacit acceptance of the offers of renewal of her contract that they contained. With regard to the allegation of unfair treatment, the Organization submits that the complainant's situation is not comparable in law or in

fact to that of her colleague at the ILO Office in Paris, since the latter received notification on 20 December 2007 of the decision not to renew her contract with effect from the end of the year. As it is the normal practice to give two months' notice in the event of non-renewal of a contract, she was awarded two months' salary in lieu of notice. Moreover, as the end-of-year festive period is an unfavourable time for job-seeking and job opportunities, it was decided to pay her an additional month's salary. As this is the only example provided by the complainant of the award of an indemnity following non-renewal of a contract, there can be no question of the existence of any kind of practice.

CONSIDERATIONS

1. The complainant was recruited by the Office to serve as a secretary-administrative assistant at the ISSA Regional Office in Paris under a short-term contract running from 1 May to 31 July 2000. She was granted a one-year fixed-term contract with effect from 1 August 2000. Her contractual relations with the ILO continued until 31 December 2007.

2. By a letter of 13 February 2007 the complainant was informed that, owing to the definitive closure of the Regional Office, her contract would not be renewed when it expired on 31 December 2007.

On 27 July she filed a grievance contending that the termination of her contract, which, she claimed, had been extended indefinitely, should have been accompanied, pursuant to Articles 11.5 and 11.6 of the Staff Regulations, by payment of the indemnities provided for in those provisions. She therefore requested that the decision of 13 February 2007 be reviewed and that her grievance be examined from that perspective.

As her grievance did not meet with a favourable outcome, the complainant referred the matter to the Joint Advisory Appeals Board, which unanimously recommended, in its report of 12 June 2008 to the

Director-General of the Office, that he dismiss the complainant's grievance.

The complainant was informed by letter of 11 August 2008 that the Director-General had decided to dismiss her grievance as groundless, in accordance with the Board's recommendation.

3. The complainant argues that her fixed-term appointment was "extended without a contract and indefinitely" so that it was "of indeterminate duration". She infers from this that when her appointment was terminated she should have been granted the indemnities provided for in Articles 11.5 and 11.6 of the Staff Regulations, which are payable to established staff members. She adds that the Joint Negotiating Committee's Guidelines on Managing Change and Restructuring Processes were not implemented in her case, for instance by exploring fully and actively all training and/or redeployment opportunities.

She also asserts that the Organization treated her unfairly by failing to pay her the "departure indemnity" that one of her colleagues at the ILO Office in Paris received when her fixed-term contract was not renewed. She cites this as evidence of the existence of a practice of granting an indemnity in the event of non-renewal of such a contract.

4. The defendant submits that the complaint should be dismissed on the grounds that it is partially irreceivable and, in any case, groundless.

5. With regard to the indemnities claimed by the complainant, it is not disputed that they are reserved for established officials, that is, according to Article 2.1 of the Staff Regulations, officials "appointed without limit of time to posts established by the budget of the Organization". Nor is it disputed that it is because she believes that her contract was without limit of time that the complainant considers that "the termination of [her] appointment should have complied with certain procedures". The only question that arises is therefore that of whether the complainant could be regarded as an established official.

6. From the evidence available in the file, the Tribunal understands that, as pertinently noted by the Joint Advisory Appeals Board, "[t]he complainant was not an established official, she held a series of fixed-term contracts, as evidenced by the notices of personnel action […] by which, in accordance with the practice of the Paris Office, she was informed of the successive extensions of her contracts".

Furthermore, as noted by the ILO, the titularisation of an official involves formally converting the fixed-term contract into a contract without limit of time, in accordance with the applicable provisions. In the case in point, however, the procedure leading to titularisation was never undertaken in the case of the complainant.

It may be concluded from the foregoing that the complainant did not have the status of an established official within the meaning of Article 2.1 of the Staff Regulations. It follows that she is not justified in claiming that there has been a violation of the formal and procedural rules applicable to the termination of the appointment of an established official, including those laid down in the Joint Negotiating Committee's Guidelines. For the same reason, there is no merit to her claim for payment of the indemnities due in the event of termination of the appointment of an established official pursuant to Articles 11.5 and 11.6 of the Staff Regulations.

7. The complainant contends that she was treated unfairly in that, unlike one of her colleagues at the ILO Office in Paris, she did not receive a "departure indemnity".

However, the Tribunal notes that the factual and legal situation of the colleague to whom she refers was neither identical nor comparable to hers, as the Organization has clearly established.

8. The complainant considers that the Office failed to observe its practice of paying an indemnity for non-renewal of a fixed-term contract, but she has produced no evidence of the existence of such a practice within the Office.

9. In view of the foregoing considerations, none of the complainant's pleas succeeds and her complaint must therefore be dismissed, without there being any need for the Tribunal to rule on the objection to receivability raised by the ILO.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 April 2010, Mr Seydou Ba, Vice-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 8 July 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet