Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.

v.

ILO

121st Session **Judgment No. 3626**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. P. M. against the International Labour Organization (ILO) on 5 April 2013, the ILO's reply of 12 July, the complainant's rejoinder of 30 September and the ILO's surrejoinder of 19 November 2013;

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 may be summed up as follows:

The complainant, a former staff member of the ILO, contests the decision not to renew his fixed-term contract upon its expiry on 31 December 2011.

In August 1992 the complainant joined the ILO's Office for India under a Special Service Agreement (SSA) contract as a National Programme Coordinator for the International Programme on the Elimination of Child Labour (IPEC). In June 2000 he was engaged under another SSA contract as Project Manager for the Andhra Pradesh State-based Project for the Elimination of Child Labour. In February 2005 he was offered a one-year fixed-term technical cooperation contract as Chief Technical Advisor – initially at grade P.4 and as of February 2007 at grade P.5 – of the project "Support to the Cambodian National

Plan of Action on the Elimination of the Worst Forms of Child Labour: A Time Bound Approach" (hereinafter "the Project"), which was due to end on 29 September 2012. This contract was subsequently renewed several times until 31 December 2011. The Project ended on 31 December 2012.

By a memorandum of 27 September 2011, the Director of the ILO Country Office in Bangkok informed the complainant that his contract would not be renewed beyond the date of its expiry on 31 December 2011. He explained that, as the Project was entering its fourth and final year of operation and based on a long-standing understanding with the donor, the Chief Technical Adviser function had to be phased out so as to allow national project staff to manage the Project, thereby increasing national ownership and contributing to the sustainability of its results.

On 30 December 2011 the complainant filed a grievance with the Human Resources Development Department (HRD), requesting that the memorandum of 27 September be set aside, that his contract be renewed from 1 January 2012 until 30 September 2012 or until the closing of the Project, whichever was later, that he be allowed to continue as Chief Technical Advisor of the Project during that period and that he be compensated for the humiliation and embarrassment that he had suffered because of the wrongful and abrupt manner in which his contract, and thereby 19 years of continuous work with the ILO, had been brought to an end. In his grievance the complainant also argued that during his employment with the ILO he had suffered discrimination – he pointed in this respect to the fact that for over 12 years between 1992 and 2005 he had carried out technical cooperation work under SSA contracts – and that he had been harassed. In his response of 30 March 2012, the Director of HRD rejected the complainant's grievance, reiterating that the phasing out of the complainant's functions as Chief Technical Adviser was considered to be in the best interest of the Project and was intended to ensure sustainable results and to promote national ownership and cost-effectiveness. As regards the complainant's allegations of discrimination relating to his employment situation between 1992 and 2005 and his allegations of harassment,

the Director of HRD rejected them respectively as time-barred and unsubstantiated.

On 25 April 2012 the complainant filed a grievance with the Joint Advisory Appeals Board (JAAB) against the 30 March 2012 decision. He claimed the following relief: (i) an apology to him and his children for the discrimination and the harassment he had suffered; (ii) payment of salary, allowances, benefits and pension contributions at the appropriate P level or, alternatively, the National Officer D level, for the period during which he had worked under SSA contracts, i.e. from August 1992 until February 2005; (iii) payment of salary, allowances, benefits and pension contributions at the P.5 level from 14 February 2005 until 1 January 2007 and thereafter until 31 December 2012; (iv) his immediate appointment as an ILO official at the D.1 level under a Without Limit of Time Contract or, alternatively, payment of a D.1-level salary from 1 January 2012 until he reaches the age of 65; and (v) that the ILO make a lump sum donation of 10 million United States dollars to an NGO working in the field of child labour, which he shall identify and which shall use the money in full compliance with the ILO's Financial Rules and Regulations and under ILO monitoring.

The JAAB submitted its report on 7 November 2012. It found that, although the complainant had no right to have his contract renewed, the ILO had handled the non-renewal in an abrupt and insensitive manner without consideration for his special circumstances, namely that he had been employed by the ILO for nearly 20 years. It recommended that the Director-General reject the claim that there were no valid reasons for the decision not to renew his contract. However, given the manner in which this decision had been implemented and the complainant's long service to the ILO, the JAAB also recommended that the Director-General pay the complainant compensation in the form of a termination indemnity of 12 months' salary, as provided for under the Staff Regulations. By a letter of 7 January 2013 the complainant was notified of the Director-General's decision not to accept the JAAB's recommendation regarding the payment of compensation and to reject his grievance. That is the impugned decision.

The complainant asks the Tribunal to order the ILO: (i) to pay him the difference between the salary to which he was entitled as a P.5-level Project Manager or, alternatively, as a D-level National Officer, and that which he was actually paid under the SSA contracts which he held from 1 August 1992 until 13 February 2005; (ii) to arrange that he be admitted to the United Nations Joint Staff Pension Fund (UNJSPF) with retroactive effect from 1 August 1992 and to pay to the UNJSPF both the employer's and the employee's contributions from that date until 13 February 2004, together with interest, and to arrange that the UNJSPF adjust his pension accordingly and that it pay him the adjusted pension retroactively with effect from 1 January 2012; (iii) to pay him a P.5-level salary and full pension rights with effect from 1 January 2012 until the closing of the Project; (iv) to continue to pay him a P.5 level salary until the matter is resolved or until he attains the age of 62, whichever is earlier; (v) to pay him moral damages in a sum equal to ten times the amount computed in claims (i), (iii) and (iv) above; (vi) to provide him with a letter in which an ILO official having at least the rank of Executive Director shall admit that there has been a denial of the complainant's rights and discrimination against him and shall affirm the ILO's intention to take all necessary steps to avoid such acts in the future; and (vii) to make a donation of 10 million dollars to an NGO working towards the elimination of child labour, which shall be spent strictly in accordance with ILO rules and regulations.

The ILO requests the Tribunal to dismiss the complaint as being, for the most part, irreceivable *ratione temporis* and *ratione materiae* and, to the extent that it is receivable, as being devoid of merit.

CONSIDERATIONS

1. The ILO raises receivability as a threshold issue. It contends that some of the grounds on which the complainant relies are irreceivable, as they are time-barred under Article 13.2.1 of the Staff Regulations having been filed outside of the six-month time limit required for filing a grievance with HRD. Article 13.2.1 provides that an official who wishes to file a grievance on the ground that he or she has been

treated in a manner incompatible with his or her terms and conditions of employment shall request HRD to review the matter within six months of the treatment complained of.

2. The ILO also contends that some grounds are irreceivable because the complainant did not exhaust the internal remedies, as he did not first bring them in his grievance to HRD. Article VII, paragraph 1, of the Statute of the Tribunal specifies that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. The Tribunal has consistently stated that to satisfy this requirement the complainant must not only follow the prescribed internal procedure for appeal, but must follow it properly and, in particular, observe any time limit that may be set for the purpose of that procedure (see, for example, Judgments 3296, under 10, and 1469, under 16). The ILO also contends that some grounds are irreceivable because the Tribunal has no power or jurisdiction to hear or to grant orders on them. The challenge on the ground of receivability will be determined by considering the grounds on which the complainant relied at the various stages of this case.

3. In his grievance to HRD the complainant sought a review of the decision not to renew his contract and asked that the decision be set aside on the ground that it was based on non-existent, erroneous, factually incorrect and wrong grounds and was made on wrong pretexts. He also claimed that the decision was unfair, unjust, arbitrary and capricious. In short, his claim was that the decision was illegal and unlawful. Although the complainant did not elaborate this claim in his subsequent grievance to the JAAB, he mentioned it sufficiently and it remained the central ground of his case. In the impugned decision the Director-General rejected this claim, on the recommendation of the JAAB, and the complainant brought it before the Tribunal mainly under issue number two of his brief. This claim is receivable and the Tribunal has jurisdiction to hear it because it is a matter which affects the complainant’s terms and conditions of employment. Moreover, the

complainant has exhausted the internal remedies and the claim is not time-barred.

4. In issue number three of his complaint brief the complainant states that the decision not to extend his contract was invalid because it was issued by a person who was not competent to issue it. This is not a claim but an additional plea to support his claim that the decision not to renew his contract was unlawful. This plea is receivable. The Tribunal has consistently stated that while new claims are irreceivable, new pleas upon which a complainant relies in support of existing claims are receivable (see, for example, Judgments 1519, under 14, and 3420, under 10).

5. In his grievance to HRD the complainant also claimed that the ILO and its officials harassed him in many ways during the period of his employment. In his grievance to the JAAB he stated that he was harassed because of discriminatory treatment in the workplace and on the basis of his nationality, colour, race and sex. He said that he was told repeatedly that he was not being promoted because of his nationality and that the ILO connived in these matters. In his brief to the Tribunal, he states that the harassment is continuing because he continues to experience the effects of it. However, as he has not substantiated his claim of harassment, that claim is unsustainable and would be dismissed.

6. The complainant's claim that he was denied his right as a global citizen and as a citizen of a member State of the ILO because the latter continuously misuses international taxpayers' money for nepotism and favouritism is also irreceivable. The Tribunal has no jurisdiction under Article II, paragraph 1, of its Statute to hear this claim, as it bears no relation to the terms and conditions of the complainant's employment. For the same reason, the claim which the complainant made that the ILO repeatedly violated his right to decent work is also irreceivable. He made it as a separate claim in his grievance to HRD; repeated it in his grievance to the JAAB and stated it as one of the grounds of discrimination in issue number four of his complaint.

7. In his grievance to the JAAB the complainant raised claims of breach of his rights under the ILO Constitution and of various Declarations of Human Rights principles and of generally recognized principles in existing collective agreements. Specifically, in addition to the violation of his right to decent work, he sought to rely on the denial of his right to non-discriminatory contracts in the ILO; the denial of his right to equal pay for work of equal value; the right to equal opportunity within the ILO; the denial of his right to pension for almost 20 years of continuous service in the ILO; the denial of his right against discriminatory appointments and promotion in the ILO; and the denial of his rights under the United Nations Universal Declaration of Human Rights by the totality of the discrimination meted out to him over the last 20 years based on his nationality, race and sex. In addition, the complainant claimed that he suffered discrimination, unequal treatment, humiliation and violation of his dignity. He also claimed that he was deprived of certain benefits and entitlements, including loss of pension. In his brief to the Tribunal he raises these grounds in issues one and four. He claims, for example, that the ILO employed him from 1992 to 2005 under discriminatory SSA contracts, which has adversely affected him and continues to affect him because, among other things, it has resulted in his receipt of a reduced pension. This latter claim is irreceivable as being time-barred, because his grievance in relation to it was not filed within the six-month time limit provided for under Article 13.2.1 of the Staff Regulations. In any event, all of these claims are irreceivable as, having not raised them at all in his initial grievance to HRD, the complainant has not exhausted the internal means of resisting the subject decision on them that were open to him under the applicable Staff Regulations.

8. The complainant has requested a personal hearing before the Tribunal for specific purposes. According to him, a hearing will allow him to impress upon the Tribunal the suffering, humiliation and discrimination he has suffered over the period that he has worked with the ILO; to explain in person how being employed under SSA contracts from 1992 until 2005 has adversely affected his pension, and to explain the many incidents of discrimination and harassment that he

has suffered. The request for a hearing will be denied, as the written pleadings, submissions and evidence, which the parties have filed, including the evidence that comes out of the JAAB's report, are sufficient to enable the Tribunal to reach an informed decision.

9. On the merits, the complainant argues that the notice of non-renewal was invalid because it was signed by an official who is identified on the face of the memorandum of 27 September 2011, by which he was informed of the decision, as "Director, ILO Country Office, Bangkok". He states that the Director-General designated only the Director of the ILO Country Office for Cambodia to supervise the ILO projects in Cambodia, where he worked. This claim is unfounded and will be dismissed, as it is clear from ILO Circular No. 236 of 25 March 2003 entitled "Reorganisation of ILO field structure" and paragraph 11(c), in particular, of the Director-General's Announcement entitled "Enhancing delivery of ILO services to constituents" (IGDS) No. 150 (Version 2) of 13 April 2011, that the ILO's Office responsible for operations in Cambodia is the Bangkok Office and that the signatory was the proper one to have signed it.

10. As to the question whether the decision not to renew the complainant's contract was unlawful, the Tribunal's scope of review in determining this issue is limited. Firm and consistent precedent has it that an organisation enjoys wide discretion in deciding whether or not to renew a fixed-term appointment. The exercise of such discretion is subject to limited review because the Tribunal respects the organisation's freedom to determine its own requirements and the career prospects of staff (see, for example, Judgment 1349, under 11). The Tribunal will not substitute its own assessment for that of the organisation. A decision in the exercise of the discretion may only be quashed or set aside for unlawfulness or illegality in the sense that a rule of form or procedure was breached, if it was based on an error of fact or of law, if some essential fact was overlooked, if there was an abuse or misuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 3299, under 6, 2861, under 83, and 2850, under 6). These grounds of review are

applicable notwithstanding that the Tribunal has consistently held, as in Judgment 3444, under 3, for example, that an employee who is in the service of an international organisation on a fixed-term contract does not have a right to the renewal of the contract when it expires.

11. The complainant argues that the decision not to extend his contract was unlawful because it was made in an abrupt and premature manner. The Tribunal has consistently stated that a staff member on a fixed-term contract must be given reasonable notice of non-renewal even where the contract does not require it (see, for example, Judgment 1544, under 11). The Tribunal does not agree that the decision not to extend the complainant's contract was abrupt or premature. Given that a two-month notice period of non-extension has been a long-standing practice in the ILO, the three months' notice which the ILO gave to the complainant was reasonable notice. This ground of the complaint will be accordingly dismissed.

12. The complainant insists that the decision not to renew his contract was unlawful because the reason which the ILO gave for doing so was based on non-existing and false grounds. The Tribunal has consistently stated, as in Judgments 1154, under 4, 1544, under 11, and 3139, under 6, for example, that the reason for not extending a fixed-term contract must be a valid one and not one that was given to conveniently get rid of a staff member.

13. The reason that was given in the notice of non-renewal of 27 September 2011 was that the Project, which was due to end on 29 September 2012, was entering its fourth and final year of operation with no prospect of extension. The Tribunal notes that the Project eventually ended on 31 December 2012. Both before the JAAB and before the Tribunal, the ILO states that the notice of non-renewal and the reason for it were based on an established practice and a long-standing understanding with the donor, the United States Department of Labor (USDOL), and the practice was followed in some eight other USDOL-funded projects. According to the ILO, under the practice or understanding, the function of the international Chief Technical Advisor

was to be phased out and replaced by a National Project Manager in order to encourage national ownership of the Project and to promote its sustainability. The JAAB agreed and found that the non-renewal decision was made on the basis of an established policy, which was then applied to the complainant.

14. The complainant however insists that there was no agreement or understanding between the ILO and USDOL that his function as the Chief Technical Advisor for the Project would have been phased out and replaced by a National Project Manager in the final stage of the Project. He notes that the ILO has failed to produce any evidence of the existence of such an agreement and insists that had there been such an agreement, it would have been a written and signed agreement, as it could not have been a secret one or a mere discussion to constitute a valid ground for the non-renewal of his contract. On the other hand, the ILO states that not only was the complainant aware of the understanding between the ILO and USDOL and the discussion that was taking place at the time, he also actively participated in that discussion. The ILO submits that the absence of a written understanding and the fact that funding was provided until the end of the Project are not sufficient grounds to question the validity and existence of the reasons given for the non-renewal of complainant's contract.

15. Although a formal document would have been useful, it is not the only basis for reliance in order to determine whether the reason that was given for the non-renewal of the complainant's contract was valid. A policy, an understanding or a well-established practice could also suffice but there must be proof that it exists. Firm and consistent precedent states, in Judgment 2702, under 11, for example, that "the party seeking to rely on an unwritten rule bears the onus of proving the substance of the rule. This applies equally to a party seeking to rely on an established practice."

16. To discharge this burden, the ILO brought documentary evidence. USDOL's First Draft Comments of 21 July 2008 on the draft Project document for Phase II of the Cambodia Project, in which

the complainant worked, includes the responses of the project personnel. This was circulated to the complainant on 8 August 2008. USDOL's 11th comment enquired whether:

> "IPEC considered phasing in the Senior National Project Officer as the project lead for sustainability purposes, to create local ownership, and to create costs savings?"

Although this approach did not find favour with the project personnel for reasons which they set out, it is clear that USDOL favoured it for these stated reasons.

17. The ILO provides another document which shows USDOL's Third Draft Comments of 22 September 2008 on the draft Project document and the project personnel responses thereto. It again shows that USDOL believed that "transitioning project leadership to a country national at some point in the project [was] possible and necessary to promote sustainability of project activities and impact". In its response, IPEC noted this suggestion which it stated was in line with the general IPEC approach. However, it further stated as follows:

> "As it is difficult to make that decision at this point in time, the project and IPEC will keep it in mind during the course of project implementation. It will also be reviewed during the Mid-Term Evaluation."

This is not reflective of the existence of a long-standing policy, understanding or practice for phasing out the Chief Technical Advisor that would have been observed or was applicable, and there is no evidence that the mid-term evaluation was carried out.

18. The ILO also produces the Project document "Final Draft: 26 September 2008". It shows, among other things, 29 September 2012 as the Project's completion date and that the Chief Technical Advisor was to report to the Bangkok-based sub-regional Director on a routine basis and to IPEC at the ILO's headquarters in Geneva on technical issues. This final draft document contained a provision for a Senior National Program Officer to work with the Chief Technical Advisor in project planning, monitoring, evaluation and implementation and to liaise with the national authorities. This is the officer whom USDOL indicated in its comments that it wished to have take over the

management of the Project. That officer did so when the complainant's contract was not renewed. However, the document contains no provision for phasing out the Chief Technical Advisor either.

19. In summary, there is no document and nothing in the comments and responses to the earlier drafts of the Project document that shows that there was an understanding that such a practice or policy to phase out the complainant's Chief Technical Advisor post in the final year of the Project could have provided a basis for not renewing his contract for the subsistence of the Project. The Project ended on 31 December 2012. In the premises, the ILO did not proffer a valid reason for not renewing the complainant's contract and, accordingly, the impugned decision must be set aside. This entitles the complainant to material damages equal to 12 months' salary, benefits and other emoluments, without any statutory deductions. He is also entitled to costs in the amount of 800 United States dollars.

20. The Tribunal has no jurisdiction to order any official of the ILO to apologise to the complainant; to order the payment of 10 million dollars to be paid to any organisation; to order that the complainant should be paid emoluments or benefits as a grade P.5 Chief Technical Advisor of the Project; to arrange to admit the complainant to the UNJSPF, or to order that he be paid re-calculated salary and pension retroactively, as the complainant seeks. These claims will accordingly be dismissed.

DECISION

For the above reasons,

1. The impugned decision of 7 January 2013 is set aside.
2. The ILO shall pay the complainant material damages equal to 12 months' salary, benefits and other emoluments, without any statutory deductions.
3. It shall also pay him costs in the amount of 800 United States dollars.

4. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

ANDREW BUTLER