Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

109th Session **Judgment No. 2950**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. G. against the International Labour Organization (ILO) on 14 November 2008 and corrected on 28 January 2009, the Organization's reply of 27 April, the complainant's rejoinder of 22 May and the ILO's surrejoinder of 24 June 2009;

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. Rule 3.5 of the Rules Governing Conditions of Service of Short-Term Officials (hereinafter "Short-term Rules") of the International Labour Office, the ILO's secretariat, concerns changes in the conditions of service upon extension of appointment. Rule 3.5(a) reads as follows:

> "Whenever the appointment of a short-term official is extended by a period of less than one year so that his total continuous contractual service amounts to one year or more, the terms and conditions of a fixed-term appointment under the Staff Regulations of the [Office] shall apply to him

[subject to the following exceptions] as from the effective date of the contract which creates one year or more of continuous service […].”

The complainant, a French national born in 1966, joined the ILO on 17 April 2001 under a special short-term contract expiring on 29 September 2001. At the end of that contract he was offered a short-term contract running until 15 December 2001, followed by another covering the period from 7 January to 6 April 2002. The latter contract was extended until 2 June 2002, with a note to the effect that Rule 3.5 of the Short-term Rules would be applicable to the complainant as of 7 April 2002. Further extensions followed, running until 28 February 2007. The complainant had been informed in the meantime, by a letter of 23 August 2006, that he had been appointed to the post of International Labour Standards Specialist at the ILO Subregional Office for Central Africa, located in Yaoundé, Cameroon. On 15 December 2006 he was offered a two-year fixed-term contract with effect from 1 March 2007; in accordance with the provisions of Chapter V of the Staff Regulations, he was on probation for those two years. The complainant accepted the offer on 18 December 2006.

By a minute dated 19 April 2007 addressed to the Human Resources Development Department, the complainant, referring to an administrative practice of the Office, sought recognition of his status as an official on mission during the first six months of his assignment in Yaoundé, in which case he would receive a mobility allowance equivalent to six months of daily subsistence allowance. This request was rejected by a memorandum of 6 June on the grounds that the complainant did not belong to the category of officials regarded as being on mission. On 27 November the complainant filed a grievance with the Director of the above-mentioned Department, arguing that the rejection of his request was a breach of the provisions of Rule 3.5 of the Short-term Rules. He pointed out that officials on a short-term contract who were covered by the said Rule were assimilated in matters pertaining to their terms and conditions of employment to officials on a fixed-term appointment. By a letter of 4 March 2008 the Director replied that his grievance could not be allowed. She considered that the practice to which he referred was not applicable to him inasmuch as his assignment to the post in Yaoundé did not

constitute a transfer "but […] the first post to which [he had] been appointed as an official" under a fixed-term contract. She added that, while Rule 3.5 was certainly applicable to the complainant's contractual situation at the time of his recruitment, it did not follow that he was an official with a fixed-term contract at that time. Referring to Judgment 2362, she affirmed that the application of Rule 3.5 had not altered his initial status as an official with a short-term contract, nor had it resulted in the conversion of his appointment into a fixed-term appointment. On 3 April the complainant filed an appeal with the Joint Advisory Appeals Board, which unanimously recommended in its report of 17 June 2008 that the complainant should be granted the status of an official on mission for the first six months of his assignment in Yaoundé and should be paid the corresponding allowance. By a letter of 18 August 2008 the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had rejected the recommendation, which he considered to be unwarranted. That is the impugned decision.

B. The complainant contends that the Office must observe the principle of equal treatment in applying its administrative practice of granting officials with a fixed-term contract who are transferred to the field the status of an official on mission for the first six months of their assignment. However, it failed to do so in the present case. He affirms that the reference to Judgment 2362 in the letter of 4 March 2008 in support of the rejection of his request for an allowance is irrelevant in this context, since the question raised in the case leading to that judgment concerned the rights of an official with a short-term contract to which Rule 3.5 was applicable and whose contract had not been renewed. He draws attention to the fact that his short-term contract covering the period from 7 April to 2 June 2002 indicated that Rule 3.5 was applicable and that he was now entitled to certain benefits, including the mobility allowance; the contract further mentioned that his mobility allowance was 0 per cent because it was his first assignment. According to him, the ILO thus explicitly recognised that his duties at headquarters in Geneva constituted his

first assignment; his appointment to the post of International Labour Standards Specialist in Yaoundé therefore constituted his second assignment. It follows, in his view, that his transfer entitled him to payment of the mobility allowance.

The complainant further indicates that, following the adoption of Circular No. 630, series 6, concerning the inappropriate use of employment contracts in the Office, the extension of his contract from 1 April to 31 December 2003 had to be approved on an exceptional basis. Pursuant to paragraph 11 of the Circular, “a combination of [special short-term] and [short-term] contracts cannot exceed a total of 364 days within a two-year period”. By a minute dated 10 March 2003, the extension in question was exceptionally approved by the Human Resources Development Department on condition that the department in which he was employed undertook to continue to extend his contract and would be in a position to appoint him to a fixed-term post in 2003-2004. The complainant points out that, notwithstanding this undertaking, he continued to be recruited on the basis of short-term contracts until 28 February 2007. Referring to the Tribunal’s case law, he argues that the Office should in fact have reclassified his short-term contracts as fixed-term contracts.

The complainant asks the Tribunal to set aside the impugned decision and grant him the status of an official on mission for the first six months following his assignment to Yaoundé, i.e. from 1 March to 31 August 2007, with all the consequences ensuing from such status, including payment for the entire period of the daily subsistence allowance applicable in Yaoundé, together with interest on arrears at a rate of 8 per cent per annum. He also claims one Swiss franc by way of token moral damages and 2,000 francs in costs, plus interest at the same rate.

C. In its reply the Organization contends that the complainant’s plea to the effect that the refusal to grant him the daily subsistence allowance constitutes unequal treatment is based on an error of law and is therefore devoid of merit. It submits that Rule 3.5 does not confer upon officials recruited on a short-term basis the status of officials with a fixed-term contract. While the terms and conditions

of employment set out in the Staff Regulations become applicable to them, administrative practices such as that under discussion in the present case are "excluded from the scope [of the rule] *ratione personae*". The Organization affirms in this regard that certain conditions of employment – such as payment of the special subsistence allowance – are applicable only to officials with a fixed-term contract who have completed their probationary period and to established officials. The complainant was not in either of those categories at the time when he was assigned to Yaoundé since this was his first appointment on the basis of a fixed-term contract. It follows that his legal status was not comparable to that of officials benefiting from the administrative practice in question.

The ILO further contends that the complainant cannot be considered to have been employed on a fixed-term contract prior to his appointment on 1 March 2007. It asserts that when the complainant invokes the case law, Circular No. 630, series 6, and the exceptional approval of an extension of his contract in 2003, he admits that his status was not equivalent to that of an official employed on a fixed-term contract. It also submits that the case law to which he refers in support of his argument is irrelevant. The ILO emphasises that an extension of the complainant's contract was exceptionally approved both in the Organization's interest and in his own interest "inasmuch as the continuation of his employment relationship with the Office was at stake".

Moreover, the defendant considers that the complainant is now time-barred from challenging the short-term contracts that he accepted and signed without reservation and that he never disputed.

D. In his rejoinder the complainant states that the ILO has misinterpreted his arguments, since he never claimed that Rule 3.5 conferred on him the status of an official with a fixed-term contract, but "simply affirmed" that, pursuant to this Rule, the employment conditions of officials in that category, apart from a few exceptions which are expressly mentioned, were applicable to him with effect from 7 April 2002.

Furthermore, he reiterates the arguments and claims presented in his complaint.

E. In its surrejoinder the Organization maintains its position on all points.

CONSIDERATIONS

1. The complainant joined the ILO on 17 April 2001 under a special short-term contract expiring on 29 September 2001. He was then offered a short-term contract, followed by another that was extended until 2 June 2002. The decision granting the latter extension specified that Rule 3.5 of the Short-term Rules was applicable to him as from 7 April 2002. The same decision listed the benefits to which he was henceforth entitled.

The complainant's contract was subsequently extended several times, without interruption, until 28 February 2007, and he worked in various units within the Office.

2. Having been selected on the basis of a competition, he was appointed to the post of International Labour Standards Specialist at the ILO Subregional Office in Yaoundé and was thus granted a two-year fixed-term contract with effect from 1 March 2007 at grade P.3. The offer of appointment specified that he would have to complete a probationary period following which, if his performance was satisfactory, he would be promoted to grade P.4.

3. By a minute dated 19 April 2007 the complainant sought recognition of his status as an official on mission during the first six months of his assignment in Yaoundé, with all the consequences ensuing from such status. He relied to that end on the Office's administrative practice whereby officials holding a fixed-term contract who are transferred to the field are granted such status for the first six months of their assignment. This request was rejected by a memorandum of 6 June.

On 27 November 2007 the complainant filed a grievance pursuant to Article 13.2 of the Staff Regulations, which was rejected by a letter of 4 March 2008.

The complainant then referred the matter to the Joint Advisory Appeals Board, which unanimously recommended to the Director-General, in its report of 17 June 2008, that he "grant the [complainant] mission status for the first six months of his assignment [to] the field and pay him the allowance applicable in Yaoundé", indicating, inter alia, that Yaoundé was the complainant's second duty station.

By a letter of 18 August 2008 the complainant was informed that the Director-General had decided not to follow the Board's recommendation and had dismissed his grievance.

4. The complainant asks the Tribunal to set aside the decision of 18 August 2008, to grant him the status of an official on mission for the first six months following his assignment to Yaoundé, with all the consequences ensuing from such status, to order the ILO to pay him interest on arrears at a rate of 8 per cent per annum on the total amount of daily subsistence allowance due from 1 March 2007, to order the Organization to pay him token moral damages of one Swiss franc, and to order it to pay him costs in the amount of 2,000 francs, plus interest at a rate of 8 per cent per annum as from the date of delivery of the judgment.

5. The complainant asserts that, as admitted by the Director of the Human Resources Development Department in her letter of 4 March 2008, the Office has adopted an administrative practice whereby officials holding a fixed-term contract who are transferred to the field are granted the status of an official on mission for the first six months of their new assignment, and that recognition of such status entitles the officials concerned to payment of a daily subsistence allowance during this first six-month period.

He points out that, while it is correct that recognition of the status he claims is not explicitly provided for in the Staff Regulations and stems solely from an administrative practice applied by the Office to

encourage staff mobility, the principle of equal treatment should nevertheless be respected in implementing the practice. In his view, the ILO failed to respect that principle and breached the provisions of Rule 3.5 of the Short-term Rules by refusing to grant him the status of an official on mission during the first six months of his assignment in Yaoundé, whereas the application of the above-mentioned Rule 3.5 entitled him to certain benefits, including the mobility allowance.

The complainant notes that the short-term contract that he "was offered […] from 7 April to 2 June 2002 explicitly stated that [Rule] 3.5 […] was applicable to him with effect from 7 April 2002" and indicated, inter alia, that the amount of the mobility allowance to which he was entitled was "0%" because it was his first assignment. The Office thus recognised, according to the complainant, that his assignment in Geneva constituted his first assignment. Accordingly, his appointment to the post of International Labour Standards Specialist in Yaoundé clearly constituted his second assignment.

6. The Tribunal recalls that, according to its case law, the principle of equal treatment requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently, and the critical question in cases involving allegations of unequal treatment is whether there is a relevant difference warranting the different treatment involved (see, inter alia, Judgment 2313).

The Tribunal notes that in this case the existence of an administrative practice whereby officials are granted the status of an official on mission for the first six months of their assignment to a field post is not disputed, and that it is likewise not disputed that such status is granted to established officials or to those holding a fixed-term appointment who leave one duty station to occupy a post in a different duty station.

7. By his minute of 19 April 2007 the complainant had requested the Human Resources Development Department to grant him the status of an official on mission on the basis of Rule 3.5 of the Short-term Rules. He asserted in support of his request that officials

to whom that Rule is applicable are assimilated in terms of their conditions of employment to officials with a fixed-term contract.

8. Pursuant to the principle of equal treatment, which must be observed in applying not only written rules but also practices, officials must be treated alike where they are in an identical or simply in a comparable position having regard to the purpose of the practice or rule (see Judgments 792, under 7, and 2066, under 8).

9. Rule 3.5(a), to which the complainant refers, reads as follows:

> "Whenever the appointment of a short-term official is extended by a period of less than one year so that his total continuous contractual service amounts to one year or more, the terms and conditions of a fixed-term appointment under the Staff Regulations of the [Office] shall apply to him as from the effective date of the contract which creates one year or more of continuous service:
>
> Provided that –
>
> (1) the provisions of Rules 5.3, 5.4, 5.5 and 5.6 shall continue to apply, and
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> (2) a grant on death shall be payable only if the official has completed at least one year of service."

It has been established from the evidence on file that the complainant, who was recruited on the basis of a short-term contract, had his contract extended several times for a total period of more than one year and that he was therefore entitled to benefit from the terms and conditions of a fixed-term appointment pursuant to the provisions cited above. It has also been established that it was in the context of his continuous employment relationship with the Organization that he was appointed, albeit following a competition, to a post in Yaoundé at grade P.3, step 5, under a fixed-term contract.

10. It is clear from the wording of Rule 3.5 cited above that the complainant must enjoy the same treatment, in all respects, as officials holding a fixed-term contract.

The Tribunal is of course well aware that the benefit in question is customarily conferred on officials appointed to a post, who are

subsequently assigned to the field pursuant to a transfer decision. The complainant was not, by definition, in this particular situation because, having been recruited on the basis of short-term contracts, he had not been appointed to a post prior to obtaining the fixed-term contract which was offered to him when he was assigned to the field, so that, strictly speaking, he was not transferred.

However, when one considers the purpose served by the practice in question, namely to compensate for the personal and family inconveniences suffered by an official based at headquarters who must be assigned to the field, the complainant, who had been working at headquarters in Geneva for more than a year when he was appointed to a post in Yaoundé, was clearly in a situation comparable to that of an official holding a fixed-term contract who is transferred to a field post.

Under these circumstances, the Organization could not lawfully refuse to grant the complainant the daily subsistence allowance paid to officials with a fixed-term contract for the first six months of their new field assignment.

11. It follows that the Director-General's decision of 18 August 2008 departing from the Joint Advisory Appeals Board's recommendation must be set aside, as well as that of 4 March 2008. The complainant is entitled to payment of the daily subsistence allowance for a period of six months from the date on which he took up his duties in Yaoundé as well as to the other benefits, if any, accruing to an official on mission. These sums shall bear interest at a rate of 8 per cent per annum from the due dates until the date of their payment.

12. As the complainant suffered moral damage as a result of the unlawfulness of the impugned decision, he should be awarded the token Swiss franc that he claims in this regard.

13. The complainant, whose complaint succeeds, is entitled to the sum of 2,000 francs that he requests in respect of costs.

DECISION

For the above reasons,

1. The Director-General's decision of 18 August 2008 is set aside, as is that of 4 March 2008.

2. The ILO shall pay the complainant the daily subsistence allowance and other benefits, if any, as stated under 11 above.

3. It shall also pay him token moral damages of one Swiss franc.

4. It shall pay him costs in the amount of 2,000 francs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 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