113th Session **Judgment No. 3113**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. I. against the International Labour Organization (ILO) on 19 May 2010 and corrected on 17 September 2010, the Organization's reply of 5 January 2011, the complainant's rejoinder of 11 April, and the ILO's surrejoinder of 12 July 2011;

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 Japanese national born in 1960, joined the International Labour Office, the ILO's secretariat, in January 1990 under a special short-term contract as a Research and Study Assistant at grade L.3 in the ILO Branch Office in Tokyo. Between October 1993 and June 1996 he was employed as an associate expert at the Organization's headquarters in Geneva and on 1 June 1996 he was

granted a fixed-term contract as a Junior Research and Development Officer at grade P.2. In October 1998 he was transferred to the P.2 position of Programme Officer in the ILO Area Office in Beijing. With effect from 1 July 2000 he was promoted to grade P.3.

At the material time, paragraph 6 of Circular No. 352, Series 6, concerning special leave without pay, relevantly provided that the total period of special leave that could be authorised by the Office could not exceed two years. By a minute dated 20 April 2001 to the Human Resources Development Department (HRD) the complainant applied for a three-year period of special leave in order to pursue doctoral studies. He acknowledged the prescribed two-year limit for such leave and indicated that in order to complete his studies, which would normally take three years, he intended to request additional leave six months prior to the expiry of the two-year period. By a letter of 23 April the complainant was informed that he had been granted special leave without pay for two years, i.e. until 31 July 2003, in accordance with Article 7.7 of the Staff Regulations and with Circular No. 352, but that he would not necessarily return to his current post should he decide to resume his work with the ILO at the end of the leave period, because the post would have to be filled during his absence.

By an e-mail of 4 February 2002 the complainant informed HRD of his intention to work as a lecturer at Meiji University, Tokyo, as from April 2002. He explained that, as a result of his work commitments, it was likely that his doctoral studies would take between five to six years to complete. On 7 March he was notified by e-mail that his special leave would be extended for two years, but that no further extension would be granted. By a letter of 11 March 2002 HRD confirmed this indicating that the extension of his leave until 14 March 2004 was “exceptional”. In the event that he wished to resume his work at the ILO, he was asked to confirm his intention to do so in writing six months prior to the end of the approved period of leave.

On 12 March 2004 the complainant was granted a further extension of special leave without pay until 14 March 2006 and by a

letter of 1 March 2005 from the Human Resources Operations and Development Branch (HR/OPS) he was instructed to inform HRD no later than the end of November 2005 if he intended to return to the ILO on 15 March 2006. He was told that, in light of the length of his absence, he should be "proactive in identifying a new assignment", as he would not be able to return to his previous post and there were no vacancies in the ILO Office in Beijing. On 4 April 2005 he responded that he expected to receive his PhD by the end of March 2006, that he would return to the ILO as of April 2006 and that he intended to apply for two vacancies graded P.4 and P.5 respectively. By a letter of 10 June 2005 HR/OPS informed him that he would be reintegrated at P.3 level – his grade when his special leave commenced – but that he could be appointed at P.4 level if he was successful in a competition for a P.4 post. Between 20 and 22 June the complainant and the Administration exchanged a series of e-mails and on the latter date it was confirmed that he intended to rejoin the ILO on 15 March 2006.

Meanwhile, during 2005, the complainant participated in three vacancy competitions in which he was considered an internal candidate, but he did not secure a post. By a letter of 1 February 2006 he was informed by HR/OPS that his special leave had been extended until 15 March 2007 and that he would be reintegrated at grade P.3 or, alternatively, appointed at grade P.4 should he be successful in a competition for a post at that level. He was asked to notify the Office no later than 30 November 2006 if he intended to return. The complainant completed his PhD in February 2006.

On 14 July 2006 he wrote to HR/OPS confirming his intention to return to the ILO on 15 March 2007. By a letter of 27 July 2006 he was informed that HRD would seek to identify positions at the P.3 level and he was encouraged to participate in competitions for any position, at any grade, that was of interest to him and corresponded to his academic background and professional experience. Enclosed with the letter was an offer of extension of his contract, which he accepted.

During 2006 he participated in a further three vacancy competitions in which he was considered an internal candidate, but he was not successful. By a letter of 28 September 2006 he asked

the Director of the ILO's International Institute for Labour Studies to accept him as a visiting scholar for the period from April 2007 to March 2008. Having received no reply, on 10 February 2007 he advised HRD that he would be undertaking research at another university between April and September 2007, but that he hoped to conduct similar studies at the International Institute for Labour Studies. He requested an additional extension of his special leave without pay for one year so that he could continue to apply for vacancies as an internal candidate. He stated that he would take up any suitable post that was offered to him during that period and he asked to be told of such a post in advance so that he could provide his employer with two months' notice. On 27 February 2007 HRD informed him that, on an exceptional basis, a final extension of his special leave had been approved until 31 March 2008 and that no further extension would be granted under any circumstances. He was asked to inform HRD no later than the end of September 2007 of his intention either to return to the ILO or resign on 31 March 2008.

During 2007 the complainant participated in eight vacancy competitions as an internal candidate but he did not secure a post. In a letter dated 16 January 2008 to the Director of HRD he pointed out that, as his special leave was due to expire at the end of March, he might have to return to his previous post in the ILO Office in Beijing. On 23 January he was informed that the Office would be publishing approximately 45 vacancy notices by 1 February. Having received no response to his letter of 16 January, he wrote to HR/OPS on 25 March, requesting clarification of his legal status as an ILO official as from 1 April 2008 and expressing his wish to return to a suitable post as soon as possible. He received no response.

By a letter of 23 May 2008 the complainant was informed that further to his request on 19 May his special leave without pay had been extended until 30 September of that year. On 30 May he submitted a grievance to HRD seeking inter alia his immediate reintegration. In the absence of an express decision from HRD within the prescribed time limits, on 29 September he filed a grievance with the Joint Advisory Appeals Board seeking reinstatement in his former

post no later than March 2009. Pending the resolution of the internal appeals procedure, the complainant was granted further extensions of his special leave until 31 March 2010.

In the meantime, during 2008 and 2009, the complainant participated in a total of 18 vacancy competitions at various levels as an internal candidate, but he did not secure a post. On 30 June 2009 he filed a second grievance with the Board, challenging the results of a competition for a P.4 post in which, despite his status as an internal applicant and the fact that his candidature had been forwarded for consideration by the responsible chief, he had not been shortlisted.

In its report of 17 December 2009 on the complainant's first grievance, the Joint Advisory Appeals Board concluded, inter alia, that the complainant was entitled to return to service with full pay at the end of his special leave, that he had been entitled to exercise that right on 1 April 2008 and that the Office had denied him that right by reaffirming its decision that he could not return to his former post while at the same time failing to offer him an alternative assignment. It recommended that he should be permitted to return to full-time service no later than 1 April 2010 on the condition of his having resigned or having secured an appropriate release from his employer as of the effective date of his return; that he should be indemnified for the Office's share of the cost of his participation in the Staff Health Insurance Fund from the date he resumed participation in the Fund (that is from 18 June 2008) until the date of his return to service; and that the Office should take no action regarding his alleged breach of the ILO's rules on outside activity in respect of his employment at Meiji University. Lastly, the Board recommended that his claim of discrimination should be rejected as unfounded.

The Board issued its report on the complainant's second grievance on 17 December 2009 and recommended that it be rejected as devoid of merit.

By a letter of 17 February 2010 – which is the impugned decision – the Executive Director of the Management and Administration Sector informed the complainant that, in light of the difficulty the Office had in finding him a suitable assignment in the past and its

inability to do so within the time frame recommended by the Joint Advisory Appeals Board, coupled with his professional commitments with Meiji University, the Office had decided that his special leave without pay would not be extended further. Consequently, his employment with the ILO would end with effect from 1 March 2010. The Office offered him an indemnity equivalent to 12 months' net base salary plus travel and removal expenses and a repatriation grant. The complainant was also informed that the Board's recommendations regarding his indemnification for the Office's share of his Staff Health Insurance Fund premiums during the material time and his outside activities during his special leave as well as the rejection of his second grievance were accepted.

B. The complainant submits that, pursuant to Circular No. 352, Series 6, an official who is granted special leave without pay has the right to return to his or her former post upon the expiry of that leave. Indeed, paragraph 5 of the Circular makes this a condition precedent to granting such leave. Absent any provision to the contrary in the Circular, that right is also applicable when the leave is extended. In the present case, the Organization breached that right each time it notified him of an extension of his leave while at the same time informing him that he would not be able to return to his former post. He argues that the Organization's numerous statements in this respect are ineffective because HRD cannot deny him a right which is stipulated by a circular, unless that circular has been lawfully repealed or amended. Furthermore, it is irrelevant that he did not immediately challenge the ILO's assertions that he would be unable to return to his former position. As his right flows from a legal instrument – Circular No. 352 – which is binding on both himself and the defendant, he must be allowed to rely unconditionally on that Circular to enforce his right.

He states that the Organization repeatedly assured him that he would be reintegrated and that it would actively seek alternative positions for him as his former post was no longer available. He

argues that he relied in good faith on those assurances and, as a consequence, had a legitimate expectation that he would be allowed to return to service at the end of his special leave, apart from his statutory right to do so.

Furthermore, during the internal appeal proceedings, the Organization did not contest his right to seek to return to his former position, but argued instead that it was impossible to grant his request immediately because his previous post was occupied and no alternative position had been identified. He contends that this admission and the corresponding assurances given to him are sufficient to establish an additional ground of claim.

The complainant challenges the ILO's reliance on Article 11.4 of the Staff Regulations to justify the termination of his appointment in the proceedings before the Joint Advisory Appeals Board, and argues that it is not applicable in his case.

Referring to Judgment 2116, he asserts that the Organization failed to treat him with good faith and to inform him in advance of any actions on its part that might imperil his rights or interests. In addition, the uncertainty surrounding his return to service adversely affected his health.

The complainant asks the Tribunal to quash the impugned decision terminating his appointment and to order the ILO to reinstate him in his former post with effect from 1 April 2008, with all corresponding pension rights even if only administratively. Subsidiarily, he asks the Tribunal to order the ILO to appoint him to a position commensurate with his experience, seniority and academic background, with effect from the earliest date from which he can resign from his current employment. In any event, he claims material damages in an amount corresponding to the difference in disposable income he would have earned in his former post and that which he has earned for the period from 1 April 2008 until the date he resumes his duties with the ILO. He claims reimbursement for the cost of his participation in the Staff Health Insurance Fund from 18 June 2008, and he seeks moral damages and costs.

C. In its reply the Organization contends that the complainant's claims for retroactive reinstatement (actual or otherwise), for an award representing the difference in his disposable income, and for moral damages are new claims and are therefore irreceivable for failure to exhaust the internal means of redress. If the Tribunal finds that they are receivable, the ILO argues that the period in question should begin from March 2009, as the complainant requested reinstatement in his former post no later than this date in his submissions before the Joint Advisory Appeals Board.

On the merits, the Organization asserts that it complied with the provisions of Circular No. 352. In its view, when read together, paragraphs 5 to 8 of the Circular provide authority for its decision not to reintegrate the complainant in his former post. Also, Article 7.7 of the Staff Regulations, which deals with special leave, does not stipulate that an official can return to his or her previous post after a period of leave.

Referring to Judgment 2938, the defendant submits that it was necessary to appoint an official to the vacated post in the interests of the service. This appointment occurred only after the complainant had initially requested an extension of his special leave without pay and it appeared that he would not be returning to the Office in the near future. The Organization asserts that it cannot now be asked to remove an official from his or her post in order to accommodate the complainant.

The defendant contends that it acted in good faith by attempting to reintegrate the complainant in a vacant post for which he was qualified, and that it only considered the circumstances insurmountable when he indicated that he would not relocate to a different geographic region. Furthermore, it argues that the Tribunal's ruling in Judgment 2755 implied that the only way the complainant could return from his special leave after the date of delivery of that judgment (9 July 2008) was if he was successful in a vacancy competition. Thus, the only duty the Organization owed him as of July

2008 was to consider him as an internal candidate for any vacancies for which he applied. If the Tribunal finds that Judgment 2755 does not apply to a return from special leave without pay, the Organization submits that this finding "should not have retroactive consequences". It points out that between 2008 and 2010 the complainant participated unsuccessfully as an internal candidate in a total of 21 vacancy competitions, most of which were for posts at grades higher than P.3.

The Organization also submits that it lawfully terminated the complainant's appointment with effect from 1 March 2010 in accordance with the Staff Regulations. It argues that as he is no longer an ILO official, his claim for appointment to an alternate post is devoid of merit and his claims for retroactive reinstatement, if granted, should only be for a period ending on 1 March 2010.

D. In his rejoinder the complainant presses his pleas. He contends that the issue of his reintegration as from 1 April 2008 was discussed during the internal proceedings and repeatedly brought to the Organization's attention in the months prior to that date. It is the defendant's failure to discharge its duty which has rendered his claims for reinstatement "retroactive". He argues that the ILO has previously asserted before the Tribunal that it is entitled to effect within-grade transfers of officials to vacant posts without competition and its reliance on its interpretation of Judgment 2755 is not in keeping with its own interpretation of the relevant provisions of the Staff Regulations. The complainant asserts that the defendant has offered no proof of the "insurmountable" obstacles it allegedly faced in seeking to reintegrate him and he denies its contention that he was unwilling to relocate.

E. In its surrejoinder the Organization maintains its position. It challenges the complainant's assertion that he was willing to relocate and produces a document showing that he failed to apply for nine vacancies for Programme Officer posts at grade P.3 that were published between 2007 and 2010.

CONSIDERATIONS

1. Before turning to the substantive issues, a consideration of the ILO's submissions on receivability is necessary. The Organization contends that the complaint raises certain claims that were not made before the Joint Advisory Appeals Board. In particular, it maintains that the complainant's claims for retroactive reinstatement with effect from 1 April 2008, for payment of the difference between his disposable income in his former post and his current position, and moral damages do not flow from his original claims. The present complaint stems from the alleged failure on the part of the Organization to reintegrate the complainant on 1 April 2008, the subject of his May 2008 grievance, in which he asked for immediate reintegration into service. While the specific requests for relief, for example, the request for moral damages, may have changed over time, the substance of the claim has remained the same throughout. Entitlement to relief arises from a proven claim and, as such, is subject to a separate analysis and has no bearing on the question of receivability. Accordingly, the Tribunal rejects the ILO's position on receivability.

2. In summary, the complainant submits that the impugned decision of 17 February 2010 is fundamentally flawed. He maintains that he has an unqualified right to reintegration in his former post or to another comparable post; there is no evidence that it was impossible to reintegrate him into the ILO; and his legal interest in reintegration remains intact regardless of whether it is in fact possible to reintegrate him.

3. In support of his argument regarding his right to be reintegrated in his former post, the complainant relies on paragraph 5 of Circular No. 352, Series 6. That paragraph provides that if the responsible chief supports an official's request for special leave without pay, that chief is required to certify that "he is able to make

satisfactory arrangements to replace the official during the period of the [leave without pay] requested, and to accept the official back in the unit upon [its] expiration".

4. Paragraph 5(b) is directed at ensuring the smooth functioning of the relevant unit during an official's absence in a manner which is consistent with the official's anticipated return to the unit upon the expiration of special leave without pay. It is not intended to create and does not confer on an official an unqualified right to return to his or her former post. Further support for this interpretation is found in the language of paragraph 7 of the Circular. In the context of planning an official's return to work after a period of special leave without pay, paragraph 7 refers to the difficulty associated with re-employing the official "in the *job* or *unit* vacated" (emphasis added). It follows that the reference to the word "unit" in paragraph 5(b) was not intended to mean that an official could only be reintegrated in the post he or she occupied before the start of the period of special leave without pay. In the letter of 23 April 2001 to the complainant informing him of the decision to grant him leave, HRD warned him that he would not necessarily be able to resume his former post upon his return, and asked him to provide six months' notice so that an adequate position could be found for him. By taking special leave without pay, the complainant must have been aware and have accepted that he might not be reintegrated in his previous post. In these circumstances, he cannot now claim entitlement to reinstatement in his former position.

5. However, when the Office granted the complainant special leave without pay and the various extensions of that leave, it consistently maintained that it would reintegrate him in a P.3 position. Indeed, the defendant concedes this point. It also concedes that it owed a duty to the complainant to find a suitable alternative post within a reasonable time after he indicated his genuine intention to return. This occurred, the Organization argues, at an unspecified date

following its notification to the complainant in February 2007 that the period of leave was no longer tenable. The ILO states that, subsequent to that date, it attempted in good faith to reintegrate the complainant at the same grade. Moreover, the issue was only considered insurmountable when the complainant indicated that he would not accept a move to a different geographic region. The defendant contends that none of the positions to which the complainant applied corresponded to his qualifications or skills and that a majority of the positions were at grade P.4 or higher. Additionally, he did not apply for nine vacant Programme Officer positions that were advertised at grade P.3. The Organization also claims that after Judgment 2755 was issued it could only offer the complainant a new post if he successfully competed for it and that, as the exigencies of the service rendered it impossible to reintegrate him into the ILO, the Director-General exercised his authority under Article 11.4, paragraph 1(d), of the Staff Regulations and terminated his employment with effect from 1 March 2010. The ILO adds that the amounts offered to the complainant as compensation correspond to the amounts set out in Article 11.4, paragraph 3, of the Staff Regulations. It submits that, accordingly, the complaint is devoid of merit.

6. As to the termination of the complainant's employment, Article 11.4, paragraph 1(d), of the Staff Regulations states that the Director-General may terminate the appointment of a fixed-term official "if the necessities of the service render impracticable the use of the official in the duties or at the duty station assigned to him". The complainant contends that this provision "is clearly tailored for use where a post is abolished or [in] similar situations". This, he argues, is not the situation in the present case. His post still exists. In fact, the official currently serving in the post has sought reassignment for some time, and the complainant asserts that his service in that capacity would still be useful. First, it is observed that his assertion is premised on the post being vacant at the material time, which it was not. Second, given that Article 11.4, paragraph 1(a), specifically addresses the termination of an appointment if the necessities of the

service require a reduction in staff, the argument that Article 11.4, paragraph 1(d), was intended to apply in the manner claimed by the complainant must be rejected. However, an issue remains regarding the consequences of the termination in the circumstances.

7. The Tribunal concurs with the Joint Advisory Appeals Board's finding that the complainant was entitled to be reintegrated in a suitable post effective 1 April 2008 and that the Office had an obligation to ensure that it had the ability to do so. The Tribunal also concurs with the Board that as Judgment 2755 was delivered subsequent to that date it cannot rely on that judgment to explain its earlier conduct. Further, the Tribunal agrees that there is no evidence of discrimination, or bad faith, on the part of the ILO. However, while it is true that retroactive reintegration was not a viable remedy at any time, the complainant is nonetheless entitled to material and moral damages for the Organization's breach of its duty to reintegrate him.

8. Having regard to the Staff Regulations and the reasons for the decision, it cannot be said in these particular circumstances that the Director-General's termination of the complainant's contract was unlawful. However, that decision was the consequence of the Organization's own failure to meet its obligation to reintegrate the complainant as promised, for which the complainant is entitled to moral damages.

9. The Tribunal concludes that in addition to the award made in the decision of 17 February 2010 the complainant is entitled to material damages in an amount equivalent to the salary, allowances and other benefits – but not including pension contributions – which he otherwise would have received for the period from 1 April 2008 to 1 March 2010 in the grade and step of the post occupied by him when he proceeded on special leave without pay. The complainant must account for net earnings from other sources during that period. He is also entitled to moral damages in the amount of 25,000 Swiss francs and costs in the amount of 8,000 francs.

DECISION

For the above reasons,

1. The ILO shall pay the complainant material damages in an amount equivalent to the salary, allowances and other benefits – but not including pension contributions – which he otherwise would have received for the period 1 April 2008 to 1 March 2010 in the grade and step of the post occupied by him when he proceeded on special leave without pay. The complainant must account for net earnings from other sources during that period.

2. The Organization shall pay the complainant moral damages in the amount of 25,000 Swiss francs.

3. It shall also pay him costs in the amount of 8,000 francs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2012, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet