

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

108th Session

Judgment No. 2871

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L. C. against the International Labour Organization (ILO) on 27 August 2008 and corrected on 16 October, the ILO's reply of 22 December 2008, the complainant's rejoinder of 23 February 2009, the Organization's surrejoinder of 27 April, the complainant's further submissions of 19 October and the ILO's final observations thereon of 30 October 2009;

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 United States national born in 1961, was recruited on 18 April 1997 by the International Labour Office, the Organization's secretariat, as Marketing Manager at grade P.4 in the Publications Bureau. He was initially granted a one-year fixed-term contract. In 2002 the Publications Bureau was informed that it was going to be faced with budget cuts. In 2003 it had to cope with a

considerable reduction in revenue from the Publications Revolving Fund, and the regular budget funds allocated to it for the 2004-2005 biennium were reduced by 25 per cent in relation to the previous budget.

Against this background it was decided to assign the complainant to the InFocus Programme on Skills, Knowledge and Employability (IFP/SKILLS) from 1 April to 31 December 2003. At the time the Administration assured him that it was continuing to look for another assignment for him. During the period 1 January 2004 to 31 December 2005 the complainant performed the functions of Web Content Manager of the Office's internet site in the Department of Communication which – having absorbed the Publications Bureau – was renamed the Department of Communication and Public Information (DCOMM) on 1 October 2004. In 2005 the complainant became eligible for, but did not obtain, titularization. The decision was, however, taken to reserve a budgeted post for him pending the identification of a regular budget position.

The complainant worked in the Relations, Meetings and Document Services Department (RELCONF) from 1 January to 30 June 2006, but he was told that as from 1 April his contract would be funded by deficit financing. In a letter of 26 June the Director of the Human Resources Development Department pointed out that his contract was being funded in this way because his position no longer existed under the Programme and Budget for 2006-2007. She informed him that, in view of the financial difficulties facing the Office and the fact that, despite the efforts which had been made, no position corresponding to his profile and professional competences had been identified, his contract would be terminated on 30 June 2006. The complainant's contract was, however, extended for one month by way of notice and he received an indemnity equal to nine months' salary.

On 30 August 2006 the complainant submitted a grievance to the Human Resources Development Department, which rejected it. On 12 January 2007 he referred the matter to the Joint Advisory Appeals

Board. In its report of 19 March 2008 the Board unanimously recommended the dismissal of the grievance. With respect to the decisions not to titularize the complainant or renew his contract, it considered that, in view of the circumstances, the Organization had acted within its discretionary authority. It added that there appeared to be objective reasons for the abolition of the complainant's post and that he was time-barred from contesting the fact that, as he saw it, the duties which he had performed in the Publications Bureau had been transferred to a grade P.3 colleague recruited in 1998 – Ms E. By a letter of 19 May 2008, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to follow the Board's recommendation.

B. As a preliminary matter the complainant asserts that, since the Executive Director of the Management and Administration Sector furnished no proof of a delegation of authority by the Director-General, the impugned decision was not taken by the competent authority and must therefore be set aside.

On the merits he submits that during his successive secondments to IFP/SKILLS and DCOMM – both of which were financed by his original department – and lastly to RELCONF, Ms E. “took over” his duties and he was sidelined so gradually that it was impossible for him to initiate proceedings against the Organization when the first moves to reorganise the Publications Bureau were made. As the Administration had given him to understand that the necessary steps would be taken to find him another job, he considers that he could challenge only the decision not to extend his contract.

Furthermore, the complainant submits that the Organization made no real effort to find him a permanent post, thereby disregarding not only its practice of guaranteeing, whenever possible, the employment security of officials affected by reorganisation, but also the Tribunal's case law. Similarly, he holds that although the budget allocated to DCOMM for the 2006-2007 biennium was substantially larger, no effort was made to retain his services or to reinstate him, even in a job carrying a slightly lower grade.

The complainant emphasises that in an e-mail of 13 April 2005 the Director of DCOMM made her support for his titularization conditional on confirmation from the Bureau of Programming and Management that funding for his post would be guaranteed until he reached retirement age. He argues that this constituted an error of law on her part, because no such guarantee is required by Circular No. 452 (Rev.1), series 6. He is of the opinion that, despite the reorganisation of the Publications Bureau, his duties and responsibilities continued to exist in a different form. He submits that, since the number of budgeted posts at the ILO has remained the same since November 1988, the Director of the Human Resources Development Department committed an error of fact in stating that his position no longer existed in the budget for 2006-2007. He explains that, despite his polyvalency, it was decided no longer to assign him any functions or duties, yet meanwhile DCOMM continued to take on new members of staff. He infers from the foregoing that the decision not to titularize him was unlawful.

The complainant seeks the quashing of the impugned decision, his retroactive reinstatement, the granting of a contract without limit of time, compensation for the injury suffered and an award of costs, which he will donate to the Office's Staff Union Committee.

C. In its reply the ILO states that the complainant's position was abolished at the beginning of 2003 and that he was subsequently transferred, not seconded, to IFP/SKILLS. His contract was financed from the budget of the Publications Bureau until the end of the 2002-2003 biennium, because it was simpler, from an administrative point of view, to proceed in that manner and to seek reimbursement from IFP/SKILLS. Similarly, the complainant was transferred to DCOMM on 1 January 2004, but funds came from an additional appropriation to meet temporary needs generated by a plan to redesign the Office's internet site. When these funds ran out, the complainant was temporarily assigned to RELCONF.

The Organization submits that the complainant's pleas calling into question the reorganisation of the Publications Bureau and its repercussions are irreceivable in accordance with Article VII,

paragraph 1, of the Statute of the Tribunal. This reorganisation, which triggered the abolition of the complainant's position, his transfer to IFP/SKILLS and the assignment of some of his duties to Ms E., took place mainly in 2003 and was completed no later than October 2004. This means that the complainant was well over the time limit when he submitted his grievance on 30 August 2006. He was also time-barred from challenging certain aspects of the titularization exercise that ended in January 2006, because he had not filed his grievance within the six-month deadline laid down in Article 13.2(1) of the Staff Regulations.

Regarding the form of the impugned decision, the Organization explains that its wording makes it clear that it was indeed taken by the Director-General, who merely authorised the Executive Director to inform the complainant thereof.

Subsidiarily the Organization argues that the decision not to renew the complainant's contract was perfectly lawful. It points out that, under Article 4.6(d) of the Staff Regulations, an official on a fixed-term contract has "no expectation of renewal or of conversion to another type of appointment". Relying in particular on Judgment 1131, it asserts that in the instant case the Tribunal has only a limited power of review, because it may not supplant an organisation's view with its own in such matters as a restructuring of posts or redeployment of staff intended to make savings or improve efficiency, and it may not consider whether abolishing a post was the right thing to do.

The ILO produces documents in an effort to show that, in terms of funded posts at DCOMM, the budget allocated to this department for 2006-2007 was indeed reduced by an amount corresponding to the funding of one post for most of that biennium. It acknowledges that the marketing manager's function disappeared following a decision to outsource much of the marketing of publications, but it denies that Ms E. took over all the tasks previously assigned to the marketing manager. The Organization also submits that the Office made substantial efforts to retain the complainant: he was transferred to DCOMM even though he was not perfectly qualified for the

work given to him. It adds that the complainant's contract was not terminated, but ended on the appointed date in accordance with Article 4.6 of the Staff Regulations; the fact that the Office treated this separation as termination of his appointment in order that he could receive the indemnity referred to in Article 11.4(3) constitutes special treatment which should not *a posteriori* increase the Office's obligations towards him.

With reference to Circular No. 452 (Rev.1), series 6, the ILO points out that, in order to be selected for titularization, candidates must fulfil each of the conditions listed in the circular. The complainant did not satisfy the criterion of the "[o]fficial's capacity to pursue a career having regard to his/her field of competence and the prospective needs of the Organization". It explains that, in addition to the fact that employment prospects in the publications marketing field were not good at the Office, another problem encountered during the 2005 titularization exercise was that, at the time, the complainant was undertaking a temporary assignment funded by a special appropriation. As his position had been abolished and no other stable position had been identified, he could not be titularized. The Organization acknowledges that by stipulating that funding had to be guaranteed until the complainant reached retirement age, the Director of DCOMM was making unreasonable demands, but it asserts that the e-mail of 13 April 2005 had no impact on the final decision, because it was subsequently agreed that a post should be reserved for the complainant. In the event, however, it had proved impossible to identify a position entirely funded from the regular budget.

Referring to Judgment 1351, the Organization comments that a decision not to renew a fixed-term contract does not interfere with any contractual right but merely disappoints expectation of further employment. The complainant is not therefore entitled to the exceptional form of redress that reinstatement represents. In these circumstances he should not be granted a contract without limit of time. Lastly, the Organization considers that, since it has committed no fault for which it may be held liable, the complainant is not entitled to damages.

D. In his rejoinder the complainant explains that he is challenging not the reorganisation of the Publications Bureau but the non-renewal of his contract and the refusal to titularize him. He states that he referred both of these issues first to the Human Resources Development Department and then to the Joint Advisory Appeals Board within the time limits laid down in the Staff Regulations. Since he never received any decision refusing his titularization, he asserts that he was not informed of the fact that he had not been “deemed eligible” until the point at which his contract was not renewed and that, in this connection, he should not be blamed for filing a grievance out of time.

The complainant reiterates his arguments on the merits. He disputes the fact that DCOMM was faced with staff cuts in the 2006-2007 biennium. On the contrary, he maintains that this department recruited – sometimes unlawfully – various persons who carried out tasks which he could have performed.

The complainant takes the view that the e-mail of 13 April 2005 from the Director of DCOMM formed the basis of the decision not to titularize him, for it constituted the departmental director’s opinion required as part of the titularization procedure, pursuant to paragraph 8 of Circular No. 452 (Rev.1), series 6; this opinion should therefore have referred solely to his capacity to pursue a career.

E. In its surrejoinder the Organization maintains its position. Relying on Judgment 675 it states that, when a decision not to extend a fixed-term contract is taken, its prime obligation is to ensure that there is a good reason for this decision and that the reason is given to the official, an obligation which it honoured in this case. The ILO considers that the Director of DCOMM did not give an opinion within the meaning of the above-mentioned paragraph 8 in her e-mail of 13 April 2005, but merely consulted the Director of the Bureau of Programming and Management.

F. In his further submissions the complainant draws the Tribunal’s attention to the fact that in 2005 DCOMM recruited Mr B. – as a Policy Officer at grade P.3 – on the basis of a technical cooperation contract, thus avoiding the holding of a competition in which he

himself could have participated. He says that since, after his post was abolished, he performed the duties of communications officer, he could have been assigned to the post which Mr B. held unofficially, which was advertised in February 2009 with the title “Communication and Public Information Officer”. As Mr B. was appointed to this post, the complainant declares that DCOMM is “a prosperous department which recruits newcomers while refusing to reinstate [him]”, that the director of this department “did not wish to keep [him]” and that the reason given for the non-renewal of his contract was unlawful.

G. In its final observations the ILO explains that the post to which Mr B. was appointed after the competition announced in February 2009 was not that which he held unofficially according to the complainant, but another post financed from the regular budget. The Organization maintains that the reference to this competition is irrelevant in this case, because the post in question did not become vacant until the 2008-2009 biennium.

CONSIDERATIONS

1. The complainant joined the International Labour Office on 18 April 1997 after succeeding in a competition and was assigned to the Publications Bureau. He was first recruited on a one-year fixed-term contract and was then given several two-year contracts.

As the Publications Bureau was facing budget cuts, the complainant agreed to be transferred from 1 April to 31 December 2003 to IFP/SKILLS, then from 1 January 2004 to 31 December 2005 to DCOMM.

In 2005 the complainant became eligible for, but did not obtain, titularization. One of the ten professional category posts available in that titularization exercise was, however, reserved for the complainant pending the identification of a regular budget position.

The complainant was assigned to RELCONF for the period 1 January to 30 June 2006. He was informed by letter of 6 April 2006

that his post would be funded by deficit financing from 1 April to 30 June 2006.

On 26 June 2006 the Director of the Human Resources Development Department informed him that, since his position no longer existed in the Programme and Budget for 2006-2007, his contract would not be renewed.

2. On 30 August 2006 the complainant filed a grievance, challenging the decisions not to extend his contract and not to grant him a contract without limit of time. At the end of the internal appeal procedure he received a letter dated 19 May 2008, signed by the Executive Director of the Management and Administration Sector, in which he was notified that the Director-General had dismissed his grievance. That is the decision impugned before the Tribunal.

3. The complainant seeks the quashing of that decision, his retroactive reinstatement, the granting of a contract without limit of time, compensation for the injury suffered and an award of costs.

4. The Organization submits that the complaint is partly irreceivable. It contends that the pleas concerning the reorganisation of the Publications Bureau and the 2005 titularization exercise, respectively, are irreceivable because the complainant did not exhaust the internal means of redress at his disposal, as required by Article VII, paragraph 1, of the Statute of the Tribunal.

In his rejoinder the complainant explains that his claims concern only two matters, namely the non-renewal of his contract and the refusal to titularize him, and that he is not challenging the reorganisation as such.

5. The Tribunal will not allow the objection to the receivability of the pleas concerning the reorganisation since, as indicated above, it would appear that the complainant is challenging not this reorganisation but the decision not to renew his contract, and that the arguments regarding the said reorganisation are merely designed to underpin his submissions.

According to the Tribunal's case law, the receivability of a complaint depends on the claims it contains and not on the pleas (see, for example, Judgment 2571, under 5(a)).

As far as the refusal to titularize the complainant is concerned, the Organization contends that the irreceivability of this plea is due to the fact that the complainant has not exhausted internal means of redress, because his grievance was filed out of time. The complainant submits, however, that he never received any decision on this matter. He contends that he found out that his titularization had not been recommended only when his contract was not renewed in 2006 and that "[he] should not [therefore] be blamed for filing a grievance out of time in this respect".

The Tribunal observes that the Organization has furnished no evidence that the complainant knew, or had the possibility of finding out, that his titularization had been refused; consequently, it cannot object that his grievance was time-barred, since he filed it with the internal appeal bodies in accordance with the applicable provisions.

6. The complainant submits that the impugned decision is unlawful because it was taken without authority by the Executive Director of the Management and Administration Sector, who furnished no proof of a delegation of authority by the Director-General. He contends that it must be quashed in accordance with the Tribunal's case law, in particular Judgment 2558, and that it is consistent with the spirit of the Collective Agreement on Conflict Prevention and Resolution signed by the Office and the Staff Union on 24 February 2004 that "the Director-General and the Director-General's Office should make the final decision in the light of

the [Joint Advisory Appeals Board's] recommendation, and not an executive director who was already involved in various aspects of the internal procedure", this executive director being the supervisor of the Director of the Human Resources Development Department.

7. The Tribunal considers, as it already stated in Judgment 2837, under 4, that the ruling in Judgment 2558 is not pertinent when it is clear from the submissions that the impugned decision was in fact taken by the Director-General and that the Executive Director merely communicated it to the complainant. As the Executive Director does not require a specific delegation of authority to communicate a decision of the Director-General, the plea has no factual basis.

Furthermore, since the decision was not taken by the Executive Director, the argument that her decision on the complainant's grievance could not have been impartial is in any case of no avail.

8. The complainant challenges the decision not to renew his contract on the grounds that his position no longer existed under the Programme and Budget for 2006-2007. He takes the Organization to task for not honouring its obligation to adopt the requisite measures to keep his post, in accordance with its policy on employment security, and to have shown only moderate interest in finding him a new position at a time when finding him a new post or reinstatement were possible.

He asserts that the Organization preferred to recruit newcomers, sometimes without a competition, rather than "recognise [his] polyvalency" and assign him "to equivalent posts or to posts which he had already held satisfactorily".

9. The evidence on file shows that after the Publications Bureau was reorganised in response to budget cuts, the complainant unreservedly accepted his transfer first to IFP/SKILLS for the period 1 April to 31 December 2003, then to DCOMM for the period 1 January 2004 to 31 December 2005. He also accepted a short assignment in RELCONF. He did not file a grievance against either of

these transfers or against this assignment within the applicable time limit and in keeping with formal requirements.

The complainant could not therefore demand that a post which was no longer his should be kept for him, especially as his former duties in the Publications Bureau had either disappeared, because it had been decided to outsource much of the marketing of publications, or had been entrusted in part to another official.

The Tribunal adds that, since the complainant was not a titularized official at the material time, his fixed-term contract could end on the appointed date in accordance with Article 4.6 of the Staff Regulations without the Organization being under any obligation to find him a post matching his profile; all it had to do was to make efforts to identify a position for which he was qualified.

10. The complainant holds that the real reason for the decision not to renew his contract was not the abolition of his post due to a lack of funding in the budget for the 2006-2007 biennium. He asserts that, contrary to the Organization's contentions, the budget of DCOMM for the biennium in question increased.

The Organization submits that this budget was lower than that of the previous biennium in terms of funded posts and that it was reduced by an amount equivalent to the disappearance of one post for most of the biennium.

11. After examining the documents produced by the parties, and bearing in mind their respective explanations in their further submissions, the Tribunal cannot find any evidence casting doubt on the genuine nature of the reason for the decision not to renew the complainant's contract, which, moreover, is not tainted with any of the flaws which would warrant its quashing, as listed, for example, in Judgment 2724, under 4.

12. The complainant also takes the Organization to task for not titularizing him during the 2005 exercise, although he met all the requirements.

He submits that the opinion given by his supervisor to the Joint Negotiating Committee was tainted by an error of law in that it made her support for his titularization conditional on a guarantee that his post would be funded by the Bureau of Programming and Management until he reached retirement age. He considers that this requirement is “disproportionate and contrary” to Circular No. 452 (Rev.1), series 6, on the procedure for titularization. He adds that the Director of the Human Resources Development Department committed an error of fact in stating that his position no longer existed in the Programme and Budget for 2006-2007.

13. For the reasons stated above under 11, the Tribunal must reject the plea that the Director of the above-mentioned department committed an error of fact.

With regard to the error of law on which the complainant relies, it is not disputed that his supervisor wrote that she would be happy to approve a contract without limit of time, provided that the Bureau of Programming and Management guaranteed the funding of the complainant’s post until his retirement. This is not, however, one of the conditions stipulated in Circular No. 452 (Rev.1), series 6, setting forth the criteria which officials must satisfy in order to be considered by the committee responsible for recommending those who may be titularized to the Director-General. The Director therefore committed an error of law.

However, paragraph 8 of the circular makes it clear that it is in fact the above-mentioned committee which determines the list of officials to be considered for titularization on the basis of clearly defined criteria. The director of the department concerned merely gives an opinion on the capacity of officials under his/her authority to pursue a career in the Organization. Thus, while it is true that the complainant’s supervisor gave an opinion which went beyond that which was required of her, this opinion did not bind the Joint Negotiating Committee and in this case the Tribunal finds that it had no influence on the Committee’s deliberations.

14. It may be concluded from the above that, since none of the pleas is well founded, the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2009, Mr Seydou Ba, Vice-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 3 February 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet