Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B. (No. 2)

v.

OIE

136th Session **Judgment No. 4675**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. M. B. against the International Office of Epizootics (OIE) – also known as the World Organisation for Animal Health (WOAH) – on 18 October 2019, WOAH's reply of 21 November 2019, the complainant's rejoinder of 11 January 2020 and WOAH's surrejoinder of 20 April 2020;

Considering Articles II, paragraph 5, 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 seeks the reclassification of her employment relationship and the consequential regularisation of her pension entitlements.

Between 1993 and 2001, the complainant was employed by WOAH for short periods on an occasional basis. Later, during the period from 2 January 2002 to 31 January 2013, the complainant was appointed by WOAH under various temporary contracts – which did not confer any pension entitlements under Article 2 of the Internal Rules of the Organisation's Autonomous Old-Age Pension Fund – or sometimes without any written contract, as a conference assistant or administrative assistant. Over that period of 11 years and one month, the complainant's

periods of work added up to five years and four months, interspersed by numerous gaps of between two and eight months.

On 28 January 2013, the complainant was offered a fixed-term appointment for three years, which was renewed for a further three years from 1 February 2016 to 31 January 2019, as a conference coordinator. On 1 February 2019, the complainant retired.

On 4 February 2019, the complainant submitted a request for re-examination to WOAH pursuant to Article 10.1 of the Staff Regulations, in which she asked for all her contracts of employment from 2002 to 2013 to be reclassified as a "long-term 12-year contract" and for her pension entitlements to be regularised. The complainant also asked to be provided with written contracts for the periods between 2002 and 2013 when she had worked without one and claimed compensation of 30,000 euros for the moral injury she alleged she had suffered. On 9 August 2019, WOAH responded to the complainant, stating that her request was irreceivable and unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order WOAH to draw up written contracts of employment for the periods between 2002 and 2013 when she had worked without one. She requests that all her contracts of employment from 2002 to 2013 be reclassified as a "long-term 12-year contract" and that her pension entitlements be regularised accordingly, and she claims 30,000 euros in compensation for the moral injury she alleges she has suffered. She also asks the Tribunal to order the payment of interest on those sums at the rate of 5 per cent, interest to be capitalised. Lastly, she seeks 6,000 euros in costs.

WOAH submits that the complaint is time-barred and unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 9 August 2019 by which the Director General of WOAH rejected the request for re-examination which she had submitted on the basis of Article 10.1 of the Staff Regulations and by which she essentially sought the reclassification

as a "long-term 12-year contract" of the employment relationship she had had between 2 January 2002 and 31 January 2013 under various temporary contracts.

As can be seen from the facts set out above, at the end of that period the complainant was given a fixed-term appointment – which was subsequently renewed – before she retired on 1 February 2019.

It is clear from the evidence on file that the only practical issue at stake in relation to the requested reclassification is whether the aforementioned period when the complainant was employed under temporary contracts should be taken into account when calculating her pension entitlements, given that, pursuant to Article 2 of the Internal Rules of the Organisation's Autonomous Old-Age Pension Fund, only service under fixed-term appointments or indeterminate appointments qualifies for contributions to be paid into the fund and the corresponding benefits to be paid out.

2. In support of her claim for the disputed employment relationship to be reclassified, the complainant relies on the case law established by Judgment 3090 – delivered by an enlarged panel of judges of the Tribunal – and confirmed by Judgment 3225, which recognised that staff members of another international organisation who had carried out their duties over a period of several years under short-term contracts which were systematically renewed without any notable breaks were, in the particular circumstances of those cases, entitled to a reclassification.

In those two judgments, the Tribunal found that this long succession of short-term contracts had given rise to a legal relationship between the complainants concerned and the organisation which employed them equivalent to that on which permanent staff members of an organisation may rely and that, in considering that the complainants should be regarded as short-term employees, the organisation had therefore failed to recognise the real nature of the legal relationship concerned. The Tribunal found that, in so doing, the organisation in question had committed an error of law and misused the rules governing short-term contracts.

However, the argument that reclassification should take place in the present case on the basis of this case law must fail.

3. In that regard, the Tribunal notes first of all that the claim for the disputed employment relationship to be reclassified as a "long-term 12-year contract", to cite the wording used by the complainant, is not strictly consistent with the legal framework defining the various categories of WOAH's contracts of appointment, as listed in Articles 40.5 to 40.7 of the Staff Rules, and that, in any event, the period from 2 January 2002 to 31 January 2013, to which, as already explained, the request for reclassification relates, only amounts to 11 years and one month rather than 12 years, the complainant herself admitting in her rejoinder that she had made a mathematical error in this regard.

4. However, the Tribunal notes also and especially that the factual circumstances in the present case are fundamentally different from those in the cases that gave rise to the aforementioned judgments, meaning that the complainant is not eligible for the right to reclassification recognised by the case law that emerged therefrom.

It should be stressed that although, in those judgments, the Tribunal found that the successive short-term contracts given to the complainants in question actually constituted a continuous employment relationship which warranted a reclassification to that effect, the Tribunal had already found – and expressly pointed out – that those contracts had been renewed without any notable breaks (see Judgments 3225, consideration 8, and 3090, consideration 7). It was clear from the evidence adduced in the cases in question that the complainants' short-term contracts had followed one another seamlessly, subject only to very brief interruptions, which showed that breaking down the employment relationship into multiple temporary appointments, as the organisation had done, was artificial.

In the present case, the requirement to have no notable breaks, as established by this case law, is not met. It is apparent from a table summarising the complainant's employment contracts, that she herself supplied in her complaint, that the employment relationship between

her and WOAH between 2 January 2002 and 31 January 2013 was subject to many long breaks, loosely corresponding to the second half of every year, and lasting up to eight months. Accordingly, over the period in question, the duration of all of the complainant's temporary contracts when added together was only five years and four months (and not six months, as the complainant erroneously stated in her submissions), in other words, not even half of the overall duration of 11 years and one month that the period represented.

5. In addition, it is plain from the file that the notable breaks which interrupted the employment relationship in this way were due to the inherently seasonal nature of the work performed by the complainant. The tasks entrusted to the complainant, as conference assistant or administrative assistant, revolved around helping to organise the General Sessions of WOAH's International Committee – from 2011 known as the World Assembly of Delegates – which ordinarily take place in May every year. It is therefore perfectly understandable that the complainant was appointed only for the periods – which coincided more or less with the first half of the year – when these sessions were prepared for and held, bearing in mind that the decision to entrust the tasks in question to a person employed on such a basis fell within the discretion conferred on an organisation's executive head to determine how her or his services function.

As a result, the fact that the complainant worked under temporary contracts on a repeated basis, in the circumstances, met a need of the Organisation intrinsic to the kind of work she carried out, meaning that, unlike the situation in the cases leading to the aforementioned Judgments 3090 and 3225, the use of this succession of contracts cannot be regarded as misuse. Furthermore, the Tribunal notes that, given that the tasks entrusted to the complainant at the material time spanned only part of the year, it would have been legally impossible to appoint her under a fixed-term contract, since Article 40.6 of the Staff Rules defines that type of appointment as one "for a continuous period of not less than one year".

The latter considerations are also sufficient to reject the plea, which the complainant appears to invoke, that the principle of discrimination was breached, since there were objective reasons for the complainant not being treated in the same way as members of staff employed under fixed-term contracts.

6. The complainant submits that she did not freely consent to a fragmented employment relationship such as the one that arose from the temporary contracts given to her. She claims in that regard that WOAH, in breach of the principle of good faith, exploited the fact that she was, at the time, suffering from a serious illness in order to force her to accept appointments under that type of contract. Taking this argument to the extreme, she even alleges that the Organisation took advantage of the fragile state of health brought about by her illness to "impose on her immoral and despicable [working] conditions", forcing her to do undeclared work and thereby fraudulently avoiding the need to make the social security contributions associated with her remuneration.

However, the Tribunal has consistently stated that bad faith cannot be presumed and must be proven by the evidence (see, for example, Judgments 4333, consideration 15, 4161, consideration 9, 3902, consideration 11, or 2800, consideration 21). Moreover, this case law must be applied particularly rigorously where the allegation of bad faith is accompanied by an accusation of fraud (see, for example, Judgment 3407, consideration 15).

In the present case, while the complainant has produced medical documents dating from 2001 and 2002, from which it is clear that, at the material time, she was indeed suffering from the illness she mentions, there is no evidence on the file to substantiate the accusation that WOAH exploited that situation to force her to accept the terms of employment offered to her and, furthermore, nothing to establish that the Organisation was even aware that she suffered from the condition in question. The allegations made by the complainant in this regard must therefore be rejected.

7. Quite apart from the absence of any link between the conduct imputed to WOAH and the complainant's illness, the Tribunal considers that it is worth examining whether the fraud of which the complainant accuses the Organisation in connection with the alleged use of undeclared work is established, even though this question does not, in fact, have any bearing on the right to have the disputed employment relationship reclassified.

However, neither of the two central arguments put forward by the complainant in support of her allegations of fraud has any real probative value.

8. In the first place, the complainant submits in this regard that, at certain times, she had to work without a written contract of appointment.

Contrary to what WOAH asserts in its submissions, the Tribunal considers that employing the complainant under mere oral contracts was objectively unlawful. While, as WOAH points out, the case law does acknowledge that the appointment of an official by an organisation can be recognised even in the absence of a written contract, it cannot be inferred therefrom that the employment relationship thus created is necessarily lawful. In any event, with regard to WOAH's internal governing texts, it is clear from the provisions of Article 4.1 of the Staff Regulations and Article 40.3 of the Staff Rules that a contract of appointment can only be made in writing.

However, even if this failure to provide written contracts was a regrettable anomaly, there is nothing to suggest, in the present case, that it was the result of intentional fraud as is alleged. The appointment of the complainant under oral contracts was not, in itself, incompatible with the normal payment of social security contributions associated with the complainant's remuneration. In addition, it is apparent from the submissions that, although the complainant was employed under this type of contract on five occasions over the aforementioned period of over 11 years, the appointments in question generally lasted no more than a month, with the total term of those five contracts adding up to only nine months, in other words, a tiny fraction of the total length of that period. These circumstances clearly suggest that the failure to draw

up written contracts was simply the result of carelessness rather than of any fraudulent intention.

9. In the second place, in support of her argument, the complainant puts forward the fact that part of her remuneration was paid in cash.

However, although that assertion is indeed corroborated by summaries of the complainant's working hours annexed to the complaint that include receipts for the sums paid by this method, the Tribunal notes that such a practice is not, in itself, unlawful. Furthermore, there is, once again, nothing to suggest that the process complained of stems from any intention to fraudulently conceal the complainant's appointment. The very fact that receipts were issued officially showing the payments made in cash to the complainant would tend to suggest, on the contrary, that there was no question of undisclosed payments.

10. The various considerations set out above lead the Tribunal to reject not only the complainant's claim in relation to the impugned decision of 9 August 2019, to the extent that it rejected her request for the employment relationship to be reclassified, but also, as a consequence, her claim for the corresponding period to be taken into account when calculating her pension entitlements. They also necessitate the rejection of her claim for moral damages which, according to the complainant, arises from "the way in which the [O]rganisation manipulated her while she was battling an illness" and from the allegedly fraudulent conditions under which she had been employed.

11. The complainant also challenges the impugned decision to the extent that it entailed the rejection of her request for written employment contracts for the periods when she had worked under oral contracts. She asks the Tribunal to order WOAH to draw up these documents.

However, the Tribunal notes that although, as already stated, the Organisation should properly have drawn up the relevant contracts in writing at the time they were entered into, there would in fact be no tangible benefit to the complainant in those documents being provided

a posteriori. Since there is no dispute between the parties as to the existence of the contracts or the content of the mutual obligations contained therein, the creation of a written version, which would not have had any bearing on the outcome of the request for the disputed employment relationship to be reclassified, would not alter the complainant's legal situation in any way. The refusal to agree to the request to provide such documents is, therefore, of no relevance in this regard. It is well settled by the Tribunal's case law that a decision that does not alter the legal situation of an official is not a decision that adversely affects her or him and it cannot, therefore, be challenged before the Tribunal (see, for example, Judgments 4038, consideration 3, 3428, consideration 13, 2364, consideration 4, or 764, consideration 4). The claims for the impugned decision to be set aside in this regard are therefore irreceivable.

As a consequence, the Tribunal cannot, in any event, order written contracts to be provided, even assuming that it had jurisdiction to make such an order against the Organisation.

12. In the light of the above, the complaint must be dismissed in its entirety.

13. As the complainant's claims have been rejected as unfounded or, with regard to the lack of written contracts, as irreceivable for the reasons set out above, it is not necessary to rule, in this Judgment, on the objection to receivability raised by the Organisation on the basis that the challenge to the temporary contracts which were the subject of the request for the disputed employment relationship to be reclassified was brought out of time.

On this issue, however, the Tribunal must express its astonishment at finding that, according to the evidence on the file, the normative provisions in force at WOAH do not prescribe any time limit within which the procedure for requesting a re-examination under Article 10.1 of the Staff Regulations must be initiated. As a result, a decision taken in relation to a member of staff may, at least in theory, be challenged at any time (see, for an analogous situation, Judgment 2781, considerations 8,

10 and 11). The effect of this state of affairs, which is unusual to say the least, is to seriously undermine the principle of the stability of administrative decisions and legal situations by which, as was recalled, for example, in Judgment 2487, consideration 4, relations between the international organisations and their staff are governed. To ensure compliance with this principle, and with the more general principle of legal certainty of which the former is one aspect, the Tribunal considers itself bound to suggest that the Organisation should remedy this anomaly by establishing, through the appropriate channels, a time limit for submitting a request for re-examination in the context of the procedure in question.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 May 2023, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ