

NINETY-EIGHTH SESSION

Judgment No. 2406

The Administrative Tribunal,

Considering the complaint filed by Mr R. V. against the International Labour Organization (ILO) on 20 February 2004, the Organization's reply of 1 April, the complainant's rejoinder of 6 May and the ILO's surrejoinder of 17 June 2004;

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, a Swiss national born in 1944, was recruited by the International Labour Office, the secretariat of the ILO, as Chief of the Financial and Administrative Services Section of the International Social Security Association (ISSA) at grade P.4. He took up his duties on 1 May 1998. His contract, which was initially for one year, was extended three times.

In a letter of 27 September 2002 the complainant submitted a grievance to the Ombudsperson alleging psychological harassment by his supervisors. On 25 November, as he was about to return to work after several months of sick leave, he received a letter dated 22 November in which the Manager of the Human Resources Operations and Development Branch informed him that due to restructuring the ISSA had decided to abolish his post as of 31 December 2002. His contract, which was due to end on that date, was nevertheless extended until 31 January 2003 in order to allow him a longer period of notice. A first Certificate of Service was drawn up on 21 February.

Having received no reply to the various letters he had written to the Ombudsperson, the complainant filed a grievance with the Joint Panel on 30 June 2003. On 13 October the latter recommended replacing the initial Certificate of Service, which failed to comply with the applicable requirements; extending the complainant's contract by three months in order to render him eligible for a pension with the United Nations Joint Staff Pension Fund (UNJSPF); and paying him compensation for the improper non-renewal of his contract. In a letter dated 20 November, which constitutes the impugned decision, the Director of the Office of the Director-General informed the complainant that the Director-General had decided to follow the Panel's recommendation only with regard to the Certificate of Service. A new certificate was sent to the complainant on 24 November 2003.

B. The complainant alleges that he suffered harassment for several years. Examples he gives include "sabotage" of his work and verbal abuse. He adds that between 1999 and 2002 his supervisors "held back" his annual performance appraisal reports and that after his office was relocated he was separated from his staff. In his view, the harassment was brought about by his refusal to endorse certain "financial, budgetary and accounting irregularities" and culminated in the decision not to renew his contract. He maintains that the various reasons given to justify this decision were wrong, that his post was not abolished and that the non-renewal of his contract was essentially due to the fact that problems had arisen as a result of his long sick leave necessitated by harassment-related stress.

He submits that he had entertained legitimate hopes of having his contract renewed, considering that he had been working with the ISSA for almost five years and was close to retirement. He adds that he is still looking for a job and that, in view of his age and the wording of the Certificate of Service issued by the Office, he was not sure of finding one. According to him, the second certificate he received is not valid, for one thing because it is undated. He also objects to its content which differs from the draft he submitted.

The complainant asks for the impugned decision to be set aside and seeks reinstatement in the Office, though not in the ISSA, with effect from 1 February 2003, "at least at the same grade and with the same remuneration as were

stipulated in the second extension” of his contract. He also asks the Tribunal to order the ILO to pay him 1,554,000 Swiss francs, which is the amount of salary he would have received until retirement; 110,000 francs for the “loss of the employer’s share in respect of contributions already paid” to the UNJSPF; 198,000 francs for the “loss of the employer’s share of contributions to the [Fund] up to the age of retirement”; 587,000 francs for the “interest which would have accrued with the [UNJSPF] until retirement”; and 650,000 francs for moral injury. He also claims a new Certificate of Service written in French in accordance with the draft he has drawn up, and 65,000 francs in costs.

C. In its reply the defendant, with respect to receivability, points out that the complainant has included in his complaint “elements” which were not submitted to the Joint Panel and which the Tribunal should therefore reject pursuant to Article VII(1) of its Statute. This applies to the part of the complaint that concerns the Certificate of Service of 24 November 2003 and the part containing the references to the complainant’s allegedly work-related health problems.

On the merits, the ILO contends that there are no grounds for the complainant’s allegation that the non-renewal of his contract was the culmination of the harassment he claims he suffered. It points out that the Joint Panel found that the evidence put forward by the complainant in support of his allegations of harassment was not sufficient. According to the Organization, the complainant sees any move by ISSA management as a form of harassment, one example being the relocation of his office which was in fact due to the reorganisation announced in a briefing memorandum of December 2001. It is willing to admit that the two performance appraisal reports adopted during the period 1 February 1999 to 31 January 2001 were sent and completed somewhat belatedly, but points out that the complainant has produced no evidence of the injury he allegedly suffered as a result.

The defendant also insists that the reason for the non-renewal of the complainant’s contract was the restructuring of the ISSA’s accounting services which resulted in the abolition of his post and that his absence on sick leave was never at issue. It emphasises that a fixed-term contract carries no expectation of renewal and that in the event of non-renewal the Tribunal exercises only a limited power of review. The decision not to renew the complainant’s contract was dictated by the ISSA’s interests.

Lastly, the ILO submits that the Certificate of Service dated 24 November 2003 was duly prepared in accordance with the provisions of the Staff Regulations but points out that, in any case, the complainant was sent a certificate on 1 April 2004 along the lines of the draft he had himself prepared.

D. In his rejoinder the complainant states that the claims he has filed with the Tribunal are the same as those he submitted to the Joint Panel. In his view, the Joint Panel was wrong in finding that the behaviour of his supervisors did not amount to harassment, as it thus failed to take account of his health problems. They were the direct result of that harassment, as certified by the medical reports he produced, which raised no objections on the part of the Organization.

He recalls that the ILO gave the Joint Panel several reasons to justify the non-renewal of his contract and produces the recording of the hearing before the Panel for the Tribunal’s convenience.

Emphasising that he is still without work, he endeavours to demonstrate that the last Certificate of Service he received is still not the same as the draft he prepared and does not comply with the Staff Regulations.

Lastly, the complainant rectifies – to 111,000 francs – the amount of his claim for the loss of the employer’s share in respect of contributions already paid into the Fund and presses all his other claims.

E. In its surrejoinder the defendant maintains its objections to receivability and reiterates that since the Joint Panel did not conclude that harassment had taken place, the complainant’s argument whereby the harassment culminated in the non-renewal of his contract is unfounded.

The Organization also states that the Certificate of Service that was sent to the complainant follows the gist of the draft he had put forward. It points out that it is entitled to include an opinion in a certificate insofar as that opinion is not damaging and that it is its duty to omit the fallacious details contained in the complainant’s draft.

CONSIDERATIONS

1. From 1 May 1998 the complainant was employed by the International Labour Office at grade P.4 as Chief of the Financial and Administrative Services Section of the International Social Security Association (ISSA), which was founded in 1927 with support and the detachment of staff from the Office. The complainant was initially given a one-year contract, which was extended three times, on the last occasion until 31 December 2002. Disagreements arose with his supervisors and the situation grew worse in April 2002 when the complainant sent a memorandum to ISSA's Secretary General refusing to pay an invoice addressed to the latter.

2. The complainant fell ill on 29 April 2002 and was granted successive periods of sick leave until 1 December 2002. While he was away, he tried unsuccessfully to persuade the Ombudsperson to intervene in order to find "a speedy and lasting solution" to the dispute, which he alleged was due partly to the harassment to which he had been subjected and partly to the fact that he had not been sent his performance appraisal reports for 1999, 2000 and 2001.

3. On 22 November 2002 the Manager of the Human Resources Operations and Development Branch wrote to the complainant notifying him that his appointment would be terminated upon the expiry of his contract for the following reasons:

"The Secretary General and chief operating officer of the ISSA [...] has informed me that for some time the Association has been considering the need to ensure an independent and uninterrupted accounting service, as recommended by its Control Commission. For this reason the Association has decided, with effect from 1 January 2003, to restructure its accounting services by outsourcing a large part of your duties to an outside firm and dividing up the remainder among the administrative and financial services. This will unfortunately entail the abolition of your post as from 31 December 2002."

The author of the letter added that in order to give the complainant time to find a new job his contract would be extended until 31 January 2003, that he was authorised not to resume work after his sick leave, that he would be entitled to an indemnity equivalent to three months' salary and allowances as well as payment of accumulated annual leave. He was informed that his performance appraisal reports had been forwarded to the Reports Board.

4. Having once again unsuccessfully requested the assistance of the Ombudsperson, the complainant filed a grievance with the Joint Panel on 30 June 2003 alleging harassment by his immediate supervisor and by the Secretary General of the Association. He also contested the non-renewal of his contract and complained that the Certificate of Service he had been issued was unsuitable.

5. Having examined the matter in detail, the Joint Panel issued its recommendation on 13 October 2003.

6. With regard to the harassment allegation, the Joint Panel, recalling the definition of harassment set out in the relevant statutory provisions, considered each of the complainant's allegations in turn and, arriving at very cautious conclusions, found that on balance the incidents considered were not enough to sustain the complaint of harassment, even though the behaviour of the complainant's supervisors was not beyond reproach.

7. In relation to the non-renewal of contract, the Joint Panel considered it likely that the decision not to renew the complainant's contract was improperly motivated and that he should be granted a further extension of three months, in order to have enough years to qualify for a UNJSPF pension, as well as financial compensation for the improper non-renewal of his contract, in an amount to be determined after discussion with the complainant.

8. The Joint Panel concluded that the Certificate of Service sent to the complainant failed to comply with the requirements of the Staff Regulations and recommended that it should be replaced by a new certificate in the drafting of which the complainant should be involved.

9. In a letter of 20 November 2003 the Director of the Office of the Director-General informed the complainant of the Director-General's decision. The latter considered that the complainant's post had been suppressed by the ISSA's management as a legitimate exercise of their managerial discretion, in view of the need to outsource part of his duties on account of his extended absence and thus ensure continuity of service. He had therefore decided not to extend the complainant's contract and not to grant him any additional compensation. With regard to the Certificate of Service, he expressed doubts concerning the Joint Panel's conclusion but in view of the fact that a proposed text submitted by the complainant had been deemed acceptable by the ISSA and the Human Resources Development Department, the Director-General was instructing the latter to provide him with a revised

certificate incorporating that proposed text by no later than 1 December 2003.

10. The complainant's claims are listed under B above.

11. The defendant considers that the complaint is receivable, except for the part concerning the new Certificate of Service, which was issued to the complainant on 24 November 2003 and gave rise to no objections prior to the complaint before the Tribunal, and the part containing the references to the impaired health of the complainant, since no claim for compensation has been submitted in compliance with the provisions of Annex II to the ILO's Staff Regulations concerning compensation in the event of illness, injury or death attributable to the performance of official duties.

Regarding the harassment-related grievance

12. The complainant recounts the difficulties he experienced with his supervisors, especially the fact that in the course of his duties he had to draw attention to various financial and accounting irregularities concerning, for instance, certain personal invoices which in his view "could be neither processed nor paid by the ISSA", and insulting remarks made against him following the submission of his memorandum of April 2002. He reiterates his allegations concerning the attitude of his supervisors, who supposedly harassed him and "sabotaged" his work in the following ways:

- by denying him the resources he needed for his work and by diverting budgets intended for his section to other recipients;
- by preventing him from completing his periodical and annual financial reports and handing them in on time;
- by authorising other officials without his knowledge to replace him in areas for which he was responsible;
- by inciting him to act on various occasions in a manner contrary to Swiss law, the regulations and rules of the ISSA and the ILO, generally accepted accounting practices and his professional code of ethics;
- by isolating him and preventing him from attending meetings of the ISSA Bureau, the Council, special committees and the General Assembly of the ISSA, especially the one held in Stockholm in September 2001;
- by avoiding any reference to his accomplishments, by making him appear as a mere executant, by minimising his work and by discrediting him in the eyes of others;
- by abusing him verbally;
- by "covering up" for a staff member who in September 1999 had entered the accounting application programmes and deleted files;
- by changing his post, as part of the restructuring of the ISSA, in order to diminish his role;
- by relocating his office during his absence on sick leave; and
- by "holding back" his annual performance appraisal reports for the period 1999 to 2002.

13. On all these points the Joint Panel gave very detailed replies. While recognising that certain administrative practices at the ISSA were not up to standard and at any event were below the complainant's expectations and that the behaviour of his superiors was not beyond reproach, the Joint Panel did not find the reported incidents to be enough to sustain the complaint of harassment. In this respect, the Tribunal can only confirm its case law (see Judgments 2067, 2100 and 2370 in particular) to the effect that allegations of harassment must be supported by specific facts and that it is up to the person alleging that he or she has suffered harassment to prove the facts. As indicated in Judgment 2370, under 9, "that proof will, of course, often be difficult to establish, and in this context both internal appeal bodies and the Tribunal itself must be particularly careful to take into account all the elements resulting from an adversarial examination of the alleged facts; but the burden of proof cannot be reversed". No new element, however, has been put forward by the complainant which might cast doubt on the views expressed by the Joint Panel after hearing the parties and many witnesses, so that the Tribunal finds no reason in the submissions to depart from the Panel's carefully reasoned conclusions. It therefore dismisses the complainant's allegations of

harassment.

Regarding the non-renewal of contract

14. This does not mean to say that the conditions surrounding the non-renewal of the complainant's contract are above reproach. No doubt the defendant is right to point out that the complainant held only fixed-term expert's contracts, that he had no right to renewal, and that he has put forward "no evidence at all" in support of his claim that he had a legitimate expectation of retaining his post until the age of 65. Nevertheless, the decision not to renew his contract should be based on valid reasons. It emerges from the submissions that while the reason given in the letter of 22 November 2002 to justify the non-renewal of the complainant's contract is the abolition of his post due to the restructuring of accounting services and the need to outsource some of the complainant's duties, it is the fact that the latter was unable for health reasons to perform those duties from 29 April 2002 onwards which was the main reason for the impugned decision. Furthermore, the statements of witnesses during the hearings before the Joint Panel show that the ISSA's Control Commission, whose recommendations were referred to as justifying the restructuring of the service, had not expressly advocated that restructuring or the subsequent abolition of the post held by the complainant – whose work was deemed entirely satisfactory. The Commission had, however, emphasised in an audit report of April 2001 that the financial services were vulnerable to potential turnover of staff or to unplanned absences due to sickness or accident. Moreover, while certain representatives of the defendant suggested that the abolition of the complainant's post was justified by an external audit report drawing the ISSA's attention to certain risks and to the desirability of outsourcing accounting activities, it has been established that the audit report was subsequent to the complainant's departure.

Lastly, the delay in the receipt by the complainant of his appraisal reports, which has been admitted by the defendant, is considerable and constitutes an element which the Tribunal must take into account when assessing the conditions in which the disputed measure was taken. Even though, as the defendant maintains, it was not the service provided by the complainant which was the reason for the non-renewal of his contract, the fact remains that the decision might have been different had the competent authorities been given the opportunity to consider his appraisal reports, where on the whole the complainant's performance was deemed satisfactory. Yet these reports were sent to the complainant for perusal and signature only on 19 February 2003, that is, after his appointment had ended.

15. From its consideration of the file and the recommendations of the Joint Panel, which on this point are also very illuminating, the Tribunal concludes that the reasons given for the non-renewal of the complainant's contract are far from convincing and that the abolition of his post, even if justified by restructuring needs, was also decided in the light of the complainant's state of health and his poor relations with his supervisors, and occurred without the competent authorities having a chance to study the complainant's file and his personal situation. In the circumstances, the Tribunal does not see fit to order either the reinstatement of the complainant – who held only a fixed-term expert's contract – or the extension of his contract to allow him to obtain pension rights. It nonetheless considers that he is entitled to financial compensation for all injuries arising from the improper manner in which his appointment was terminated and sets the amount to be paid to him by the defendant at 100,000 Swiss francs. On the other hand, although the complainant pleads that his health was impaired by the treatment he received, the Tribunal notes that no claim for compensation was filed in accordance with the provisions of Annex II to the Staff Regulations.

Regarding the drafting of the Certificate of Service

16. When the complainant objected to the way his first Certificate of Service had been drafted, he was sent a second certificate on 24 November 2003, which clearly did not comply with the instructions given in the decision of 20 November 2003. He was then sent a further Certificate of Service on 1 April 2004, after the Director of the Human Resources Development Department had apologised to him on behalf of the Office for the "hitch" due to the fact that the decision of 20 November had not been "fully implemented". The complainant also objects to the wording of the third certificate but, without needing to consider the receivability of his claims, the Tribunal finds no justification in his arguments for rejecting the draft, which should entirely meet his requirements, even though it is not worded in exactly the same manner as his own draft and despite the fact that the certificate was sent to him on the very day the Organization replied to his complaint before the Tribunal. The complainant furthermore shows no evidence that he suffered any specific injury as a result of the way the previous Certificates of Service were drafted.

Regarding costs

17. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 12,000 Swiss francs.

DECISION

For the above reasons,

1. The Organization shall pay the complainant compensation amounting to 100,000 Swiss francs.
2. It shall also pay him 12,000 francs in costs.
3. All the complainant's other claims are dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Agustín Gordillo

Claude Rouiller

Catherine Comtet