NINETY-SEVENTH SESSION

Judgment No. 2362

The Administrative Tribunal,

Considering the complaint filed by Mrs D. L. against the International Labour Organization (ILO) on 20 January 2003 and corrected on 22 April, the Organization's reply of 7 July, the complainant's rejoinder of 17 October and the ILO's surrejoinder of 23 December 2003;

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 and the pleadings may be summed up as follows:

A. The complainant, a Canadian national born in 1950, joined the International Labour Office – the ILO's secretariat – in 1998 under a special short-term contract as a Consultant, at grade P.4, in what later became the Bureau of Library and Information Services (BIBL). From 6 March 1999 she held a short-term contract in BIBL, which was extended several times, the last such extension spanning the period from 1 June to 31 December 2001.

In March 2001 she applied for the post of Chief of the Client Services Section – a fixed-term position in BIBL. By a minute of 16 July 2001, the Human Resources Development Department (HRD) asked the complainant's supervisor to shortlist the applicants with a view to arranging interviews. To that end, the supervisor was instructed to examine, "in priority", applications from internal candidates and from candidates who had been working for the Office for an extended period "on what are regarded to be 'precarious' conditions". Applications from other external candidates were to be examined only if the applicants belonging to the former two categories did not appear to present the appropriate profile and meet the required qualifications.

At that time, HRD had begun an extensive reclassification exercise in accordance with the Collective Agreement of 14 March 2001, between the Office and the ILO Staff Union, on Arrangements for the Establishment of a Baseline Classification and Grading. In April and May 2001 the complainant's supervisor submitted reclassification proposals to HRD for the staff in BIBL, with the exception of the complainant and another short-term official. When the complainant queried that apparent omission, she was informed by her supervisor that the reclassification exercise concerned only officials holding fixed-term or without-limit-of-time contracts.

On 9 July 2001 the complainant was notified by her supervisor that her short term contract would not be extended beyond its expiry date of 31 December 2001 because the post she occupied was to be suppressed for budgetary reasons. On 16 July she wrote to the Director of HRD requesting retroactive reclassification of her post, but she received no reply. In a minute sent to her supervisor on 27 September 2001, she queried the reason for the non-renewal of her contract, explained why she considered herself to be qualified for the vacancy in BIBL and asked her supervisor to support her candidacy for that vacancy.

In November and December 2001, the complainant made several requests to her supervisor to extend her contract pending the outcome of the selection process for the vacancy. These requests were denied. However, during 2001, in an attempt to resolve the situation of officials who had been employed on "precarious" conditions, the Administration had decided that those for whom no regular employment had been located in the Office by the beginning of 2002 and who were not under contract with the Office at that time would be offered one final three-month contract, after which a termination package would be offered to those who had still not found other employment with the Office. The complainant had been identified by HRD as one of the employees concerned. Consequently, when her short-term contract expired on 31 December 2001, she was granted a three-month extension of her contract, in the Bureau of Programming and Management, and for a limited period she was

entitled to apply for vacancies at the Office as an external candidate without being barred by exclusions based on nationality stipulated in vacancy announcements. She also received an *ex gratia* termination indemnity when that contract ended.

On 15 March 2002 the complainant was informed that she had not been selected for the vacant post in BIBL, which had been offered to an external candidate. Three days later, she submitted a grievance to the Ombudsperson alleging harassment by her supervisor and requesting that the decision not to extend her appointment be stayed on the basis of Article 3.3 of the Collective Agreement on the Resolution of Grievances and Article 13.4 of the Staff Regulations. In her report dated 1 July 2002, the Ombudsperson stated that she could not recommend the stay requested by the complainant, since her appointment had "expired on its own terms, without the intervention of a 'decision'".

Meanwhile, by a minute dated 21 May 2002 the complainant had asked the Director of HRD to suspend the application of the selection decision for the vacancy on the grounds that it had been taken in breach of the applicable procedures. The Office considered that no breach of procedural rules had occurred and consequently rejected her request on 31 May 2002.

On 22 May 2002 the complainant had submitted an appeal to the Joint Panel, alleging that she had been the victim of harassment of a "discriminatory and violent nature", which had resulted in the non-renewal of her contract, the appointment of an external candidate to the post for which she had applied and the termination of her employment. In its report dated 13 September 2002, the Joint Panel found that there was insufficient evidence to support the complainant's allegation of harassment and that the selection for the vacancy had been procedurally correct. It therefore recommended that no action should be taken by the Office with respect to the complainant's appeal.

By a letter of 21 October 2002, the Director of the Director-General's Office informed the complainant that the Director-General had decided to adopt the recommendations of the Joint Panel and to reject her appeal. That is the impugned decision.

B. The complainant contends that the ILO failed to follow the proper procedure in abolishing her post. She argues that since Rule 3.5 of the Rules Governing Conditions of Service of Short-Term Officials (hereinafter the "Short-term Rules") entitles her to the terms and conditions of a fixed-term appointment, the Office ought to have consulted the Administrative Committee before abolishing her post, in accordance with Article 11.5 of the Staff Regulations. For the same reason, she considers that the ILO ought to have paid her a six-month indemnity in accordance with Articles 14.4(1) and 11.6 of the Staff Regulations.

The complainant alleges that in selecting an external candidate for the vacancy in BIBL the Administration acted in violation of the applicable rules. She submits that her application ought to have been given priority, firstly on the basis of Article 4.2(g) of the Staff Regulations, concerning applications from former officials whose appointments have been terminated on reduction of staff, and secondly because of the instructions given to her supervisor on 16 July 2001 by HRD regarding the shortlisting of candidates.

She contends that her post was wrongly excluded from the baseline classification and grading exercise, given that that post officially belonged to the organisational structure of the library and that the Baseline Agreement did not provide for the exclusion of any category of staff. She asserts that the impugned decision was tainted by mistakes of fact and erroneous conclusions, insofar as the Office based its actions on the erroneous view that she was to be treated as a short-term staff member.

As a further ground for quashing the impugned decision, the complainant argues that the actions and decisions of her supervisor were based on "prejudice, ill-will, bad faith, and malice". In particular, she asserts that as from March 2001 her supervisor began to remove some of her responsibilities, that she excluded her from important decisions, and spread lies about her professional performance, all of which, she argues, amounts to discrimination. She adds that the selection process for the vacancy was clearly tainted by her supervisor's prejudice.

Lastly, the complainant submits that her supervisor abused her authority by appointing an external candidate to that position. She alleges that her supervisor's choice of candidate was based on her prior acquaintance with him and hence not on objective grounds.

The complainant asks the Tribunal to set aside the selection decision for the vacancy in BIBL and order the ILO to

conduct a new selection procedure. Pending the outcome of that procedure, she seeks reinstatement as a staff member of the ILO and payment of all salary and benefits she would have received had she been selected for that vacancy. She also seeks the annulment of the decision not to renew her contract; reinstatement in her former post; the payment of all salary and emoluments she would have received "had her appointment not been illegally terminated"; the application of the Baseline Agreement of 14 March 2001 to her former post, with retroactive effect; the quashing of the Director-General's decision rejecting her allegations of harassment by her supervisor, and an order that the Office take disciplinary measures against the latter; an additional termination indemnity amounting to three months' salary; 250,000 United States dollars in moral damages; 15,000 dollars in costs; interest, at an annual rate of 8 per cent, on all sums awarded to her; and "such other relief which the Tribunal feels is fair, necessary, and equitable". Lastly, she asks the Tribunal to order the ILO to produce numerous documents connected with her case and to allow an oral public hearing.

C. In its reply the ILO contests the receivability of the complainant's claims based on the exclusion of her post from the baseline grading exercise, since that issue was the subject of a separate appeal on which the Director-General had not made a final decision at the time when the present complaint was filed.

It considers that the complainant's arguments concerning the abolition of her post are erroneous, since hers was simply a case of non-renewal of a short-term contract – an eventuality that was specifically referred to in her contract. It adds that the indemnity paid to her when her appointment ended was not legally required. The Organization also rejects her arguments concerning Articles 11.5 and 11.6 of the Staff Regulations for two reasons: firstly, her contract was not terminated, whereas both of those articles concern the termination of a contract, and not non-renewal; and secondly, she was not an "established" official, within the meaning of Article 2.1 of the Staff Regulations, and the two articles in question apply only to established officials.

The Organization emphasises that Rule 3.5 of the Short-term Rules merely entitled the complainant to certain advantages granted in relation to a fixed-term contract, and not those granted to established officials. It did not make her a fixed-term staff member. Article 11.4 of the Staff Regulations, concerning the termination of the appointment of a fixed-term official, did not apply to her, since she was appointed under the Short-term Rules.

It asserts that the competition procedure was correctly followed and points out that the complainant, who did not have the appropriate profile for the vacancy, would not even have been shortlisted for an interview, had it not been for the fact that her supervisor – the very person whom she accuses of prejudice – insisted that the complainant's name should be included at that stage. Notwithstanding the instructions given by HRD on 16 July 2001 concerning the shortlisting of candidates, the competition procedure was governed solely by the Staff Regulations and the terms of the vacancy notice.

Regarding the complainant's allegations of prejudice and discrimination by her supervisor, the Organization refers to the findings of the Joint Panel, noting that she has produced neither any evidence nor any argument warranting a departure from the conclusions reached by the Panel. It dismisses the complainant's allegations of abuse of authority by her supervisor as unfounded and mischievous.

The defendant sees no need for oral proceedings and considers that all the relevant documents connected with the case have already been submitted.

D. In her rejoinder the complainant submits that the Organization has misinterpreted both Rule 3.5 and Article 11.4, and that as an internal candidate "in a precarious condition" she ought to have been given priority in the competition for the vacancy. She rejects the defendant's objection to receivability, noting that the decision not to include her in the baseline classification and grading exercise was effectively taken on 9 July 2001, before the filing of her complaint.

E. In its surrejoinder the Organization maintains its position on all issues.

CONSIDERATIONS

1. The complainant was appointed under a special short-term contract with the ILO on 14 September 1998 subject to the provisions of the Short-term Rules. The offer of appointment stated, inter alia, that the appointment was by nature temporary and that there was "no expectation of continued employment within the established

policies and procedures of the ILO".

2. As from March 1999, the complainant was covered by Rule 3.5(a) governing short-term contracts, which provides:

"Whenever the appointment of a short-term official is extended by a period of less than one year so that his total continuous contractual service amounts to one year or more, the terms and conditions of a fixed-term appointment under the Staff Regulations of the ILO shall apply to him as from the effective date of the contract which creates one year or more of continuous service […]".

3. At the very outset, the Tribunal would dispel the complainant's notion that she enjoyed a status other than that of a short-term employee. Her initial appointment was as a short-term official, subject to the terms and conditions specified in the Short-term Rules. She signed and accepted the offer of appointment which made it clear that the appointment was temporary and would "come to an end on completion of the period of appointment without further notice".

4. By virtue of successive short-term contracts and extensions thereof, her service lasted for four years. The series of extensions and the grant of pension coverage and other benefits did not signify a change in her original status. Staff Rule 3.5(a) quoted above cannot be invoked by her as proof that her appointment had been converted to fixed-term. While this provision ostensibly bestows on her "the terms and conditions of a fixed-term appointment", it would be stretching the intent and signification of the provision to make the complainant a fixed-term official (see Judgment 1666). Had that been the purpose of the Rule, it would have explicitly so provided instead of stating that "the terms and conditions of a fixed-term appointment […] shall apply to [the official concerned]". The complainant was recruited as a short-term official and remained one at all times.

5. As the Tribunal pointed out recently in a similar case: "It was clearly within the discretionary authority of the Director-General to decide whether to renew [that complainant's] short-term contract or offer him a fixed-term contract. [He] cannot now claim to be treated retroactively as if he had a fixed-term contract" (see Judgment 2198, under 12).

6. Precedent has it that, at the discretion of the executive head, a temporary appointment may be extended or converted to a fixed-term appointment, but it does not carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity (see Judgments 2198, under 13, and 1560, under 4).

7. The complainant has no basis for contesting the non-renewal of her short-term appointment. The Tribunal has stated often enough that the decision to make an appointment lies at the discretion of the executive head of an international organisation and, as such, is subject to only limited review. It may be quashed only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

8. The complainant refers to irregularities committed in selecting the candidates for the vacancy in BIBL. She states that her immediate supervisor received a minute from HRD, instructing her that in preparing her shortlist of candidates, priority should be given to internal candidates, then to those persons who had been working for the Office for an extended period on what are regarded as "precarious" conditions, such as herself, and lastly to other external candidates. She contends that, contrary to the instructions in the minute, her supervisor reviewed all the candidates in order to prepare her shortlist, disregarding those priorities, thus rendering the selection decision null and void. The complainant points out that the Joint Panel noted that those instructions had not been followed.

9. What is important, however, is that the recruitment procedure in the Staff Regulations and the terms of the vacancy notice were complied with. The priorities for shortlisting candidates were merely indicated in a minute from HRD. It is to be pointed out that at the interview stage, the complainant's name was included at the insistence of her supervisor, the very person whom she accuses of prejudice. The panel which interviewed the shortlisted candidates found that the complainant did not possess the appropriate profile for the position. Indeed, HRD stated in its report that she did not have "the same level of related experience" as the two other candidates referred to in the report. The complainant's claim regarding her non-selection therefore fails on both procedural and substantive grounds.

10. The complainant also claims that she is entitled to the six-month termination indemnity paid to fixed-term staff and not the three-month *ex gratia* indemnity actually paid to her. She cites Article 11.6 governing the indemnity due upon reduction of staff. However, it is to be pointed out that in her case there was no reduction of staff leading to termination of her contract. Her contract simply expired according to its terms and was not renewed. Moreover, Article 11.4 applies only to the termination of a fixed-term appointment and not to that of a short-term contract such as the complainant's. The distinction earlier adverted to between a fixed-term official and one who is merely provided with some of the advantages of a fixed-term official becomes relevant at this point for she falls under the second and not the first category.

11. As regards her allegations of harassment, discrimination and prejudice, the complainant produced no persuasive evidence before the Joint Panel and nothing new or convincing is added in her pleadings before the Tribunal. There is no indication of what could be added by the complainant's proposed witnesses, and her application for oral proceedings is accordingly denied.

12. From the above, the ineluctable conclusion is that the complainant's pleas are unfounded and that her claims must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.