Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

114th Session **Judgment No. 3175**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. Z. against the International Labour Organization (ILO) on 20 October 2010 and corrected on 22 November 2010, the ILO's reply of 23 February 2011, the complainant's rejoinder of 30 May and the Organization's surrejoinder dated 29 July 2011;

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 Georgian national born in 1968, is a former official of the International Labour Office, the ILO's secretariat, which he joined in 2001 at grade P.3. In September 2006 he was assigned to the Payment Authorisation Section in the Budget and Finance Branch, to perform duties at the same grade. At that point he was employed on a fixed-term technical cooperation contract which was extended several times.

On 31 July 2008 the Office published a vacancy notice for a grade P.3 post of Finance Officer in the above-mentioned section.

This post was financed from the Organization's regular budget. The complainant applied, was placed on the shortlist and underwent a technical evaluation interview. On 4 December 2008 he was informed that the competition had been declared "unsuccessful".

By a letter of 25 March 2009 the complainant was offered an extension of his contract from 1 April to 30 June which, it was explained, was the last extension which the Office could offer him. His contract would therefore end on 30 June 2009 without further notice.

The complainant was on certified sick leave from 22 June to 15 July 2009 as a result of an accident. On 29 June he asked the Human Resources Development Department for a contract extension long enough to cover his incapacity for work. As this request was rejected, on 1 September he filed a grievance with the above-mentioned department. This grievance was likewise rejected. On 11 December 2009 he referred the matter to the Joint Advisory Appeals Board. In its report of 1 June 2010 the Board considered that there was a "valid reason" for the non-renewal of the complainant's contract, i.e. "a lack of long-term resources", and that he had been notified of this in sufficiently clear terms by the letter of 25 March 2009. Furthermore, the Board held that, in light of Article 8.6(d) of the Staff Regulations of the International Labour Office and the Tribunal's case law, the Organization was under no obligation to extend his contract until the end of his sick leave. It therefore recommended that the Director-General should reject the grievance as unfounded. The complainant was informed by letter of 27 July 2010 that the Director-General had decided to adopt that recommendation. That is the impugned decision.

B. The complainant considers that there was no reason to employ him under a technical cooperation contract, because he was not assigned to a technical cooperation project. In his opinion, his duties in the Payment Authorisation Section were "regular duties" of the Office. He explains that he always preferred not to challenge the type of contract which he was given for fear of losing his job. He

adds that, after the competition to fill the post of Finance Officer had been declared "unsuccessful", an official of another international organisation was appointed to it, without a competition, although she did not possess the minimum qualifications required, as is evidenced by the fact that she was recruited at a grade lower than that stipulated in the vacancy notice published on 31 July 2008. He alleges that he performed all the specific and generic duties described in the vacancy notice and that he was in fact doing that job. He submits that his contract was not renewed in order to permit the appointment of the aforementioned official. In his view there is therefore no valid reason for the non-renewal of his contract.

Relying on the Tribunal's case law and on Article 3 of the Arrangement for the execution of the Agreement between the Swiss Federal Council and the ILO concerning the legal status of the ILO in Switzerland, where it has its headquarters, the complainant argues that the Office had a duty to extend his contract until the end of his sick leave.

He asks the Tribunal to set aside the impugned decision, to order redress for the injury suffered and to award him costs in the amount of 2,000 Swiss francs.

C. In its reply the ILO contends that the complainant's contract was not renewed on the grounds that the extra-budgetary resources financing his post had been exhausted by the end of June 2009. It also explains that the creation of the post of Finance Officer, which was financed from the ordinary budget, necessitated the holding of a competition. Consequently, the Office could not re-employ the complainant in the new post by simply extending his contract. It denies that the two posts in question were identical, emphasising that the duties pertaining to the post of Finance Officer were "much more varied" than those performed by the complainant.

The Organization submits that the Tribunal's case law does not establish any general principle to the effect that an international organisation is under a duty to extend an official's contract if it expires during a period of sick leave. It points out that Article 8.6(d)

of the Staff Regulations states that entitlement to sick leave terminates on the date of termination of an official's appointment. The complainant therefore had no right to have his contract extended to cover his period of incapacity. The Organization further states that he may not rely on Article 3 of the Arrangement for the execution of the Agreement between the Swiss Federal Council and the ILO because this article does not create any third party rights, as it forms part of an "international bilateral agreement". It explains, however, that it provided the complainant with the "equivalent social protection" required under the above-mentioned Article 3 by proposing that he remain a member of the Staff Health Insurance Fund for six months after separation.

The Organization requests the joinder of this complaint with the second complaint filed by the complainant on the grounds that they both raise largely the same issues of fact and contain at least two identical arguments.

D. In his rejoinder the complainant submits that the Organization improperly described his post as a "post in a technical cooperation project" in order that it might then "easily" justify the non-renewal of his contract. He maintains that his job was identical to that of the Finance Officer and considers that the appointment of an official to the latter post without a competition is a "disturbing and inadmissible" fact demonstrating the unlawful nature of his "replacement and [his] ejection" from the Office. He further contends that he is right to rely on Article 3 of the Arrangement insofar as, in his opinion, it relates to the "personal rights of the Organization's employees".

E. In its surrejoinder the Organization maintains its position.

CONSIDERATIONS

1. The complainant entered the service of the International Labour Office in 2001. At the material time, he had been assigned since September 2006 to the Payment Authorisation Section, where

he was performing grade P.3 duties under a fixed-term technical cooperation contract financed by extra-budgetary resources. This contract had been extended several times.

2. On 31 July 2008 a vacancy notice was published to advertise a post of Finance Officer, also at grade P.3, in the above-mentioned section. Having applied, the complainant was shortlisted for technical evaluation. On 4 December 2008 he was informed that the competition had been declared "unsuccessful", but he did not file a grievance against that decision. He learnt later that another person had been recruited to fill the post.

3. On 25 March 2009 the complainant was offered an extension of his contract for the period 1 April to 30 June 2009. This offer stated that it was the last extension which the Organization was able to offer him and that his contract would therefore end on 30 June without further notice.

4. Although there is no documentary evidence in the file to corroborate this fact, it is not disputed that the complainant injured his knee on 22 June 2009 and that he was therefore unfit for work from 22 June until 15 July. The complainant requested an extension of his contract to cover this period of incapacity, but his request was denied.

5. On 1 September the complainant filed a grievance with the Human Resources Development Department under the provisions of Article 13.2 of the Staff Regulations, in order to challenge the fact that his contract had been terminated during sick leave, which, according to him, was contrary to the applicable law. As this grievance was rejected on 1 December 2009, he referred the matter to the Joint Advisory Appeals Board. It should be noted that in the internal proceedings the complainant's grievance was also directed against the non-renewal of his contract.

6. In the report which it issued on 1 June 2010 the Board recommended that the Director-General should dismiss the grievance

as unfounded. He accepted this recommendation and the complainant was informed by letter of 27 July 2010 that his grievance had been dismissed.

7. The complainant impugns that decision and asks the Tribunal to set it aside and to order redress for the injury which he allegedly suffered.

8. The Organization requests the joinder of this complaint filed on 20 October 2010 with the second complaint which the complainant lodged on the same date. It contends that both raise largely the same issues of fact and that, while "logically a distinction c[ould] be drawn between them, this is plainly not the approach chosen by the complainant", who puts forward at least two arguments common to both complaints. However, although both complaints stem from a single decision taken on 27 July 2010, the Tribunal will not accede to the Organization's request, as precedent has it that complaints may be joined only if they raise the same issues of fact and of law (see Judgments 1541, under 3, and 3064, under 6). In the instant case, the two complaints concern different facts, since the first is directed against the non-renewal of the complainant's contract and the refusal to grant him an extension of that contract beyond the date of its expiry to cover his sick leave, while the second is directed against the appointment of another person after the "unsuccessful" competition in which the complainant had taken part. The complaints also raise different issues of law.

9. As stated above, the complainant was serving under a fixed-term technical cooperation contract when he was offered an extension of his appointment for the period 1 April to 30 June 2009, which specified that it would be the last extension and that his contract would therefore end on 30 June without further notice. As the complainant accepted the offer without expressing any reservations or filing a grievance, it was understood that his employment relationship with the Organization would cease on 30 June 2009. Thus, the question of a further extension – and not a renewal – of his contract

did not arise until after his temporary incapacity for work, which was certified on 22 June 2009. The complainant's grievance therefore concerned the refusal to grant him an extension of contract to cover the period of his temporary incapacity for work. This grievance was later extended, as stated above, during the internal proceedings, to the issue of the non-renewal of the complainant's contract.

10. The complainant submits that there was no valid reason for this non-renewal.

11. The Tribunal notes that the complainant did not challenge the decision by which his contract was extended no further than 30 June 2009; it was only in the wake of his request for an extension beyond its expiry to cover his sick leave that he submitted to the Joint Advisory Appeals Board that the non-renewal of his contract was unlawful and contrary to the Staff Regulations and to his conditions of employment. In this regard, he has therefore failed to exhaust all internal remedies as required by Article VII of the Statute of the Tribunal. The argument that since September 2006 he had never challenged his employment on the basis of a technical cooperation contract because he was afraid of losing his job is in any case of no avail in respect of this decision, since it explicitly informed him that his appointment would end on that date.

12. The complainant taxes the ILO with having refused to extend his contract until the end of his sick leave on 15 July 2009. He submits that "the extension of a contract for a period of time equivalent to the length of sick leave is supported by the case law" – in this connection he cites several of the Tribunal's judgments – and by the Arrangement for the execution of the Agreement between the Swiss Federal Council and the ILO concerning the legal status of the ILO in Switzerland.

13. The Tribunal notes, however, that although in some of the judgments cited by the complainant an official's appointment had been extended because that person's contract had ended during sick leave, the circumstances of the instant case are different to those in the

cases concerned by those judgments, because in the Office there is no legal provision or administrative practice permitting the extension of a contract until the end of sick leave.

14. Moreover, as the Organization points out, the Tribunal has clarified its position regarding the extension of a contract to cover sick leave. In Judgments 1494 (under 6 and 7) and 2098 (under 8) it made it plain that the precedent set in Judgments 607 and 938, on which the complainant relies, must not be applied out of context; obviously, the Tribunal did not establish a rule whereby, whatever the circumstances, an official who falls ill towards the end of his or her appointment is entitled to have it extended beyond the date of expiry and to receive a salary for the same term. It is equally plain that the principle set forth in Judgment 938, under 12, that "a staff member cannot be separated while on sick leave" must be seen in context; it cannot be extended to every case in which an appointment ends.

15. The Tribunal considers that, in the circumstances of the case and in light of the foregoing considerations, it was lawful for the complainant's contract to end on its date of expiry.

16. The Tribunal notes, with regard to the complainant's argument based on the social protection to be afforded to officials under Article 3 of the aforementioned Arrangement, that the Organization submits, without being contradicted, that it provided the complainant with the social protection required by that article by proposing that he remain a member of the Staff Health Insurance Fund for six months after separation. The argument is therefore unfounded.

17. Since none of the complainant's pleas succeeds, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Dolores M. Hansen
Patrick Frydman
Catherine Comtet