

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**C.-S.**

**v.**

**ILO**

**124th Session**

**Judgment No. 3884**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. C.-S. against the International Labour Organization (ILO) on 26 September 2014 and corrected on 12 November 2014, the ILO's reply of 2 March 2015, the complainant's rejoinder of 9 June, the ILO's surrejoinder of 16 July, the complainant's further submissions of 5 November and the letter of 20 November 2015 by which the ILO informed the Registrar of the Tribunal that it did not wish to file any final comments;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant impugns the decision not to extend her appointment beyond the mandatory retirement age.

At the material time, the complainant held the post of Registrar of the ILO Administrative Tribunal. Article 11.3 of the Staff Regulations of the International Labour Office (hereinafter "the Office"), the ILO's secretariat, relevantly provided:

"An official shall retire at the end of the last day of the month in which he reaches the age of 62. An official appointed before 1 January 1990 shall retire at the end of the last day of the month in which he reaches the age of 60. In special cases the Director-General may retain an official in service until the end of the last day of the month in which the official reaches the age of 65."

As she was due to reach the mandatory retirement age – which, in her case, was 60 – in November 2013, the complainant informally advised the Administration in October 2011 that she was considering not retiring at that date. On 17 January 2013 she sent the Director-General a reasoned request for her appointment to be extended until 30 November 2015 at least. She emphasised that her request was supported by the President of the Tribunal. During a meeting with the Director of the Office of the Director-General on 7 February 2013, she was informed that it was the Director-General’s policy to grant extensions to appointments beyond the mandatory retirement age in exceptional cases only. A vacancy announcement for the post of Registrar was published on 27 February 2013.

On 8 March the official then in charge of the Human Resources Development Department (HRD) sent the President of the Tribunal a letter concerning the appointment procedure for the post of Registrar. He stated that, should the new Registrar be unable to take up his or her duties before December 2013, the Office “might ask [the complainant] to remain beyond retirement age for the period necessary to ensure the transition”. The President replied that he was willing to meet with him to discuss any matters relating to the complainant’s retirement.

On 2 May 2013 the President of the Tribunal wrote a letter to the Director-General informing him that the members of the Tribunal considered it “rather inappropriate” that they had not been notified of the opening of the recruitment procedure. He added that it was not an opportune time to replace the Registrar for several reasons and that “the Tribunal would be grateful if [the complainant]’s request could be granted and the procedure for recruiting a new registrar halted if at all possible”. On 9 May the President and the President-elect of the Tribunal met with the Director-General.

In the event, the recruitment procedure continued and on 3 July 2013 the complainant submitted a grievance to HRD concerning “unfair and degrading treatment”, in which she alleged that she had faced antagonism from the Administration due to the nature of her position. She contended that the decision not to extend her appointment was unlawful, arbitrary and constituted an abuse of authority and that she had suffered “discrimination and humiliation”, and she sought the

cancellation of the decision to advertise her post, the extension of her appointment until February 2016 and damages. Emphasising that she had not been notified of the reasons why her request had been rejected, she asked to be informed of the criteria used to determine whether to extend the appointments of officials reaching the mandatory retirement age. In a minute dated 29 July 2013, she was informed by the Director of HRD of the reasons for the contested decision. To that minute was appended a second minute, dated 8 May 2013, which had been issued by the Director of the Office of the Director-General and which indicated that there were two criteria: requests for extensions would be considered where the non-extension of an official's contract would cause her or him "hardship" or where it would be "clearly contrary" to the Organization's interests. The complainant was told that her request had not been considered to fulfil either of those criteria. The Administration dismissed her grievance as unfounded on 20 September 2013.

The appointment of the new Registrar with effect from 1 December 2013 was announced on 24 September 2013.

On 18 October 2013 the complainant, represented by her counsel, lodged a grievance with the Joint Advisory Appeals Board (JAAB). She requested the setting aside of the decision of 20 September 2013, the cancellation of her successor's appointment, the extension of her appointment until February 2016 at least, her reinstatement as Registrar, the restoration of all her entitlements, compensation for the injury she claimed to have suffered and costs. In its written submissions to the JAAB, the ILO argued inter alia that the complainant had no cause of action to challenge the decision to advertise her post and observed that she had not challenged the new Registrar's appointment in her initial grievance. Therefore, on 30 January 2014 the complainant, who had separated from service on 30 November 2013, submitted a new grievance to HRD directed solely against the decision to appoint her successor. That grievance was dismissed, and on 19 May the complainant lodged a second grievance with the JAAB, seeking principally the cancellation of the new Registrar's appointment.

On 14 May 2014 the JAAB issued its report on the grievance of 18 October 2013. Considering inter alia that the complainant had not proved any abuse of authority or shown that her retirement had placed her in a vulnerable situation which would have justified her retention “for humanitarian reasons”, it unanimously recommended that the grievance be dismissed as unfounded. In a letter of 30 June 2014, which is the impugned decision, the complainant was informed that the Director-General endorsed that recommendation and had decided to dismiss her grievance.

On 11 August the JAAB issued its report on the grievance of 19 May. It found that the complainant’s claims regarding the new Registrar’s appointment had already been the subject of a “final dismissal which [could not] be appealed” except before the Tribunal. For that reason, it held that the grievance was “clearly devoid of merit” and unanimously recommended that it be dismissed in accordance with the summary procedure provided for in paragraph 12 of Annex IV to the Staff Regulations. In a letter of 3 October 2014, the complainant was advised that this grievance had likewise been dismissed.

The complainant asks the Tribunal to set aside the impugned decision, the appointment of the new Registrar and the decision of 3 October 2014; to order her reinstatement in the post of Registrar with all the legal consequences that this entails; to award her moral and material damages; and to award her costs for both the internal appeal proceedings and the proceedings before the Tribunal. In her rejoinder, she further asks the Tribunal to order the ILO to disclose the list of officials whose appointments were extended beyond the mandatory retirement age in 2012 and 2013. She also requests that the Tribunal deal separately with the challenge to the decision not to extend her appointment and the challenge to the new Registrar’s appointment, should it see fit. Lastly, she details the relief that she claims in the event that her reinstatement is not ordered and recalls that the non-payment of salary on due dates warrants the payment of interest for late payment as from the date on which each payment became due.

The ILO contends that the claims raised for the first time before the Tribunal or reassessed in the course of proceedings are irreceivable and that the complaint is, in any event, devoid of merit.

At the Tribunal's request, the complaint was forwarded to the new Registrar for comment. On 20 February 2015 he stated that he had accepted his appointment in good faith.

### CONSIDERATIONS

1. The complainant challenges the denial of her request for an extension of her appointment beyond the mandatory retirement age – in her case 60 – which she had submitted with a view to continuing to serve as Registrar of the Tribunal. That request was based on the provision of Article 11.3 of the Staff Regulations allowing the Director-General to grant such an extension, if he considers it appropriate, “[i]n special cases”.

2. The Tribunal has consistently held that a decision to retain an official beyond the normal retirement age is an exceptional measure over which the executive head of an organisation exercises wide discretion. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 1143, under 3, 2845, under 5, 3285, under 10, or 3765, under 2).

3. Among the numerous pleas entered by the complainant in support of her complaint, there is one which, being based on an error of law, falls within the limited scope of the Tribunal's power of review thus defined and is decisive for the outcome of this dispute.

It is the plea of a breach of the principle of non-retroactivity.

4. The principle of non-retroactivity, which is one of the general principles of international civil service law, forbids an organisation from applying to staff retroactively a rule which is unfavourable to them (see, for example, Judgments 963, under 5, 1979, under 5(h), or 2439, under 12).

Such unlawful retroactive effect occurs *inter alia* when a new rule that has not yet entered into force (see, for example, Judgments 1012, under 7, or 1641, under 8) or a new administrative practice that has not been clearly announced in advance (see, in particular, Judgments 767, under 9, 792, under 8, 1053, under 7, and 1610, under 21) is applied to an official in a manner which goes against her or his interests.

5. In the present case, the denial of the complainant's request of 17 January 2013 for an extension of her appointment did not take the shape of a clear, formal decision – which, it may be added, denotes a somewhat disrespectful attitude towards the complainant on the part of the Office.

However, an implicit decision to that effect had necessarily been taken by 27 February 2013, since a vacancy announcement was published on that date seeking a replacement for the complainant as Registrar of the Tribunal, which obviously implied that the request for an extension had been rejected. Moreover, the letter concerning that matter sent to the President of the Tribunal on 8 March by the official then in charge of HRD confirmed the existence of that decision, as it stated *inter alia* that the post in question “[would] become vacant after [the complainant's] retirement at the end of 2013”.

6. The fact that the decision was purely implicit meant, by definition, that it was not accompanied by a statement of reasons.

Accordingly, in her grievance of 3 July 2013 the complainant objected to the fact that she had not been notified of the reasons why her request for an extension of her appointment had been rejected and asked what criteria were used to decide on such requests. Before taking a decision on that grievance, the Director of HRD sent the complainant a minute dated 29 July 2013 replying to her questions in that respect.

7. The minute sent to the complainant stated in relevant part:

“The extension of contracts beyond retirement age is among the questions of particular interest to the Staff Union that were brought to the Director-General’s attention when he took office.

Your request of 17 January 2013 was hence submitted at a time when the Director-General wished to clarify the Office’s policy and practice concerning the extension of contracts beyond retirement age and, in due course, to publish a policy in that regard.

[...]

Pursuant to [the] provision [of Article 11.3 of the Staff Regulations providing for retention of staff beyond retirement age in special cases], the Director-General has decided to consider favourably requests for extensions of contracts beyond the mandatory retirement age in two exceptional cases only: where not extending an official’s contract would result in hardship (for example, when the extension would allow him or her to meet the eligibility criteria for health insurance cover or to complete the minimum period of service necessary to receive a pension) or where not extending his or her contract would be clearly contrary to the Organization’s interests (in order to avoid leaving a key position vacant, in particular a managerial position, provided that the vacancy is due to unforeseen circumstances and not to a lack of appropriate succession planning). You will find attached the minute of the Director of [the Office of the Director-General] regarding this matter.

As far as you are concerned, it was considered that you were not in either of these exceptional situations. In your case, retirement at the normal age does not cause you hardship of the type specified in paragraph [...] above. Furthermore, your departure did not leave a key position vacant since measures were taken in good time to replace you.”\*

8. To the minute of 29 July 2013 was appended, as indicated therein, a minute from the Director of the Office of the Director-General dated 8 May 2013 entitled “Policy on the extension of employment contracts for officials beyond the age of normal retirement”, which had been sent to various senior ILO officials, who were in turn invited to circulate it more widely. The minute did indeed state that the Director-General had decided, pending a review of Article 11.3 of the Staff Regulations and the promulgation of a new policy in this area, to establish two criteria for examining requests to remain in service

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\* Registry’s translation.

– namely those restated in the aforementioned minute of 29 July – and to grant such requests only if they met one of those requirements.

9. The Tribunal notes that the minute of 20 September 2013 by which the Director of HRD subsequently replied to the complainant's grievance confirmed in two places that the reasons for the decision to deny her an extension were the same as those indicated to the complainant in the minute of 29 July.

10. It is thus clear from the file, and particularly from the wording of the minute of 29 July 2013, that the merits of the complainant's request for an extension of her appointment were weighed solely against the two criteria which were specified in the minute of 8 May 2013 and which the Director-General intended thenceforth to apply in this area, and that it was because her request satisfied neither of those criteria that it was rejected.

It is further observed that the exclusive use of those two criteria in this case rendered redundant the arguments put forward by the complainant in support of her request, including the argument that her retention would facilitate the Tribunal's smooth operation during the period concerned. Irrespective of the assessment which might have been made on this last point, had those two criteria not been established, a consideration of this kind might well have been relevant in support of such a request.

11. Where a provision confers a broad discretion on the executive head of an organisation, as Article 11.3 of the Staff Regulations does in this case, it is perfectly proper for the executive head to decide to establish a rule circumscribing the exercise of her or his own discretionary authority. Indeed, such a measure can only be welcomed since, in principle, it seeks to eradicate the risk of arbitrary decision-making inherent in such authority, and the Tribunal's case law recognises it as completely lawful (see, specifically with reference to an organisation's policy concerning the retention of staff beyond retirement age, Judgments 2125, under 6, and 2513, under 2 and 8).



Moreover, the Tribunal considers that, contrary to what the complainant submits, the rule resulting from the exclusive application of the two criteria defined in the minute of 8 May 2013 is not, in substance, unlawful in the light of the provisions of Article 11.3 of the Staff Regulations.

It is, furthermore, undeniable that the complainant's request did not fulfil either of the criteria in question.

12. However, in accordance with the principle of non-retroactivity, and having regard to the case law cited under 4, above, the new rule could only be applied to decisions taken after its entry into force.

Moreover, even supposing that the minute of 8 May 2013 could be regarded as not actually constituting a legal rule, the change in practice that it entailed in respect of the consideration of requests for extensions of appointments could not, in any event, be implemented before it had been clearly announced to the officials concerned.

13. In this case, the decision to refuse to extend the complainant's appointment, which must have been taken, as stated above, by 27 February 2013, was thus taken before the minute of 8 May 2013 had been circulated.

Although the rule laid down in that minute was introduced in the general interest of ILO officials insofar as it aimed inter alia to shield them against the risk of arbitrary decision-making, this does not alter the fact that it was unfavourable to the complainant, since it prevented her request from being granted. The rule therefore could not lawfully be applied to her retroactively.

Nor can it be accepted that the rule consisting of the exclusive application of the above-mentioned criteria was already being referred to by the Organization's services when dealing with requests for extensions before it was formalised in the minute of 8 May 2013. Indeed, the rule, like the change in administrative practice that it engendered, had not yet been publicised in any way, so that neither was applicable to officials.

14. In an attempt to persuade the Tribunal that nevertheless it did not retroactively apply a new rule in this case, the defendant has appended to its surrejoinder a circular dated 4 April 1990, No. 433,

Series 6, concerning “extensions of contracts beyond the mandatory age of retirement”, which was issued when the mandatory retirement age for officials appointed after 1 January 1990 was raised to 62. The ILO points out that this circular already provided for exceptions to the mandatory retirement age on the basis of the two criteria that were later restated in the minute of 8 May 2013.

However, while it may be accepted that this circular was never officially revoked, it was essentially intended as a provisional measure pending a decision by the Governing Body expected at the time of its publication, and it had clearly become obsolete by the time of the facts giving rise to this dispute. The minute of 8 May 2013, which clearly presents the criteria specified therein as resulting from the Director-General’s decision to introduce a new practice concerning extensions of appointments, and the aforementioned minute sent to the complainant on 29 July 2013, which explains the context in which these criteria were established to address the criticism levelled at the previous practice, suffice in themselves to demonstrate this unambiguously.

Besides, the circular of 4 April 1990 stipulated that staff members recruited before 1 January 1990 would ordinarily have their contracts extended automatically by six months beyond retirement age, if they so requested. That being so, it is difficult to see why, if the circular was considered to be still in force, the complainant’s request was not granted at least for that period, in accordance with the circular, but that was never considered.

15. The Tribunal is hence led to conclude that by basing the decision to refuse to extend the complainant’s appointment on the exclusive application, pursuant to the minute of 8 May 2013, of the criteria specified therein, the Organization breached the principle of non-retroactivity and rendered that decision unlawful.

In fact, the defendant itself highlighted this unlawful retroactivity in its written submissions to the JAAB, stating that the decision in question “[had been] taken pursuant to Article 11.3 of the Staff Regulations, [...] in accordance with the rule for its application laid down by the Director-General himself in the [m]inute of 8 May 2013”, although the decision preceded the publication of the minute by several months.

The Tribunal further observes that there is some similarity between the error of law committed by the Organization in this case and the error identified in the case leading to the above-mentioned Judgments 767 and 792, concerning the Office's policy on agreed termination, where a new administrative practice specified in a circular was applied retroactively to an official in a decision pre-dating the circular.

16. It ensues from the foregoing that the decision of the Director-General of 30 June 2014, to the extent that it confirmed the implicit decision to reject the complainant's request for an extension of her appointment beyond the mandatory age of retirement, as well as the decision rejecting her request, must be set aside, without there being any need to rule on the complainant's other pleas or to order the production of the document which she requests.

17. The complainant seeks reinstatement as Registrar of the Tribunal.

The Tribunal observes that in her request for an extension of her appointment dated 17 January 2013, the complainant had asked to remain in service "until the age of 62, that is until 30 November 2015 at least". Although its wording leaves open the possibility of a further extension, that request can only be construed as covering the two-year period beginning from 1 December 2013 for which it was made firmly and definitely.

That period having expired by the date of this judgment, the Tribunal cannot, in any event, order that the complainant be reinstated as she requests.

18. Nevertheless, the complainant is entitled to compensation for the material and moral injury caused to her by the impugned decision.

19. In respect of material injury, the ILO disputes the receivability of various claims presented by the complainant on the grounds that they were submitted for the first time in the complaint or even in the rejoinder filed with the Tribunal. However, the claims in question simply restate in greater detail those already included in the grievance submitted to the JAAB, in which the complainant requested *inter alia* the "restoration of all her entitlements" and "compensation for all injury

suffered". In fact, they merely reflect what was entailed by the claim to the benefits flowing from an extension of her appointment underlying the initial grievance of 3 July 2013.

20. On the other hand, the defendant is right in stating that the length of the extension of the complainant's appointment to be taken into consideration to determine material injury must be limited to the two-year period beginning from 1 December 2013. Given that the extension of appointment initially requested on 17 January 2013 covered that period alone, as stated above, the complainant's contention that she might have been retained for several more months, so that her departure would coincide with the end of a session of the Tribunal, or for several more years, until she reached 65, cannot be accepted.

21. Although the complainant's request for an extension of her appointment was rejected, as stated above, on a ground tainted with an error of law, it cannot be assumed, in view of the Director-General's broad discretion in applying Article 11.3 of the Staff Regulations, that the request would have been granted had it been lawfully examined. Nevertheless, the complainant was indisputably deprived of a valuable opportunity to have her appointment extended, the loss of which warrants compensation.

22. In view of these various considerations, the Tribunal finds, in the circumstances of the case, that it is appropriate to award her a sum equivalent to one year's remuneration, calculated on the basis of the complainant's final net salary before she left the Office, less the amount of her retirement benefits for the 12 months following her departure and any professional earnings during that same period.

As this lump sum must be seen as compensation for all material injury suffered by the complainant, there is no reason to grant the complainant's claims for a supplement to her retirement benefit and for the payment of interest for late payment.

23. The unlawfulness of the impugned decision has, in itself, caused the complainant moral injury, for which compensation must also be paid. The injury was, in this case, exacerbated by the disrespectful manner in which the complainant was treated at times by the Office during the relevant period, as shown by the evidence on file. Apart from the fact, recalled above, that a reasoned decision was not initially issued in response to the complainant's request for an extension of her appointment, it is surprising, for example, that, as she asserts without being contradicted by the defendant, her request for a certificate of service submitted on 31 January 2014 went unheeded, even though under Article 11.17 of the Staff Regulations all staff leaving the Office's service are entitled to such a document.

Having regard to all these circumstances, the Tribunal considers that the moral injury suffered by the complainant may be fairly redressed by the payment of compensation in the amount of 20,000 Swiss francs.

24. The complainant requests the cancellation of her successor's appointment to the post of Registrar of the Tribunal.

The ILO disputes the receivability of that claim on the ground that the complainant has no cause of action to challenge the decision in question. However, in the particular circumstances of the case, that question need not be determined.

Indeed, since there is no reason to reinstate the complainant in her post, as stated above, her challenge to her successor's appointment, which would obviously make sense only if her reinstatement were possible, has become irrelevant.

The claims directed against the decision of 30 June 2014 to the extent that it confirmed that appointment, against the decision of 3 October 2014 and against the appointment itself have hence become moot.

25. As the complainant succeeds for the most part, she is entitled to costs in respect of the proceedings before the Tribunal as well as the internal appeal proceedings, which the Tribunal sets at a total of 7,000 Swiss francs.

DECISION

For the above reasons,

1. The Director-General's decision of 30 June 2014, to the extent that it confirmed the implicit decision to deny the complainant's request for an extension of her appointment beyond the mandatory retirement age, as well as the decision denying her request, are set aside.
2. The ILO shall pay the complainant financial compensation for the material injury resulting from the refusal to extend her appointment as indicated under 22, above.
3. The ILO shall pay the complainant moral damages in the amount of 20,000 Swiss francs.
4. It shall also pay her 7,000 Swiss francs in costs.
5. All other claims, to the extent that they have not become moot, are dismissed.

In witness of this judgment, adopted on 28 April 2017, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 28 June 2017.

*(Signed)*

CLAUDE ROUILLER      PATRICK FRYDMAN      FATOUMATA DIAKITÉ

ANDREW BUTLER