Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

109th Session **Judgment No. 2926**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. L. against the International Labour Organization (ILO) on 5 December 2008, the ILO's reply of 12 March 2009, the complainant's rejoinder of 17 June and the Organization's surrejoinder of 22 September 2009;

Considering Articles II, paragraphs 1 and 6, 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 1977, was initially recruited by the Staff Union of the International Labour Office, the ILO's secretariat, under an external collaboration contract as a "Legal Consultant" for the period from 10 March to 9 June 2003. He continued to work for the Staff Union from 10 June 2003 to 1 August 2004 although the aforementioned contract was not extended and no new contract was concluded. On 12 August the Human Resources Development Department offered him a special short-term contract assigning him to the Staff Union for the period from 2 August to 31 December 2004, which he accepted that same day.

At its second session on 28 October 2004, the Annual General Meeting of the Staff Union approved the recruitment of a legal adviser to the Staff Union for a period of 12 months. A dialogue then began between the Office and the Staff Union concerning the complainant's employment. He was offered a further external collaboration contract beginning on 1 January 2005 by the Chairperson of the Staff Union Committee, but he refused to sign it. The complainant nevertheless continued to perform his duties on behalf of the Staff Union.

On 19 October 2007 the complainant submitted a grievance to the Director of the Human Resources Development Department pursuant to Article 13.2 of the ILO Staff Regulations. He stated that he performed regular tasks that could not be equated with an "end-product" within the meaning of Circular No. 11 (Rev.4), series 6, concerning external collaboration contracts, and that he had been treated in a manner that was incompatible with the law applicable to the Office, in particular the provisions of Circular No. 630, series 6, entitled "Inappropriate use of employment contracts in the Office". He contended that he should have been treated as an official throughout his "contractual relationship with the Office" and requested, inter alia, that the relationship be redefined. He was informed by letter of 18 January 2008 that his grievance was irreceivable on the grounds that he could not avail himself of the provisions of the Staff Regulations dealing with conflict resolution because he was not an ILO official. On 12 February the complainant referred the matter to the Joint Advisory Appeals Board, which issued its report on 4 July. Having concluded that the complainant did not have the status of an official, it recommended that the Director-General reject the grievance as irreceivable. By a letter of 3 September 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 reject his grievance as irreceivable, in accordance with the Board's opinion.

B. The complainant submits that the Office's position regarding his own status and that of the Staff Union is based on two errors of law. Referring first to the argument that he does not have the status of an

official and that the Staff Union bears responsibility for his employment relationship, he asserts that, prior to the expiry of his special short-term contract, the Chairperson of the Staff Union Committee proposed that his employment relationship be continued, which he accepted, and that the continuation of that relationship as from 1 January 2005 enabled him to preserve his status as an international civil servant. He points to a number of factors as evidence of his employment relationship with the Office, for instance the fact that two performance appraisal reports were compiled and that he was provided with an office, an e-mail address, visiting cards bearing the ILO logo and a telephone number, in other words "the material facilities customarily provided to all officials".

Second, referring to Article 10.1(e) of the Staff Regulations, which provides for the "release of officials designated by the Staff Union in full or in part from the duties to which they are assigned under article 1.9 (Assignment of duties) to undertake representative functions on behalf of the Staff Union and/or official functions provided for under the Staff Regulations", the complainant adds that the Chairperson of the Staff Union Committee was acting in the exercise of his official functions when he proposed the continuation of his employment relationship with the Office beyond 31 December 2004. He contends that every international organisation is legally responsible for the acts undertaken by its officials in the performance of their official functions and that the Office commits a further error of law when it claims that it was not bound as an employer by the decision to continue his employment relationship. He emphasises in this connection that the Office never informed him that it was opposed to the continuation of his employment and that, on the contrary, in two administrative documents which are annexed to his submissions, it stated that it had employed him on the basis of a special short-term contract from 1 January to 31 December 2005 and on the basis of an external collaboration contract from 1 January 2007 to 31 December 2008.

The complainant further maintains that the August 2007 version of the Staff Regulations institutionalised the Staff Union, which thereby

acquired the status of an official ILO body. He points out that it has been the practice, except in one case, to remunerate ILO officials assigned to the secretariat of the Staff Union from the subscriptions paid by the members of the Union rather than from the ILO budget. Yet the Organization has never contended that the persons concerned thereby forfeited their status as ILO officials. The complainant notes in this connection that the Office had envisaged, in the course of the dialogue with the Staff Union, that the latter become a legal entity under Swiss law and thus be entitled to conclude employment contracts; however, it acknowledged that the Staff Union was not in a position to recruit staff in its own name because it had no legal personality under Swiss law. He infers from this that every employee of the Staff Union is necessarily an employee of the Office.

Lastly, the complainant asserts that the Office concealed its employment relationship with him from the host State of the Organization, i.e. Switzerland. In so doing, the Office undermined his dignity and placed him in an embarrassing situation because, for instance, the Swiss authorities never issued him with an identity card (*carte de légitimation*).

The complainant requests the Tribunal to find that he has been an ILO official since 12 August 2004 and on that ground to set aside the impugned decision. He claims compensation of 300 euros per month for the period from 1 January 2005 until the date on which the Tribunal delivers its judgment on the case, 8,000 euros in costs and interest at a rate of 8 per cent per annum on these sums calculated “from the date of delivery of the judgment”.

C. In its reply the ILO makes clear at the outset that the dialogue between the Staff Union and the Administration on the issue of the recruitment of a lawyer for the Staff Union, which was a general discussion not concerning the complainant personally, is a matter of internal Organization policy which cannot form part of the complaint filed by the complainant with the Tribunal.

The Organization submits that the Tribunal lacks jurisdiction *ratione personae* because the complainant has not provided evidence

of his status as an ILO official. In its view, it also lacks jurisdiction *ratione materiae*. Indeed, even if the complainant, relying on the special short-term contract he was granted in 2004, were to invoke his status as a former official under Article II, paragraph 6, of the Statute of the Tribunal to bring proceedings before the Tribunal, he fails to mention any non-observance of the terms of the said contract or of the provisions of the Staff Regulations, as required by paragraph 1 of the same article, since he merely takes the Organization to task for its refusal to recognise his status as an employee of the Office, a status that allegedly ensued from "his *de facto* relations with the Staff Union". The ILO adds that the complainant has not specified which right under Article 10.1 of the Staff Regulations was allegedly violated and that that article is irrelevant in the present case. Lastly, it argues that the complaint is irreceivable *ratione temporis* inasmuch as the complainant first raised the issue of his status in October 2007, some three years after the expiry of his special short-term contract. According to Article 13.2 of the Staff Regulations, an official wishing to initiate an internal grievance procedure must do so "within six months of the treatment complained of", and Article VII, paragraph 2, of the Statute of the Tribunal sets a time limit of ninety days after the complainant was notified of the impugned decision for the filing of a complaint.

On the merits, the ILO affirms that the complainant knew by the end of 2004, given the non-renewal of his special short-term contract, that the Office did not intend to continue its employment relationship with him; in the absence of any form of contract, he cannot assert that his employment continued beyond 31 December 2004. It submits that under international civil service law a contract cannot be renewed tacitly and it further notes that the above-mentioned contract contained an explicit clause barring tacit renewal. The reason why the complainant was nevertheless able to continue benefiting from a number of facilities was that the Office makes them available to the Staff Union and refrains from interfering with their use out of respect for the principle of freedom of association. The Organization emphasises that the administrative document which is supposed to prove that the complainant was granted a special short-term contract

from 1 January to 31 December 2005 was solely intended to render account of the number of unused days of annual leave for purposes of reimbursement, and it produces the complainant's leave record, which mentions only one contract, namely the contract covering the period from August to December 2004.

The ILO states that the complainant, with the complicity of the former Chairperson of the Staff Union Committee, drew up two false performance appraisal reports, which were "secretly incorporated" in his personal file. It points out that the reports in question, which cover periods during which the complainant was working without a contract, were not submitted to the Reports Board and that the Office was not involved at any stage in their preparation. It further claims that the complainant created his own e-mail address and that he had visiting cards printed without authorisation. It also takes him to task for refusing to comply with its request that he return the laissez-passer issued to him when he was under contract and for having used it for inappropriate purposes. These facts demonstrate, in the Organization's view, the manifestly fallacious nature of the complainant's arguments aimed at affording proof of his status as an ILO official. The conclusion that the complainant did not enjoy such status is all the more inevitable for the fact that he was not affiliated either to the United Nations Joint Staff Pension Fund or to the Staff Health Insurance Fund.

Referring to the complainant's implicit reliance on the theory of estoppel, the ILO argues that the complainant cannot attribute responsibility for his administrative situation to the Organization, since he refused to sign an external collaboration contract and opted instead to work without a contract as from 1 January 2005.

D. In his rejoinder the complainant contends that his complaint is receivable. He asserts that the Tribunal's jurisdiction depends in the present case on the answer to the question whether or not he has access to the Tribunal and hence on the examination of the merits of his complaint. As he sees it, the Tribunal has jurisdiction, irrespective of the outcome of the dispute, to examine his claim for redress for the injury caused by the Office. He submits that he complied with the

requirement under Article 13.2 of the Staff Regulations that a grievance be filed "within six months of the treatment complained of" but states that the vague wording of that provision renders the right of appeal "merely virtual" and that the article in question is therefore inapplicable since it breaches the "fundamental principles of intelligibility and readability of the law".

On the merits, the complainant maintains his position. He points out that he did not argue that his contract had been tacitly renewed, since an explicit agreement with respect to the extension of his appointment from 1 January 2005 existed following his acceptance of the verbal offer made by the Chairperson of the Staff Union Committee. He also denies any reliance on the theory of estoppel. According to him, there is fresh evidence clearly demonstrating that he is an ILO official, for instance the fact that he enjoyed "fundamental rights" accorded to international civil servants, such as the right to annual leave. He produces evidence in support of his contention that the visiting cards he received were provided by the competent unit and that the e-mail address in his name was created without any form of fraudulent manipulation on his part. He describes the Organization's assertion that he compiled false performance appraisal reports as "deliberately offensive".

E. In its surrejoinder the ILO reiterates its position in full. Citing Judgment 2722, it recalls that time limits are an objective matter of fact and that the Tribunal "should not entertain a complaint filed out of time, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar". It also recalls that "the only exceptions to this rule that the Tribunal has allowed are where the complainant has been prevented by *vis major* from learning of the impugned decision in good time […], or where the organisation by misleading the complainant or concealing some paper from him or her has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith". No such circumstances exist in the present case. The

Organization invites the Tribunal to reject the complainant's arguments to the effect that Article 13.2 of the Staff Regulations is not applicable.

On the merits, the ILO maintains that the verbal agreement between the complainant and the Chairperson of the Staff Union Committee is not binding on the Organization. It considers that the conditions required by the case law for recognition of the existence of a contract are not met in this case and that the said agreement cannot be characterised as a contract of employment within the meaning of Article 4.7 of the Staff Regulations since none of the formal requirements set out in the article is satisfied. Furthermore, given that, pursuant to Article 4.1 of the Staff Regulations, ILO officials are selected and appointed by the Director-General, the Chairperson of the Staff Union Committee manifestly lacked the authority to make a job offer to the complainant.

CONSIDERATIONS

1. The complainant was employed by the Staff Union of the International Labour Office as a "Legal Consultant" from 10 March to 9 June 2003 under an external collaboration contract. At the Union's request, the Office then granted him a special short-term contract covering the period from 2 August to 31 December 2004. It should be noted that he had continued to work for the Staff Union without a written contract from 10 June 2003 to 1 August 2004.

In December 2004 the Staff Union requested authorisation from the Office to issue the complainant a three-month short-term contract. The Office agreed to this request but laid down certain conditions which the Staff Union rejected. A dialogue ensued between the Office and the Union regarding the complainant's employment. The complainant nevertheless continued to make his services available to the Staff Union after 31 December 2004, the date of expiry of the special short-term contract that he had accepted on 12 August 2004.

2. The complainant challenges the decision laid down in the letter of 3 September 2008 by which he was informed that the

Director-General of the ILO, endorsing the recommendation of the Joint Advisory Appeals Board, had rejected, as irreceivable, his grievance aimed at having his "contractual relationship with the Office" redefined and at obtaining recognition of the fact that he held a "contract of employment as an official".

In support of his complaint, he contends in essence that an employment relationship exists pursuant to which he has been providing legal advice for years to the Staff Union, or to ILO officials on behalf of the Union, particularly in connection with the latter's official mandate to assist and represent officials.

According to the complainant, the Chairperson of the Staff Union Committee was acting in the exercise of his official functions when he proposed that the complainant continue his working relationship with the Office as the end of the contract concluded on 12 August 2004 approached, and in this regard he cites the Tribunal's case law to the effect that an international organisation is legally responsible for the acts undertaken by its officials in the performance of their official duties. He infers from this that he never lost his status as an official inasmuch as his employment was extended beyond 31 December 2004 by the Chairperson of the Staff Union Committee, acting in the exercise of his official functions.

3. He asks the Tribunal to find that he has been an ILO official since 12 August 2004, to set aside the impugned decision, to order the Organization to pay him compensation for moral injury, and to award him costs as well as interest on the sums claimed.

4. The ILO challenges the Tribunal's jurisdiction to hear this case. It maintains first of all that the complainant is manifestly unable to provide any documentary or other evidence of his status as an ILO official. It follows that he has no *locus standi* before the Tribunal, which therefore lacks jurisdiction *ratione personae*. Secondly, it states that if the complainant were to rely on his status as a former international civil servant on the basis of his special short-term contract that expired on 31 December 2004, the Tribunal would lack jurisdiction *ratione materiae* because the complainant has not alleged

any non-observance of the provisions of the said contract or of the Staff Regulations. Thirdly, it affirms that the complaint is irreceivable *ratione temporis*.

5. It should first be noted that the submissions show that the complainant, as he stated himself in the complaint form, is appealing to the Tribunal in his capacity as a serving official of the ILO, and not as a former official whose employment relationship with the Office ended on 31 December 2004.

A question thus arises as to whether the complainant was entitled, after 31 December 2004, to consider himself as a serving international civil servant with access to the Tribunal pursuant to the relevant provisions of Article II, paragraphs 1 to 4, of its Statute.

6. It has been ascertained that the complainant accepted the offer made on 12 August 2004 of a special short-term contract expiring on 31 December 2004. However, he has produced no document proving that this contract was duly extended or that he received a new formal contract signed by the Office or by the Chairperson of the Staff Union Committee after 31 December 2004.

On the contrary, the evidence on file shows that the complainant continued to make his services available to the Staff Union without any written contract. A contract subject to specific conditions was actually offered by the Office, at the Staff Union's request, in anticipation of the expiry of his special short-term contract on 31 December 2004, but it was not accepted by the Union. Moreover, the complainant himself refused to sign an external collaboration contract beginning on 1 January 2005, which was offered to him by the Staff Union. While it is true that a dialogue on the subject of the complainant's employment took place between the Office and the Staff Union, it yielded no result and the Staff Union Committee, faced with this situation, took it upon itself, with the complainant's consent, to continue using his services in the absence of any formal document.

7. The Tribunal considers, like the Joint Advisory Appeals Board, that the fact that the complainant continued to make his services

available to the Staff Union in the absence of any contract, that he was given access to the material facilities which the Office provides for the Staff Union, and that performance appraisal reports were drawn up for him could not confer on him a status that had not been granted by a formal administrative document. It follows that when he filed his complaint with the Tribunal, he was not in a position to invoke the status of an official bound to the Organization by a contract concluded in accordance with the rules in force.

8. Even if, as the complainant claims, the ILO were legally responsible for acts undertaken by the Chairperson of the Staff Union Committee in the performance of his official functions, the decision taken by the latter could not, in any case, bind the Organization unless it met certain minimum requirements of compliance with the formal and substantive rules governing such a decision. In the present case, it was clearly stated in the contract signed by the complainant on 12 August 2004 that his appointment was by nature temporary, that there was no expectation of continued employment within the established policies and procedures and that the contract would come to an end automatically and without further notice on completion of the stated period of appointment. Although the Chairperson of the Staff Union Committee then took the initiative of maintaining the complainant's employment relationship without concluding any kind of contract with him, this decision was grossly unlawful and could not therefore bind the Organization.

9. It follows that the complainant, since he lacks the status of an ILO official, has no access to the Tribunal, which must decline jurisdiction and dismiss the complaint.

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