

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**Z. (No. 2)**

**v.**

**ILO**

**129th Session**

**Judgment No. 4254**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. Z. against the International Labour Organization (ILO) on 31 August 2018 and corrected on 4 November, the ILO's reply of 12 December 2018, the complainant's rejoinder of 11 March 2019 and the ILO's surrejoinder of 20 March 2019;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision not to extend his appointment beyond the statutory retirement age.

The complainant joined the International Labour Office (hereinafter "the Office"), the ILO's secretariat, on 1 July 1996. Before reaching the statutory retirement age (62 years in his case) in January 2016, the complainant submitted a request on 9 October 2015 to extend his appointment up to the age of 65 years. This request was rejected in a minute of 30 October 2015 in which the Human Resources Development Department (HRD) indicated that the reasons given by the complainant were not sufficient to warrant an extension in accordance with the minute of the Office of the Director-General (CABINET) of 8 May 2013, entitled "Policy on the extension of employment contracts for

officials beyond the age of normal retirement”. The complainant retired on 31 January 2016.

On 29 April 2016 the complainant filed a grievance with HRD contesting the decision of 30 October 2015. He contended, *inter alia*, that the reasons on which the decision was based were inadequate, because HRD had referred to a CABINET minute which had not been disclosed to him and which had not been published, and he asked to be reinstated or, failing that, to be paid the equivalent of the salary and allowances that he would have received up to the age of 65 years. By a letter of 2 August 2016 the Director of HRD dismissed the complainant’s grievance on the grounds that the non-extension of his appointment was not “clearly contrary” to the Organization’s interests and that there was no justification for retaining him on humanitarian grounds.

On 26 September 2016 the complainant lodged a grievance with the Joint Advisory Appeals Board (JAAB). In its report of 14 May 2018 the JAAB concluded that the grievance was unfounded, except with regard to the argument based on the failure to provide adequate reasons and to publish the rules. It recommended to the Director-General that the complainant be paid the sum of 2,500 Swiss francs in compensation for moral injury as a result of the procedures flaws noted, including on account of the excessive delay in the examination of the case by the JAAB.

By a letter of 31 May 2018 the complainant was informed that the Director-General had accepted the JAAB’s conclusion that the grievance was unfounded and the recommendation to award him 2,500 Swiss francs in compensation for moral injury. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of the Director-General rejecting his request for an extension of his appointment. He further asks that such an extension be granted retroactively from the date on which he retired and up to the age of 65 years, or that he be awarded damages equivalent to the salary and allowances that he would have earned if he had obtained an extension of his appointment up to the age of 65 years. He also claims moral damages in the amount of 50,000 Swiss francs, as well as 80,000 Swiss francs in damages for the delay in the examination of his case by the

JAAB. Lastly, the complainant requests an award of 20,000 Swiss francs in costs.

The ILO asks the Tribunal to dismiss the complaint in its entirety.

### CONSIDERATIONS

1. The complaint is brought against the decision of 31 May 2018 whereby the Director-General confirmed the decision to reject the complainant's request for an extension of his appointment beyond the statutory retirement age – 62 years in his case – which he had submitted with a view to continuing to work at the Office. That request was based on the provisions of Article 11.3 of the Staff Regulations, which, at the material time, allowed the Director-General to grant such an extension, if he considered it appropriate, “[i]n special cases”.

2. The complainant requests an oral hearing on some of the issues raised in his complaint. However, the Tribunal considers that it is sufficiently well informed about the case by the evidence in the file and does not therefore deem it necessary to hold such a hearing.

3. As the Tribunal has consistently held, a decision to retain an official beyond the normal retirement age is an exceptional measure over which the executive head of an organisation exercises wide discretion. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 1143, consideration 3, 2845, consideration 5, 3285, consideration 10, 3765, consideration 2, or 3884, consideration 2).

4. Among the various pleas entered by the complainant in support of his complaint, there is one plea which falls within the limited scope of the Tribunal's power of review thus defined, since it relates to

a mistake of law, and which is decisive for the outcome of this dispute. The plea in question is that based on a violation of the principle that a rule is applicable to an official only from the date on which it is brought to her or his notice. This principle is well established in the Tribunal's case law (see, for example, Judgments 963, consideration 5, 2575, consideration 6, 3835, consideration 2, and 3884, consideration 13).

5. In the present case, the decision of 30 October 2015 rejecting the complainant's request to extend his contract beyond the normal retirement age was based on a minute of the Director-General of 8 May 2013. That minute, adopted pursuant to the abovementioned Article 11.3 of the Staff Regulations, read as follows:

“[T]he Director-General has decided to consider favourably requests for extensions of contracts beyond the mandatory retirement age in two exceptional cases only: where not extending an official's contract would result in hardship (for example, when the extension would allow him or her to meet the eligibility criteria for health insurance cover or to complete the minimum period of service necessary to receive a pension) or where not extending his or her contract would be clearly contrary to the Organization's interests (in order to avoid leaving a key position vacant, in particular a managerial position, provided that the vacancy is due to unforeseen circumstances and not to a lack of appropriate succession planning).”

6. The JAAB noted that the abovementioned minute was circulated only to directors and heads of department and the ILO does not dispute that it was not made available to all staff. The JAAB was therefore right to consider that the Office had failed in its obligation to publish the rules and administrative measures that apply to officials and that, on that point, the complainant's grievance was well founded.

7. The ILO submits that this error was corrected at a meeting on 27 November 2015 and later in the decision of 2 August 2016 dismissing the complainant's grievance. In this regard, the Tribunal notes that the complainant denies having received the minute in question at the meeting of 27 November 2015 and that, while the decision of 2 August 2016 paraphrases the said minute, the minute itself does not appear to have been attached thereto. In any event, the rules applied must be communicated to those concerned before the initial

decision is taken. It follows that the plea is well founded. The Director-General's decision of 31 May 2018 to dismiss the complainant's grievance must therefore be set aside, except as regards the award of 2,500 Swiss francs for moral damages, without there being any need to examine the complainant's other pleas. The same applies to the initial decision of 30 October 2015, confirmed on 2 August 2016.

8. The complainant asks the Tribunal to order the "extension of [his] contract retroactively from the date on which [he] left the International Labour Office [...] on 31 January 2016 up to the age of 65 years with the same status that [he] had before leaving the Office". However, that period having expired by the date of this judgment, the Tribunal cannot, in any event, order that the complainant be reinstated as he requests.

9. Failing that, the complainant seeks "compensation equivalent to the salary and allowances that [he] would have earned if [he] had continued his duties at the Office up to the age of 65 years including [his] children's education grants and participation in the Pension Fund".

Although, as stated above, the complainant's request for an extension of his appointment was rejected on a ground tainted with an error of law, it cannot be assumed, in view of the Director-General's broad discretion in applying Article 11.3 of the Staff Regulations, that the request would have been granted had it been lawfully examined, that is to say if the minute of 8 May 2013 had been provided to the complainant before the decision was taken.

Indeed, the matter is quite the contrary. The complainant did not meet either of the two criteria established by the abovementioned minute. On the one hand, since the complainant was entitled to a retirement pension relating to 17 years of service, of which 15 were at grade P-5, his situation cannot be described as one of "hardship". On the other hand, the Organization considered that the non-extension of his contract was not clearly contrary to its interests. In this respect, the Tribunal can but recall that what is in the interest of an organisation may be decided at the discretion of its executive head

(see Judgments 2105, consideration 17, and 4084, consideration 13). In the present case, the Director-General did not exceed the limits of this authority.

Even if the abovementioned minute is ignored, in view of the fact that it could not be relied on in this case, the complainant stood no chance of obtaining an extension, because his was not a special case within the meaning of Article 11.3 of the Staff Regulations. In his request for an extension of his appointment, he put forward two arguments: firstly, financial difficulties due to the amount of his pension and, secondly, the fact that in 2009 the Organization had disclosed some of his confidential emails condemning practices current in the countries of the Persian Gulf, which he alleged had an adverse impact on his employment prospects in those countries after his service for the Organization had ended.

With regard to the complainant's financial situation, it cannot, for the reasons stated above, be considered as a special case. As to the disclosure of some confidential emails, the Organization considered that this should not be taken into account, since the complainant's claim in this respect was time-barred. The Organization cannot be faulted for not taking into consideration, in the context of a request for extension of a contract, an event that occurred six years previously, in respect of which no timely appeal was made and which, with regard to the prospect of employment in Persian Gulf countries, is founded solely on the complainant's assertions, unsupported by any evidence.

It follows that, in this case, the flaw tainting the impugned decision did not result in the complainant being deprived of an opportunity to have his appointment extended, the loss of which would warrant an award of compensation for the material injury suffered as a result. The complainant's claim in this regard must therefore be rejected.

10. The complainant seeks damages in the amount of 50,000 Swiss francs for the moral injury suffered because of the unlawfulness of the impugned decision, and an award of 80,000 Swiss francs for the injury suffered because of the delay in the examination of his grievance by the JAAB.

In the impugned decision, the Director-General accepted the JAAB's recommendation to award damages in the amount of 2,500 Swiss francs for moral injury "suffered as a result of the procedural flaws observed, including the excessive delay in the proceedings before the JAAB".

The Tribunal considers that the amount of 2,500 Swiss francs awarded to the complainant constitutes fair redress for the moral injury suffered. There is therefore no reason to grant the complainant's requests for the award of larger amounts.

11. Since the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 750 Swiss francs.

#### DECISION

For the above reasons,

1. The decision of the Director-General of 31 May 2018 is set aside, except as regards the award of 2,500 Swiss francs for moral damages. The decisions of 30 October 2015 and 2 August 2016 are also set aside.
2. The ILO shall pay the complainant 750 Swiss francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2019, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

*(Signed)*

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ