

The Administrative Tribunal,

Considering the complaint filed by Mr O. B. against the International Labour Organization (ILO) on 15 November 2006 and corrected on 5 February 2007, the Organization's reply of 20 April, the complainant's rejoinder of 15 June and the ILO's surrejoinder of 7 August 2007;

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, who has dual French and Spanish nationality, was born in 1965. He is an information systems specialist. He was initially engaged by the International Labour Office, the Organization's secretariat, from 1 March to 21 December 2001 under an external collaboration contract. He had been recruited in the context of the project to set up the Integrated Resources Information System (IRIS). He was subsequently offered a special short-term contract from 2 January to 21 June 2002, and then a fixed-term contract from 24 June 2002 to 31 December 2003. The latter contract, which was financed from technical cooperation funds, was extended first until 31 January 2004 and for a second time until 30 June 2004. During the periods 1 July to 22 December 2004 and 3 January to 31 March 2005 the complainant was employed as an external collaborator. The contractual relationship between the complainant and the Office ended on 31 March 2005.

On 23 June 2005 the complainant filed a grievance with the Human Resources Development Department under Article 13.2 of the Staff Regulations. He contended that since he had performed identical regular duties throughout his contractual relationship with the Office he ought to have been regarded as an official on a fixed-term contract. By a letter of 4 November 2005 the Director of the above-mentioned department rejected the grievance as being unfounded. She described her reply as "informal", for she considered that the internal appeal procedure was not applicable to the complainant, since at the time of his separation from the Office he could not be regarded as an official thereof.

On 2 December 2005 the complainant referred the matter to the Joint Advisory Appeals Board and requested, *inter alia*, that his employment relationship with the Office be redefined. In its report of 15 June 2006, the Board recommended that the Director-General should redefine the contractual relationship, replace the external collaboration contracts with an equal number of short-term contracts and pay the complainant appropriate financial compensation for the moral and material injury suffered. By a letter of 15 August 2006, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to endorse some of the Board's findings. She indicated that the Office was prepared to regard the external collaboration contracts beginning on 1 July 2004 and 3 January 2005 as short-term contracts. Since the complainant had been entitled, as an external collaborator, to remuneration higher than that which he would have received if he had been on a short-term contract, he was offered the option of retaining the sum of 33,566 United States dollars which resulted from this difference in remuneration, provided that he accepted it as compensation for any moral injury caused by the inappropriate use of external collaboration contracts and "in final settlement of [his] appeal as a whole".

B. The complainant submits that his complaint is receivable. He takes issue with the position of the Director of the Human Resources Development Department who, in her reply of 4 November 2005, considered that his status on separation barred him from availing himself of the internal appeal procedure. In this connection he contends that, according to the Tribunal's case law, even if the Staff Regulations apply only to officials, some provisions are nonetheless merely the translation of general principles of international civil service law, which include the right to the safeguard of an appeals procedure. The complainant emphasises that the Joint Advisory Appeals Board deemed his grievance to be receivable even though it is supposed to examine only grievances filed by the Office's officials or former officials.

On the merits, the complainant asserts that he ought to have been regarded as an official on a fixed-term contract throughout his contractual relationship with the Office because, according to the terms of Circulars Nos. 11 (Rev.4) and 630, series 6\*, when he was working as an external collaborator he should have carried out work that was not an ongoing activity. This was not, however, the case because by replacing other officials he had performed “regular” duties. He points out that under paragraph 12 of Circular No. 630, an external collaboration contract “may be used only where there is a specific well-defined task to be performed and the output can be considered as a specific end-product”, and he asserts that he was never engaged to turn out such an “end-product”. He therefore believes that the repeated breach of the provisions of these circulars justifies the redefinition of his contractual relationship. He criticises the Joint Advisory Appeals Board and, by extension, the Director-General insofar as he endorsed some of the Board’s findings, for disregarding his first period of external collaboration and also the spirit of Circular No. 630, which forbids the use of short-term contracts for all but temporary duties.

The complainant comments that the non-renewal of his contract, which he believes is the consequence of his having approached the Staff Union with a view to obtaining the regularisation of his situation, took place without prior notice and without reasons being given.

The complainant requests the redefinition of his entire employment relationship with the Office and the setting aside of the decision not to renew his contract. He also seeks reinstatement or an indemnity based on the sum he would have earned had his contract been lawfully renewed, as well as 200,000 United States dollars in compensation for the moral and material injury suffered.

C. In its reply the ILO submits that the complaint is irreceivable. The complainant’s representative was informed of the impugned decision of 15 August 2006 that same day, but the complaint was not filed until 15 November 2006, in other words more than ninety days after notification of the decision. The complaint is therefore time-barred because the complainant did not comply with the time limit laid down in Article VII, paragraph 2, of the Statute of the Tribunal.

In the event that the Tribunal considers that the complaint is not time-barred, the Organization points out that in requesting the redefinition of his “entire” contractual relationship, the complainant appears to refer in particular to the first external collaboration contract covering the period from 1 March to 21 December 2001. The ILO submits that the complainant’s claims regarding this contract are irreceivable for failure to exhaust internal means of redress and failure to comply with the time limit for filing a complaint with the Tribunal. The complainant filed his grievance on 23 June 2005, in other words long after the six-month time limit laid down in Article 13.2, paragraph 1, of the Staff Regulations. The Organization asserts that all issues not relating to the last two external collaboration contracts are therefore time-barred and adds that if an internal appeal is time-barred and the internal appeal body was wrong to hear it, the Tribunal, according to its case law, will not entertain it.

On the merits, the Organization submits that although the impugned decision refers to the partial acceptance of the Joint Advisory Appeals Board’s recommendations, in reality the Director-General accepted “all of their operational part” by endorsing the recommendation that the external collaboration contracts covering the periods 1 July to 22 December 2004 and 3 January to 31 March 2005 should be redefined as short-term contracts. With regard to the payment of compensation for the injury suffered, the Organization points out that the Board made no finding of moral or material injury; it confined itself to recommending “appropriate” compensation, which it did not calculate. Any such calculation would in any case have shown that the complainant had not suffered material injury but that, on the contrary, the status of external collaborator had been to his financial advantage, in that the difference in salary worked out in his favour in the amount of 33,566 dollars. Similarly, the Organization considers that it displayed generosity towards the complainant by allowing him, by way of compensation for any moral injury he might have suffered, not to reimburse the overpayment he had received as a result of that difference in salary. The Organization therefore considers that it followed the Board’s recommendation “in full”. However, it submits that the complainant’s claims before the Tribunal exceed the Board’s recommendations. The Organization notes that the complainant would have preferred to have had his contracts redefined as fixed-term contracts, but states that this claim cannot be granted because, in order to receive this type of contract, it is necessary first to go through a competition and then to be appointed to a vacant post, the existence of which normally depends on budgetary decisions.

The ILO contends that it acted transparently and in accordance with the principles recognised by the case law as far as the non-renewal of the last contract is concerned. It states that from the outset the complainant was well aware

that he had been recruited for a limited period and that his employment could not be extended after the new IRIS data-processing system had been put into operation. Once this system was functioning, in other words, after several delays, in March 2005, the complainant's services were no longer required. It explains that the complainant's fixed-term contract was financed from technical cooperation funds and therefore offered no career prospects.

D. In his rejoinder the complainant asserts that he was notified of the impugned decision by the Chairperson of the Staff Union Committee, who sent him a letter dated 17 August 2006 in which he informed him that he had ninety days, as from notification of the decision in question, to file a complaint with the Tribunal. The complainant therefore thought that the date of notification was the date on which he had received the letter or, in the worst-case scenario, 17 August. The complainant submits with respect to the alleged time bar that since he was *de facto* an official, and since the whole period of employment should be taken into account, he filed a grievance with the Human Resources Development Department "within six months of the treatment complained of", in accordance with Article 13.2 of the Staff Regulations.

Although the complainant expresses "deep gratitude" to the Joint Advisory Appeals Board, he considers that its recommendation was "not perfect", for he had requested the redefinition of his entire employment relationship. He states that there was no reason to "split up" this contractual relationship, and that it would have been preferable to give him as many fixed-term contracts as necessary, because conversion into short-term contracts is contrary to Circular No. 630, which stipulates that this type of contract may be issued for no more than 12 months for the replacement of regular staff members or for temporary duties.

The complainant withdraws his request for retroactive reinstatement, but he denies that his duties were temporary, since he has been replaced by another official.

E. In its surrejoinder the ILO considers that the complainant has admitted that he did not observe the time limit laid down in Article VII, paragraph 2, of the Statute of the Tribunal. He has explained that the letter from the Chairperson of the Staff Union Committee appeared to constitute the start of the period in question, but it was not the fault of the Organization if the Staff Union failed to draw his attention to the real time limit for filing a complaint. The Organization points out that this time limit is mandatory and must be strictly observed by the parties and the Tribunal.

The ILO notes that the complainant acknowledges that he did not raise the issue of the contracts signed prior to 1 July 2004 before the internal appeal bodies – or, if appropriate, the Tribunal – within the applicable time limits.

It emphasises that the complainant has not produced the slightest evidence that the person recruited after him – who is in fact an external collaborator – is performing his former duties.

Referring to paragraph 3 of Circular No. 630, the ILO submits that for certain categories of staff, such as information technology consultants, a short-term contract may be issued for a period of over 12 months. Even supposing that the short-term contracts given to the complainant on the basis of the Joint Advisory Appeals Board's recommendations did not comply with the provisions of the above-mentioned circular, this would not constitute sufficient grounds for converting the employment relationship into a fixed-term contract financed from the regular budget. The purpose of the circular in question is to clarify the Office's policy on contracts and not to establish criteria for determining the validity of these contracts.

## CONSIDERATIONS

1. The complainant entered into an external collaboration contract with the International Labour Office covering the period 1 March to 21 December 2001. He is an information systems specialist and he replaced first an information technology consultant, then an official in charge of the Human Resources Information Systems Unit who had been seconded to the IRIS project. The complainant held a special short-term contract from 2 January to 21 June 2002. For the period 24 June 2002 to 31 December 2003 he was given a fixed-term contract financed from technical cooperation funds so that he could continue to replace the official in charge of the above-mentioned unit and also run the Personnel Information and Payroll System (PERSIS). This fixed-term contract was extended until 30 June 2004 but was not renewed. The complainant was subsequently given two external collaboration contracts, one for the period 1 July to 22 December 2004, the other for the period 3 January to 31 March 2005, after which the contractual relationship between the complainant and the Office ended.

2. On 23 June 2005 the complainant filed a grievance under Article 13.2 of the Staff Regulations. In her reply of 4 November, the Director of the Human Resources Development Department rejected the grievance as unfounded.

On 2 December 2005 the complainant referred the matter to the Joint Advisory Appeals Board. In its report of 15 June 2006 the Board considered that the complainant's grievance was receivable and well founded. It recommended that the Director-General should redefine the contractual relationship between the Office and the complainant, replace his external collaboration contracts with the same number of short-term contracts and pay the complainant appropriate financial compensation for the moral and material injury suffered.

On 15 August 2006 the Administration informed the complainant that the Director-General had decided, in substance, "[to] accept some and reject other findings and recommendations of the [Joint Advisory Appeals Board]" and that the Office was prepared to regard his last two external collaboration contracts as short-term contracts. The complainant was also offered the option of not reimbursing the overpayment he had received as a result of being recruited on the basis of two external collaboration contracts instead of short-term contracts, provided that he considered this sum to be compensation for any moral injury arising from the inappropriate use of external collaboration contracts and "in final settlement of [his] appeal as a whole".

3. On 15 November 2006 the complainant filed a complaint with the Tribunal in which he requested the redefinition of his entire employment relationship with the Office, the setting aside of the decision not to renew his contract, his reinstatement or payment of an indemnity based on the sum he would have received had his contract been lawfully renewed and 200,000 United States dollars in compensation for the moral and material injury suffered.

In the course of the proceedings the complainant withdrew his claim for retroactive reinstatement.

In support of his complaint he submits that he was continuously employed by the Office from 1 March 2001 until 31 March 2005 under various contracts, and that his employment relationship was ended without prior notice or any reasons being given, even though he had contacted the Staff Union with a view to obtaining the regularisation of his situation.

He contends that the manner in which he was treated is incompatible with the ILO rules, since he should have been regarded as an official on a fixed-term contract throughout his contractual relationship with the Office. He states that he performed "regular" duties and that he "was never employed to supply an end-product appropriate to the functions of an external collaborator" as defined in Circulars Nos. 11 (Rev.4) and 630. In view of the fact that his duties were always identical, there was no reason to offer him anything other than a fixed-term contract. The fact that he was replacing other officials assigned to another department and that his contractual status changed on their return is irrelevant. The ongoing nature of the duties performed is the sole criterion for determining whether his contracts were lawful.

He considers that the external collaboration contracts were plainly designed to deprive him of certain rights and safeguards while enabling the Organization to avail itself of services identical to those provided by a regular staff member.

### *Receivability*

4. The Organization first submits that the complaint is irreceivable. It asserts that the complainant's representative was notified of the impugned decision of 15 August 2006 that same day, and that the complaint filed with the Registry of the Tribunal on 15 November 2006 was therefore lodged outside the ninety-day period laid down in Article VII, paragraph 2, of the Statute of the Tribunal, which in its opinion expired on 13 November 2006.

5. The Tribunal draws attention to the fact that under Article VII, paragraph 2, of its Statute, to be receivable, a complaint "must [...] have been filed within ninety days after the complainant was notified of the decision impugned".

The complainant states that the Chairperson of the Staff Union Committee posted the decision of 15 August 2006 to him, together with a covering letter dated 17 August 2006 informing him that he had ninety days as from

notification of the decision to file a complaint with the Tribunal, if he so wished.

The forwarding of the decision to the complainant's representative could not be deemed notification within the meaning of Article VII, paragraph 2, of the Statute of the Tribunal. For this reason the Organization's objection to receivability is unfounded.

6. With regard to the complainant's request that his entire employment relationship with the Office be redefined, the Organization observes that it was not until 23 June 2005 that the complainant filed a grievance with the Human Resources Development Department in order to raise the issues which are now before the Tribunal, in other words well after the expiry of the six-month period allowed to this end under Article 13.2, paragraph 1, of the Staff Regulations. In its opinion, all issues other than those relating to the last two external collaboration contracts are therefore time-barred.

With respect to the first external collaboration contract in particular, the Organization submits that the complainant ought to have lodged a complaint with the Tribunal or filed a grievance at the end of that contract, i.e. on 21 December 2001.

7. The complainant replies that since he was *de facto* an official of the Office, the whole period of employment should be taken into account. He had no choice but to await the end of his employment before resorting to the administrative procedure for conflict resolution, because if he had initiated this procedure as soon as he received his first external collaboration contract, that contract would not have been renewed and it would have been difficult for him to prove that he was performing regular duties from this first contract onwards.

8. The Tribunal considers that, although it is understandable that the complainant could not challenge the lawfulness of his first external collaboration contract for the reasons he has explained, the same does not apply to the contracts that followed, which he should have challenged by lodging a grievance within the prescribed time limits, i.e. at the latest after the non-renewal of his fixed-term contract which ended, after it had been extended, on 30 June 2004, because that grievance would otherwise be time-barred. However, the complainant waited until 23 June 2005 – in other words until after his contractual relationship with the Office had ended on 31 March 2005 – before filing a grievance.

In view of the applicable time limits, this grievance could only concern the last two external collaboration contracts and it was therefore irreceivable in respect of the previous contracts. The complaint is therefore likewise irreceivable in respect of these contracts on the grounds that internal means of redress have not been exhausted in accordance with Article VII, paragraph 1, of the Statute of the Tribunal.

#### *The merits*

9. In the light of the above, the request for redefinition will apply only to the last two external collaboration contracts.

In this regard the Organization accepted the Joint Advisory Appeals Board's recommendation that the contractual relationship should be redefined and the two last external collaboration contracts replaced by short-term contracts. But the complainant disagrees with this redefinition since he considers that the Board did not exactly abide by the spirit of Circular No. 630, and that the Director-General committed an error of law by partially accepting the Board's recommendation and by drawing the conclusions which are set out in the decision of 15 August 2006.

10. Circular No. 630 states:

“8. A short-term appointment (ST or SST) is envisaged in the following situations:

- for (a) specific assignment(s) of short duration;
- where a regular staff member needs to be replaced for temporary reasons (e.g. a replacement consequential on maternity leave, leave without pay, or other type of extended leave);
- pending the filling of a vacant job;
- pending the creation of a job.

9. The duration of a Short-Term (ST) contract may extend for the full period of the anticipated need, from a minimum of one day to a maximum of 364 days. Alternatively, a series of ST contracts may be issued successively [...] up to a maximum of 364 days.

10. A Special Short-Term (SST) contract may be issued for a minimum of 30 days up to a maximum of 171 days (or 5 months and 3 weeks) within any 12 consecutive months. A series of SST contracts may be issued successively, up to a maximum of 171 days.”

It emerges from an analysis of this text that short-term contracts should be offered in only specific cases and for a limited duration.

Having already obtained a fixed-term contract which had been extended, the complainant could not be recruited under a short-term contract, let alone under an external collaboration contract, to continue performing the same work as he had performed under his fixed-term contract, without contravening the spirit of the applicable texts.

The complainant’s last two contracts should therefore be converted into a fixed-term contract.

11. The complainant asks the Tribunal to set aside the decision not to renew his contract. He submits that this decision should have been taken for proper reasons and that, if it was sound, the Organization was obliged to prove that efforts had been made to find him another job.

12. It is well established that a decision not to renew an appointment, though discretionary, must be taken for proper reasons that are notified to the staff member (see Judgment 1273, under 8).

In the instant case, the evidence on file shows that the complainant had been kept on in order to run the PERSIS system (which was to be replaced by the IRIS system), that he was given his last contract because of the delay in putting the IRIS system into operation and that, once the IRIS system was in place in March 2005, the PERSIS system was discarded, as a result of which the tasks performed by the complainant were eliminated.

The Tribunal infers from the foregoing that there was indeed a proper reason for not renewing the complainant’s contract. It considers that, in view of the specific nature of his duties and his specialisation in the field of information technology, it was difficult for the Organization to find him another job.

The claim for compensation for the loss of the remuneration he would have received had his contract been lawfully renewed therefore appears to be unjustified.

13. The complainant asks the Tribunal to order the Organization to pay him 200,000 dollars in compensation for the moral and material injury suffered.

The Tribunal finds that the complainant has not suffered any material injury. Nevertheless, the irregularity established in consideration 10 warrants an award of compensation for moral injury which should be set *ex aequo et bono* at 2,000 dollars.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The ILO shall pay the complainant 2,000 United States dollars in compensation for the moral injury suffered.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

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\* These circulars are entitled respectively “External collaboration contracts” and “Inappropriate use of employment contracts in the Office”.

Updated by SD. Approved by CC. Last update: 27 February 2008.