

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

**105th Session**

**Judgment No. 2724**

The Administrative Tribunal,

Considering the complaint filed by Mr P. S. against the International Labour Organization (ILO) on 2 October 2006 and corrected on 9 October 2006, the Organization's reply of 12 January 2007, the complainant's rejoinder of 12 February and the ILO's surrejoinder of 15 May 2007;

Considering the Interlocutory Order in Judgment 2700, delivered on 6 February 2008, whereby the Tribunal requested further submissions;

Considering the ILO's comments of 20 February 2008, the complainant's observations of 20 March and the Organization's final note of 28 April 2008;

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;

A. Reference should be made to Judgment 2700, which sets out the facts of the case and the parties' arguments concerning the dispute. The Tribunal, considering that the complainant was entitled to see the Reports Board's recommendation concerning him, ordered the ILO to produce it within 15 days of notification of the said judgment. It further ordered the ILO to pay the complainant 3,000 United States dollars in compensation for the injury suffered and 3,000 dollars in costs.

B. In its comments accompanying the production of the Reports Board's recommendation, the Organization informs the Tribunal that it took steps to ensure that the sums due to the complainant in execution of Judgment 2700 were paid to him as soon as possible.

The ILO indicates that it was "somewhat surprised" at the Tribunal's order for the filing of further submissions, since the complainant had not requested a copy of the recommendation in question during the internal appeal proceedings or in his complaint to the Tribunal; he did so only in his rejoinder, "the sole purpose of which is to comment on the organisation's reply". Moreover, the ILO points out that the substantive content of the Reports Board's comments had been reproduced in the letter of 29 April 2005 from the Director of the Human Resources Development Department.

The defendant states that it reiterates its arguments. It maintains that it correctly followed the procedure for assessing the complainant's work, particularly by giving him the opportunity to improve his performance. In the light of the findings of the Reports Board, which followed the proper procedure, it concluded that the complainant's probationary period had not been completed satisfactorily.

C. In his observations on the Reports Board's recommendation concerning him, the complainant expresses concern about the fact that the recommendation was neither signed nor dated. He notes that the Board summed up his defence in two paragraphs without taking into consideration the voluminous document he had submitted because, according to the Board, it did not contain any major new arguments; the complainant considers that his arguments were simply "brushed aside". As evidence of this, he refers to the fact that the arguments of his three supervisors, on which he was unable to comment, took up 12 paragraphs and that their position was meticulously examined and reproduced in the Board's findings.

The complainant asserts that the Board ignored his situation prior to the regularisation of his contractual relationship in 2003 despite its importance for any appraisal of his performance throughout his career. He

emphasises the fact that, contrary to his supervisors' statements, he was not a mere consultant from 1993 to 2003 but "a casual worker employed [under] unlawful external collaboration contracts whose functions and duties fully corresponded to the functions and duties of a regular official". He contends that these contracts enabled the Organization to benefit from an employee's services at a lesser cost and that, once his situation was regularised, his supervisors' perception of his work suddenly changed and they were eager to be rid of him. He alleges that he was replaced by an employee whose situation was just as insecure as his own had been from 1993 to 2003, and who was summarily dismissed as soon as he applied for regularisation of his contractual relationship; the latter is furthermore prepared to testify.

D. In its final note the Organization states that it is normal practice not to sign and date a recommendation by the Reports Board. It points out that the names of the Board's members are listed on the Joint Negotiating Committee's website and that the complainant was in any case aware of the identity of the members of the Reports Board since he appeared before them.

The ILO affirms that since the proceedings before the Reports Board are not adversarial, the complainant was not entitled to be present at all his supervisors' hearings. There can be no doubt, in its view, that the Board took careful note of the complainant's comments; besides, he has produced no evidence that might indicate the contrary.

The Organization submits that the reference to the complainant's external collaboration contracts has no relevance to the case, which concerns only the decision not to renew his fixed-term contract. Moreover, the complainant failed to raise any questions regarding those contracts in due time, so that his claims in that regard are time-barred. It emphasises that there is no evidence in the file to support the complainant's contention that his fixed-term contract was not renewed on grounds of cost. It further affirms that the complainant's allegation that he was replaced by just one person is incorrect, since his duties were distributed among three persons after his departure.

## CONSIDERATIONS

1. On 2 October 2006 the complainant filed a complaint with the Tribunal, challenging the decision of 13 July 2006 which confirmed that of 29 April 2005 not to renew his contract. By Judgment 2700, delivered on 6 February 2008, the Tribunal ordered, inter alia, the filing of further submissions in order to supplement the file with a copy of the Reports Board's recommendation, as requested by the complainant.

2. The ILO produced the Reports Board's recommendation with its comments. The Tribunal will not dwell on the ILO's observations regarding the propriety of its order for the filing of further submissions. Suffice it to recall that, contrary to the Organization's contention, the Tribunal's power to order the filing of further submissions may be exercised at any stage of the proceedings.

In its comments the defendant reiterates its arguments and maintains that, in the instant case, it correctly followed the procedure for assessing the complainant's performance. It submits, in particular, that it gave the complainant the opportunity to improve his performance and concluded, in the light of the Reports Board's findings, that he had not performed satisfactorily during his probationary period.

3. The complainant notes that the document produced is neither signed nor dated. But he rightly refrains from challenging its authenticity, given that it was forwarded to the Director-General under cover of a minute signed by the Chairperson of the Reports Board.

4. As the Tribunal has consistently held, a decision not to renew a fixed-term contract, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. These criteria, which are applicable to all discretionary decisions, must be applied with particular circumspection in the case of a decision not to confirm the appointment of a person on probation (see, in particular, Judgments 1052 and 1526).

5. In the present case, the complainant submits that the decision not to renew his contract at the end of the probationary period was taken improperly and that it was biased.

6. The complainant maintains that the adversarial principle was not observed because he was summoned to appear first, and alone, before the Reports Board and therefore had no opportunity to comment on the observations

of his supervisors.

The Tribunal will not entertain this plea, since the Reports Board's recommendation makes it clear that the Board, before formulating its conclusions, took into account the complainant's probationary report covering the period from 1 December 2003 to 31 August 2004, focusing in particular on the recommendation contained therein not to renew the complainant's contract; that it examined the complainant's job description and analysed his comments and those of one of his supervisors; that it also took into consideration the documents pertaining to the complainant's first performance report covering the period from 1 March to 30 November 2003; that, given the different views expressed, the Board invited the complainant and his supervisors to clarify individually their points of view; and that it heard all the persons concerned and forwarded the documents produced in that process to the complainant, who submitted additional comments and supporting documents.

The Tribunal infers from the foregoing that the adversarial principle was observed, since the complainant was not denied the right to be heard. The Reports Board, which is set up by the Director-General and establishes its own procedure, in accordance with the provisions of Article 10.3 of the Staff Regulations, cannot be regarded as either an internal appeals body or a judicial body. Where an official has had the opportunity to state his or her point of view before the Board and to comment on the relevant supervisors' assessments of his or her performance and conduct, the adversarial principle can reasonably be deemed to have been observed. Such was the case in the present instance.

7. The complainant submits that the real grounds for non-renewal of his contract are not those indicated in the decision of 29 April 2005. He emphasises that, according to that decision, although the Reports Board noted that he had "demonstrated an ability to perform when responding to maintenance requests or when working with a team of developers", it concluded that "[his] profile did not match the needs" of the post in question. He maintains that this criticism is inconsistent or indeed manifestly contradictory.

8. In accordance with its case law, the Tribunal is especially cautious, in a case involving the non-renewal of a contract, in reviewing any appraisal by a supervisor of the staff member's performance; the supervisor has the technical background and the knowledge of the staff member's work and conduct that qualify him or her better than anyone else to advise the executive head of the organisation (see, in particular, Judgment 1610, under 18). The Tribunal's power of review is all the more limited when it involves non-confirmation of an appointment at the end of the probationary period (see Judgment 1175, under 5).

9. No flaw that would warrant setting aside the impugned decision has been identified in the present case. The decision was taken on the basis of performance appraisals that were duly established and submitted for review to the Reports Board, which made its recommendation under the circumstances described above.

10. The allegations of bias and, implicitly, of misuse of authority cannot be entertained since they are not supported by any evidence. The reasons for non-renewal of the complainant's contract were clearly stated in the letter of 29 April 2005 by which he was notified that, according to the findings of the Reports Board, his "profile did not match the requirements of the post in question". The mere fact that the defendant issued an employment certificate to the complainant, which mentioned that "[h]is contract was not renewed because the duties [he] performed have been subcontracted", does not mean that his performance was considered to be satisfactory.

11. With regard to the alleged contradictions and inconsistencies, the complainant emphasises that the previous appraisal of his performance was excellent and that it was only when his contractual situation improved that relations with his supervisors deteriorated and the assessments became unfavourable. But it is clear from the evidence on file that the complainant's duties and responsibilities were different from those he had assumed during the period when he was employed as an external collaborator, and that it was only after he was granted a fixed-term contract that inadequacies came to light. That is why he was criticised in his first performance appraisal and warned that he was expected to improve.

The Tribunal therefore sees no inconsistency or contradiction in the differences noted in the assessment of the complainant's performance between the period when he was an external collaborator and the period when he held a fixed-term contract.

12. The arguments with respect to the unlawful nature of the external collaboration contracts cannot be taken into consideration, since no grievance was filed regarding such contracts in due time.

13. In view of the foregoing considerations, the complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 May 2008, 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 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet