

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

105th Session

Judgment No. 2758

The Administrative Tribunal,

Considering the complaint filed by Mr L. N. against the International Labour Organization (ILO) on 10 April 2007 and corrected on 5 May, the Organization's reply of 27 August, the complainant's rejoinder of 30 September and the ILO's surrejoinder of 28 November 2007;

Considering Article II, paragraph 1, 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. Article 11.16 of the Staff Regulations of the International Labour Office, the Organization's secretariat, deals with agreed termination of an appointment. It provides that:

"The Director-General may terminate the appointment of an official if such action would be in the interest of the efficiency of the work of the Office, provided that the official concerned consents to the action. The Director-General may pay to an established official terminated under this article an indemnity not more than 50 per cent higher than that payable under article 11.6 (Indemnity upon reduction of staff), and to a fixed-term official so terminated, an indemnity not more than 50 per cent higher than that payable under paragraph 3 of article 11.4 (Fixed-term appointments)."

Circular No. 619 (Rev.1), series 6, of 10 December 2004, states in paragraph 12, that:

"Under certain conditions of eligibility, an official [whose appointment has been terminated by mutual agreement] may request to continue affiliation to SHIF and/or the United Nations Joint Staff Pension Fund for a duration corresponding to the number of months of indemnity [payable under Article 11.16 of the Staff Regulations]."

The complainant, a Burundian national born on 27 September 1947, joined the Office on 15 October 1981. He held the post of Director of the ILO Office in Lusaka (Zambia) as from 1998.

On 17 February 2005 the complainant sent a memorandum to the Regional Director for Africa in which he applied for the agreed termination of his appointment with effect from 1 October 2005 on the basis of Circular No. 619 (Rev.1), series 6, and requested his continued affiliation to the United Nations Joint Staff Pension Fund (UNJSPF) and to the Staff Health Insurance Fund (SHIF) until 30 September 2006.

By a letter of 7 September 2005 the Chief of the Human Resources Operations and Development Branch notified the complainant of the conditions on which the Office was prepared to terminate his appointment by mutual agreement on 30 September 2005. He stated that under Article 11.16 of the Staff Regulations the complainant would receive an indemnity equivalent to 12 months of the remuneration specified in Article 3.1(d) of the Staff Regulations. He took note of the complainant's wish to continue to contribute to SHIF and informed him that he would be contacted again in order to determine the arrangements for maintaining his affiliation to the UNJSPF. On 8 September the complainant signed and returned a copy of this letter, thereby confirming his agreement to the conditions for terminating his appointment.

By a letter of 30 September the above-mentioned Branch informed the complainant that he would be placed on special leave without salary from 2 October 2005 to 30 September 2006 in order to enable him to remain affiliated to SHIF and to the UNJSPF by paying his own contributions and those of the Organization.

In an e-mail of 6 October 2005 the secretariat of SHIF reminded the complainant that, according to the Regulations of SHIF, in order to remain affiliated, officials must submit an application to that end before cessation of service and it asked him to “say by return” if he wished to maintain his affiliation; if he did not reply, his affiliation would cease with effect from 30 September 2005, the date on which his contract had ended. The complainant replied to this e-mail on 11 October, pointing out that he had already confirmed that he wished to continue his affiliation and asking how much his contributions to SHIF would be, if the amount had changed.

By an e-mail of 7 October the secretariat of the ILO Staff Pension Committee informed the complainant that during his special leave without salary he would have to pay a total amount of 14,710.11 United States dollars as his personal contribution to the UNJSPF and 29,420.22 dollars as that of the Organization. By a fax dated 19 October 2005 the complainant informed the secretariat that, on the previous day, he had paid the sum of 14,710.11 dollars in order that the period in which he was on special leave without salary would be included in his period of affiliation. In a letter of 24 October the secretary of the above-mentioned committee acknowledged receipt of the fax and drew the complainant’s attention to the terms of the letter of 30 September, which explained that his special leave without salary would enable him to remain affiliated to the UNJSPF by paying his own contributions and those of the Organization. She added that he still had to pay the outstanding balance of 29,420.22 dollars.

On 27 October 2005 the complainant sent an e-mail to the Director of the Human Resources Development Department to enquire why the Organization could not pay its contributions towards his continued affiliation to SHIF and the UNJSPF. The Director of this department replied on 10 November 2005 that the letter of 7 September setting out the conditions for the agreed termination of his appointment, which he had accepted, had said nothing about the Office agreeing to meet some of the costs of his affiliation to SHIF or of his contributions to the UNJSPF.

On 10 February 2006 the complainant filed a grievance with the Director of the above-mentioned department under Article 13.2.1 of the Staff Regulations. Having received no reply, on 30 May he filed a grievance with the Joint Advisory Appeals Board. In its report of 6 December 2006 the Board recommended that the Director-General should dismiss the grievance. On 8 January 2007 the Executive Director of the Management and Administration Sector notified the complainant that the Director-General had decided to dismiss his grievance as unfounded. That is the impugned decision.

B. The complainant submits that owing to “two serious wilful and deliberate omissions on the part of the Office” in connection with the application of Article 11.16 of the Staff Regulations, of Circular No. 619 (Rev.1), series 6, and of Article 25(b)(i)* of the Regulations of the UNJSPF, his right to health insurance is currently suspended and may in due course be forfeited. He contends that this serious double omission on the part of the Office constitutes deceit.

He submits two main pleas. Firstly, he points out that, before he signed the letter of 7 September 2005, the Office omitted to inform him clearly about the terms and conditions for terminating his appointment. In his opinion, Article 11.16 of the Staff Regulations and the circular in question, especially paragraph 12 thereof, establish the principle and the presumption of eligibility for continued affiliation to SHIF and the UNJSPF on the same conditions as those obtaining before agreed termination, provided that the official so requests. In this connection he argues that the letter terminating his appointment did not reject his request for continued affiliation to the two funds on the same conditions as had hitherto applied. He alleges that, in that letter, the Office, for the sole purpose of obtaining his signature, deliberately omitted to specify that he would have to pay the Organization’s contributions to the two funds in addition to his own and to explain the meaning of the “ambiguous” phrase “that you wish to continue to contribute”. He submits that the Office unilaterally added the conditions in question without even consulting him, that it concealed them from him and that it advised him of them only after he had signed the said letter and at the end of his contract.

Secondly, the complainant contends that the Office breached Article 11.16 of the Staff Regulations, paragraph 8 of the above-mentioned circular and the terms of the letter terminating his appointment, in that it omitted to consult him and to obtain his written consent to the principle and conditions of the agreed termination. He emphasises that, although the Organization acknowledges that Article 25(b)(i) of the Regulations of the UNJSPF provides for three ways of paying contributions, it stated in its submissions to the Joint Advisory Appeals Board that “it is not at all the Office’s habitual practice to undertake to pay an official’s contributions to either SHIF or the UNJSPF after the termination of an official’s contract during special leave without salary”. He takes the Office to task for not having informed him of this before he signed the letter terminating his appointment and for not having warned him of the

risk that he might lose his right to retain his affiliation to both funds. In his opinion, “even habitual practice cannot depart from the application of the Staff Regulations and circulars in force”. He submits that he was entitled to be contacted again to determine the terms for implementing the letter of termination since, in his view, the Office’s specific promise to that effect contained in this letter had acquired contractual status.

The complainant seeks to have his affiliation to SHIF restored and requests compensation for the injury resulting from the suspension of this affiliation and for any injury which might ensue from the possible loss of this affiliation. He also requests the reimbursement of the contributions to the UNJSPF which he paid provisionally in order to cover his contribution and that of the Organization, compensation for the moral and material injury caused by the “long and expensive” proceedings which he had to initiate before the Tribunal, and costs.

C. The ILO submits that the wording of paragraph 12 of Circular No. 619 (Rev.1), series 6, is unambiguous and provides no basis for the “presumption” that, if an official whose appointment is terminated by mutual agreement requests continued affiliation to SHIF and to the UNJSPF, contributions must be shared in the same way as they were before separation from service. The “conditions of eligibility” mentioned in the paragraph in question do not refer to the payment of contributions, but to the conditions on which an official may continue his or her affiliation to the two funds for a given period.

The Organization rejects the plea that it omitted to inform the complainant fully about the terms and conditions for implementing the agreement to terminate his appointment and draws attention to the fact that this agreement definitively settled all the conditions on which the complainant was leaving the Office’s service “without reservations or restrictions by either party”. It emphasises that the complainant did not contact either the secretariat of SHIF or the ILO Staff Pension Committee to elucidate what he calls a “presumption” during the months following his application, or indeed before signing the letter of 7 September 2005.

The Organization admits that there was a delay in dispatching the letter setting out the arrangements for paying contributions, which was not sent until 30 September 2005, i.e. the last day of the complainant’s contract. It does not, however, consider that this delay constituted deceit, or that it had any adverse consequences for the complainant.

Citing the articles of the Regulations of the UNJSPF concerning contributory service and Article 7.7(b)* of the Staff Regulations, the Organization maintains that it is not the Office’s practice to pay in full or in part contributions to the UNJSPF during periods of special leave without salary.

D. In his rejoinder the complainant enlarges on his pleas and adds that the Organization’s deceitful manoeuvres consisted principally in “deceit by omission”.

E. The ILO reiterates its position in its surrejoinder. It explains that the terms it used in the third paragraph of the letter of 7 September 2005, where it stated that it would contact the complainant to determine the arrangements for maintaining his affiliation to the UNJSPF, show that it did not intend to enter into consultations or negotiations.

CONSIDERATIONS

1. The complainant, who had applied for the agreed termination of his appointment, received a letter of 7 September 2005 from the Chief of the Human Resources Operations and Development Branch, which set out the conditions on which the Office was prepared to terminate his appointment with effect from 30 September 2005. This letter stated that the complainant was entitled to an indemnity equivalent to 12 months of the salary specified in Article 3.1(d) of the Staff Regulations. The third paragraph of this letter was worded as follows:

“We have taken note of the fact that you wish to continue to contribute to the Staff Health Insurance Fund until 30 September 2006. As far as your wish to maintain your affiliation to the United Nations Joint Staff Pension Fund is concerned, we will contact you again in order to determine the arrangements for this.”

The complainant was asked to confirm his agreement by signing and returning a copy of the above-mentioned letter, which definitively settled all the conditions on which he was leaving the Office’s service without reservations or restrictions by either party.

The complainant signed and returned a copy of the letter on 8 September, the day on which he received it. His

appointment ended on 30 September and he was granted special leave without salary from 2 October 2005 to 30 September 2006 in order to enable him to remain affiliated to SHIF and the UNJSPF by paying both his share of the contributions and the Organization's share.

In an e-mail of 27 October the complainant asked why the Organization could not pay its contributions in order that he might maintain his affiliation to SHIF and the UNJSPF. He considered that the terms of the letter of 30 September 2005 were inconsistent with what had been agreed and with the provisions of the applicable texts. On 10 November 2005 the Director of the Human Resources Development Department replied that he "ha[d] been given special leave without salary for a period equivalent to the number of months of net basic salary specified in the termination agreement (12 months), which enable[d] [him] to remain affiliated to SHIF and the UNJSPF". She added that "[T]he letter establishing the conditions for the agreed termination of [his] contract, which [he] ha[d] accepted, sa[id] nothing about the Office agreeing to meet some of the costs of [his] affiliation to SHIF for the period mentioned, or of contributions to the UNJSPF".

The grievance which the complainant filed against the Organization's refusal to pay its share of the contributions to the two funds was dismissed on 8 January 2007. That is the decision which the complainant impugns before the Tribunal.

The omission to provide information concerning the terms on which his appointment was terminated

2. Article 11.16 of the Staff Regulations and paragraph 12 of Circular No. 619 (Rev.1), series 6, are quoted above under A.

Article 22(b) of the Regulations of the UNJSPF states that "[C]ontributory service may accrue in respect of leave without pay if contributions are received by the Fund in accordance with article 25(b)", and Article 25(b)(i) of these Regulations provides that "[c]ontributions [...] in respect of a period of leave without pay [...] shall be payable concurrently with such leave, by the participant in full or by the organization in full, or in part by the participant and in part by the organization".

3. The complainant submits that the Organization deliberately omitted to inform him clearly and in due time, either before he signed the letter of 7 September 2005 or at least before the end of his contract, of the terms of the agreed termination of his appointment, to which reference is made in the third paragraph of the said letter.

He stresses that this letter contains both parties' acceptance "without reservations or restrictions" of the principle that he was eligible for continued affiliation to SHIF and the UNJSPF, implicitly on the same conditions as those obtaining before the termination of his appointment. He adds that the presumption of this eligibility is supported by Articles 22(b) and 25(b)(i) of the Regulations of the UNJSPF, which provide for the possibility of payment in full or in part of contributions to the Fund by the Organization. In addition, he argues that this presumption may be inferred from Article 11.16 of the Staff Regulations, from paragraph 12 of Circular No. 619 (Rev.1), series 6, from his application of 17 February 2005 to have his appointment terminated, which referred explicitly to the said paragraph, and from the absence of a reply to this application before signature of the letter and the end of his contract. It also stems implicitly from the intentional ambiguity of the Organization's statement in the letter of 7 September 2005 that "[w]e have taken note of the fact that you wish to continue to contribute to [SHIF]", which misrepresented his request to "continue [his] affiliation to SHIF and [the] UNJSPF", and from the fact it was not until after the signature of the agreement and the end of his contract that the Organization disclosed the mistaken interpretation of the phrases "continue to contribute to [SHIF]" and "your wish to maintain your affiliation to the [UNJSPF]", as meaning continued affiliation with the payment by him of both his share and the Organization's share of the contributions to the two funds.

4. The Organization contends that the agreement contained in the letter of 7 September 2005 definitively settled all the conditions on which the complainant was leaving the Office's service, "without reservations or restrictions by either party", and it considers that it ill becomes the complainant to submit that it omitted to inform him fully of the conditions of the agreed termination of his appointment; it asserts that the complainant did not contact either the secretariat of SHIF or that of the ILO Staff Pension Committee to elucidate what he calls a "presumption of eligibility" either in the months following his application for agreed termination or before signing the letter of 7 September 2005.

5. The Tribunal, like the Joint Advisory Appeals Board, observes that the complainant, in his application for the agreed termination of his appointment, had expressed the wish to “continue [his] affiliation” to SHIF and the UNJSPF until 30 September 2006, should termination take effect as of 1 October 2005, in order to accrue 25 years of contributory service to the UNJSPF on retirement, but that he had not mentioned payment of contributions by the Organization. Similarly, in the termination agreement signed by both parties it was noted that the complainant wished to “continue to contribute” to SHIF until 30 September 2006 and, as far as his wish to maintain his affiliation to the UNJSPF was concerned, it was agreed that the Organization would “contact [him] again” to determine the relevant arrangements, again without any mention of a possible contribution by the Organization.

Having signed the agreement “without reservations or restrictions”, the complainant was bound by its terms. The only issue which therefore arises is whether the provisions applicable to the agreed termination of an appointment, namely Article 11.16 of the Staff Regulations and Circular No. 619 (Rev.1), series 6, have been breached.

6. The evidence on file and, in particular, the agreement terminating the appointment, show that no pertinent provision of the applicable texts has been breached.

As the Joint Advisory Appeals Board rightly noted after analysing these texts, “the indemnity ‘equivalent to 12 months of the remuneration specified in Article 3.1(d) of the Staff Regulations’ mentioned in the termination agreement signed by both parties is the maximum payable by the Office”.

Although the principle of continued affiliation to the two funds was accepted in the agreement, the latter does not contain any stipulation regarding the payment of the Organization’s and the official’s contributions to SHIF and the UNJSPF which might be construed as a departure from the rules established in the applicable regulations or from the Organization’s practice in the matter. Moreover, Article 7.7 of the Staff Regulations, which governs special leave, states that during special leave without salary of one month or more “[N]o contributions will be paid by the Office to the official’s pension fund”, and the above-mentioned Article 25(b)(i) of the Regulations of the UNJSPF provides that contributions “shall be payable concurrently with [the] leave, by the participant in full or by the organization in full, or in part by the participant and in part by the organization”. In addition, Article 3.6 of the Regulations of SHIF specifies that contributions of officials on leave without salary are to be paid by the insured person at the rate of 5.6 per cent of his or her last remuneration and that “[t]his provision may be varied by the decision of the ILO [...], in particular cases or categories of cases, to pay the organization’s contribution in respect of remuneration not paid”. It must be concluded from a combined reading of the above-mentioned texts that the Organization could only leave all contributions to be borne by the complainant. The agreement terminating the appointment contains no indication that the Organization contemplated the payment in full or in part of contributions to the UNJSPF, or an amendment of the applicable provisions in order to be able to pay contributions to SHIF in respect of unpaid remuneration.

The complainant could not therefore rely on the provisions of the agreement in order to demand that the Organization pay contributions to both funds. That is why he has placed emphasis on the fact that the Organization failed in its duty to inform him fully of the conditions for implementing the termination agreement.

The Tribunal considers that this plea cannot be entertained. In view of the circumstances of the case, the conditions on which the appointment was terminated and the events preceding the signature of the termination agreement, the complainant should have obtained as much information as possible, he should have consulted all the relevant texts and he should have scrutinised the stipulations of the agreement to ascertain their scope before signing a document by which he was bound “without reservations or restrictions”.

7. The complainant submits that the Organization used deceit to obtain his signature of the agreement terminating his appointment by mutual consent. He considers that there has been “deceit by omission” insofar as the Organization concealed information which would have helped to clarify the agreement and that it disclosed this information only after the signature of the agreement and at the end of his contract.

The Tribunal draws attention to the fact that deceit consists in the manoeuvres of one party to mislead the other and obtain his or her consent. Deceit cannot be presumed; it must be proved, if necessary by means of strong, precise and concurring presumptions.

In this case the Tribunal finds no evidence of deceit. Before signing the agreement, the complainant had the possibility, as pointed out above, of obtaining all the requisite information and he, like all ILO officials, was

deemed to be in possession of the pertinent texts.

Non-compliance with the terms of the agreement to terminate his appointment

8. The complainant takes the Organization to task for deliberately omitting to consult him and obtain his consent, in breach of Article 11.16 of the Staff Regulations, paragraph 8 of Circular No. 619 (Rev.1), series 6, and the termination agreement which stated that the Office would “contact [him] again to determine the arrangements” for his continued affiliation to the UNJSPF, which are governed by Article 25(b)(i) of the Fund’s Regulations.

As stated above, the Tribunal has not found any breach of Article 11.16 of the Staff Regulations. By signing the copy of the letter of 7 September 2005, the complainant gave the consent required by this Article before the termination of his appointment by the Director-General on the conditions established by this Article. The requirement under paragraph 8 of the above-mentioned circular that the official must give his or her written consent has been satisfied, since the complainant signed the said copy.

9. It remains to be determined whether the Organization complied with the terms of the agreement, in particular the third paragraph of the above-mentioned letter which states: “[a]s far as your wish to maintain your affiliation to the United Nations Joint Staff Pension Fund is concerned, we will contact you again in order to determine the arrangements for this”.

The Organization informed the complainant by a letter of 30 September 2005, in other words on the last day of his contract, that he would be granted special leave without salary from 2 October 2005 to 30 September 2006 in order to enable him to remain affiliated to SHIF and the UNJSPF by paying his share of the contributions and the Organization’s share.

Although it apologises to the complainant for the delay in sending this letter, the Organization submits that this delay could not have had any adverse consequences for him.

10. The Tribunal is likewise of the opinion that this delay has had no legal consequences. However, in view of the circumstances of the case, the Organization ought to have acted more promptly in contacting the complainant again after 8 September. By leaving him uncertain as to the arrangements mentioned in the letter of 7 September until the very last day of his contract, the Organization neglected its duty of care towards the complainant. It thereby caused him moral injury warranting an award of compensation, which the Tribunal sets *ex aequo et bono* at 2,000 United States dollars.

11. Since he partially succeeds, the complainant is entitled to costs, which shall be set at 1,000 dollars.

DECISION

For the above reasons,

1. The ILO shall pay the complainant 2,000 United States dollars in compensation for the moral injury suffered.
2. It shall also pay him costs in the amount of 1,000 dollars.
3. All other claims are 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

* Article 25(b)(i) of the Regulations of the UNJSPF is worded as follows: Contributions [...] in respect of a period of leave without pay shall be at a percentage rate of the pensionable remuneration of the participant equal to the applicable rates specified in (a) above as payable by the participant and by the employing member organization, combined. Such contributions shall be payable concurrently with such leave, by the participant in full or by the organization in full, or in part by the participant and in part by the organization.”

* Article 7.7(b) of the Staff Regulations provides that, during periods of special leave without salary of one month or more, “[n]o contributions will be paid by the Office to the official’s pension fund”.