

C. M.

v.

ILO

131st Session

Judgment No. 4363

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. C. M. against the International Labour Organization (ILO) on 5 August 2019, the ILO's reply of 30 August, corrected on 11 September, the complainant's rejoinder of 19 November, corrected on 17 December 2019, and the ILO's surrejoinder of 10 February 2020, corrected on 14 February 2020;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant, who states that he was the victim of retaliation, claims redress for the injury he considers he has suffered.

On 1 December 2016 the complainant was appointed to the position of Senior Expert on Labour Inspection at grade P.5 on a one-year technical cooperation contract due to end on 30 November 2017. The complainant was assigned to the ILO Country Office for Bangladesh (CO-Dhaka) to work on a ready-made garment (RMG) project. In March 2017 the complainant joined a team to conduct an audit aimed at controlling how the employers' organisations were reporting and planning for the third phase of the RMG project.

By a letter of 23 March 2017 addressed to the Director of CO-Dhaka, the Chief Executive Officer of one of the employers' organisations expressed his "deepest concern regarding [the complainant's]

unprofessional behaviour” during the audit and requested the ILO to take action accordingly. On 30 March 2017 the complainant was asked to provide feedback on these allegations.

In an e-mail of 5 April the RMG project staff, including the complainant, received the final version of documents that had been submitted for approval to the donors of the RMG project. These documents included a detailed budget plan showing, inter alia, that the complainant’s position would no longer be funded as of 2018.

By an e-mail of 6 May the complainant provided his feedback with regard to the employer organisation’s allegations. Referring to the findings of the audit that he had shared with the RMG Project Manager shortly after the audit took place, he contended that the allegations had been formulated due to some irregularities that he had detected and he suggested that CO-Dhaka undertake further investigations.

As of 17 May, CO-Dhaka carried out further verifications into the allegations of financial irregularities raised by the complainant. As a result, an investigation led by the Office of Internal Audit and Oversight (IAO) was opened which concluded that there was no clear evidence of fraud. The case was closed on 7 February 2018.

In the meantime, the complainant undertook administrative steps with the Human Resources Development Department (HRD) for his family’s arrival at the duty station.

On 19 September 2017 the complainant was informed, in the presence of the RMG Project Manager, the Deputy Director of CO-Dhaka and a Human Resources Officer, that his position had been removed due to the concerns of the donors and evaluators that there were too many international experts on the RMG project.

On 11 October the complainant’s contract was extended until 31 December 2017.

By a letter of 19 October 2017 the complainant received confirmation that his contract would not be extended beyond 31 December 2017 for lack of funding. He was offered to be placed on special leave with full salary from 22 October, which he accepted. On 17 November 2017 the complainant filed a grievance with HRD asking that his contract be extended until the end of 2020 as initially foreseen and that an investigation be conducted into his allegations of “institutional discrimination and harassment”.

On 16 March 2018 the complainant challenged the implied rejection of his grievance before the Joint Advisory Appeals Board (JAAB), alleging that the non-extension of his contract was due to retaliation after he had conducted the audit in 2017. In its report of 20 March 2019, the JAAB concluded that the grievance was devoid of merit but recommended that the complainant be awarded moral damages for the delay caused by HRD and exemplary damages for the ILO's failure to act diligently and transparently towards the complainant. Regarding the allegations of retaliation, it concluded that there was no reason to consider that the discontinuation of the complainant's position was a measure of retaliation.

By a letter of 15 May 2019, the complainant was informed that the Director-General had decided to set aside the contested decision. Referring to the concerns pertaining to the complainant's performance and conduct raised at the stage of the internal appeal proceedings, the Director-General considered that these aspects had not been addressed in accordance with the applicable legal framework. He added that it could not be excluded that the decision not to extend the complainant's contract was motivated by reasons other than the lack of funding. He however agreed with the JAAB's finding that the allegations of retaliation were unsubstantiated. While reinstatement was no longer available, the Director-General decided to award to the complainant moral and material damages equivalent to six months' salary, benefits and emoluments without any statutory deductions. That is the impugned decision.

On 7 June 2019 the complainant filed a complaint with the ILO Ethics Officer alleging retaliation, mobbing, discrimination and ostracism suffered after conducting the audit.

The complainant asks the Tribunal to set aside the decision of 19 October 2017 and to have his appointment extended until the end of 2020 as initially foreseen. He asks the Tribunal to set aside the decision of 15 May 2019 and to award him compensation for "the remaining 30 months" in which he was not able to work because of retaliation. In this regard, he explains that his position was budgeted for Phase II of the RMG project for a total of 42 months (July 2017 until the end of 2020); he was paid for the first six months of that period and received an amount equivalent to an additional six month's remuneration pursuant to the impugned decision. He also seeks moral and "economic" damages of 500,000 United States dollars as well as 300,000 United States dollars

for damage to his health combined with a permanent invalidity pension from the ILO Staff Health Insurance Fund as he can no longer perform in an efficient manner his duties as a labour inspector due to retaliation.

The ILO asks the Tribunal to dismiss the complaint as entirely devoid of merit.

CONSIDERATIONS

1. In the grievance, dated 16 March 2018, which the complainant filed with the JAAB against the implied rejection of the grievance which he had filed with HRD on 17 November 2017, he challenged the decision to discontinue his post and to terminate his employment when his contract eventually expired on 31 December 2017. He also challenged the decision not to allocate funds for the continuation of his post. He alleged that it had been removed and his contract was not renewed “based on an irregular retaliation after [he] conducted an audit” instead of being afforded protection as a whistle-blower who had uncovered wrongdoing.

2. The JAAB concluded that the complainant’s grievance was unmeritorious and that there was no reason to consider that the discontinuation of his post was a measure of retaliation. Considering the reasons which the Administration gave for not extending the complainant’s contract, the JAAB stated that it understood from the documents which the Administration provided that the complainant’s contract was not extended because the donors wanted to reduce the cost of Phase II of the RMG project by decreasing the international staff and increasing the use of local staff. It however found contradictions in the final budget submitted to the donors. In its opinion, however, the Administration sought an excuse for not extending the complainant’s contract by referring to the donors’ wish to reduce costs and failed to act diligently, transparently or in good faith towards him. It therefore recommended that he be awarded exemplary damages, as well as moral damages for HRD’s delay in replying to his grievance.

3. In the impugned decision, the Director-General agreed with the JAAB that retaliation had not been substantiated. He however set aside the decision of 19 October 2017 not to extend the complainant’s contract on the ground that it could not be ruled out that that decision was

motivated by reasons other than the lack of funds for the post. In effect, the Director-General thereby accepted that the decision not to extend the complainant's contract was flawed. He stated that reinstatement was not an option as the complainant's post was discontinued on 31 December 2017. He however awarded him compensation for the damages "caused by the flawed decision" and for the delays in reviewing his grievance.

4. In his complaint, the complainant states that he is claiming "compensation for the retaliation [he has] suffered after conducting [an ILO audit]". He asks the Tribunal to set aside the decision of 19 October 2017 and to extend his contract in the same P.5 grade from 1 January 2018 until the end of December 2020 as initially foreseen. This request is rejected, as, in the first place, the Director-General has already set aside the decision of 19 October 2017 in the impugned decision. In the second place, it is not within the Tribunal's purview to extend the complainant's appointment.

5. The complainant also asks the Tribunal to set aside the impugned decision of 15 May 2019 and to award him additional compensation equivalent to 30 months' remuneration. He also seeks moral damages, as well as material damages on the basis that his family moved to his workstation in June 2017 without him knowing that his post would have been discontinued.

6. The ILO submits that his claim for moral damages is irreceivable, as having not made it in the internal appeal proceedings, he had failed to exhaust the internal means of redress in relation to it as Article VII, paragraph 1, of the Tribunal's Statute required. The ILO's submission would be supported by reference to Judgment 3997, consideration 6, and similar statements of the case law in kindred judgments. However, for reasons that will become clear later, it is unnecessary to consider at this juncture whether this claim for moral damages is irreceivable.

7. The complainant's claim for material damages is however irreceivable. As the ILO submits, having not made that claim in the internal appeal proceedings he did not exhaust the internal means of redress that were available to him in relation to it as Article VII, paragraph 1, of the Tribunal's Statute required. The complainant's further claim for

“compensation for the health damage [he] still suffer[s] [...] and to be granted a permanent invalidity pension (from ILO Staff Health Insurance Fund–SHIF)” is irreceivable for the same reason.

8. Regarding the complainant’s claim that he suffered retaliation, victimization, mobbing, and discrimination as a result of the audit which he conducted on 22 March 2017, the Tribunal observes the complainant’s intimation that on 7 June 2019 he formally requested the Ethics Officer to investigate that matter. The complainant further states that his request was acknowledged by the Ethics Officer on 17 June 2019, who informed him that his complaint was being reviewed to determine whether there were reasonable grounds to warrant further investigation. As this was a separate ongoing procedure within the purview of the Ethics Officer, the Tribunal will not address this matter further.

9. The central question which this complaint raises on the merits, is whether it was in error that, in the impugned decision, the Director-General accepted the conclusion of the JAAB that it did not consider that retaliation was the reason for the discontinuation of the complainant’s post in Phase II of the RMG project and the consequent non-extension of his contract. According to the complainant, that retaliation occurred because the audit which he conducted in March 2017 uncovered financial irregularities on the part of an implementing partner. In his grievance he had alleged that the implementing partner and various officials, including the Director of the Country Office, orchestrated the retaliation against him and that his post was suppressed to cover up the financial wrongdoing and as punishment for the professional, objective and independent manner in which his conduct of the audit discovered the shortcomings.

10. It is convenient to recall that in Judgment 3948, consideration 2, where a decision not to renew a contract was challenged, the Tribunal stated that its scope of review is limited as an organization enjoys wide discretion in deciding whether or not to extend a fixed-term appointment and that the exercise of such discretion is subject to limited review because the Tribunal respects an organization’s freedom to determine its own requirements and the career prospects of staff. Accordingly, the Tribunal will not substitute its own assessment for that of the organization and a decision in the exercise of this discretion may only be quashed or

set aside for unlawfulness or illegality in the sense that it was taken in breach of a rule of form or procedure; or if it is based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence.

11. The complainant submits, in effect, that the JAAB did not properly investigate his allegation that retaliation for his conduct of the audit was the reason for the discontinuation of his post. He insists that the JAAB did not take into consideration all of the evidence to formulate its conclusion; did not call or interview witnesses or consider all the clear indicators of retaliation. He argues that, moreover, the JAAB did not appreciate that since he raised the issue of retaliation the burden of proof rested upon the Administration, which was required to prove, by clear and convincing evidence, that it would have taken the same action (to discontinue his post and not extend his appointment) had he not made the whistle-blower complaint. He relies, in particular, on the United Nations Dispute Tribunal (UNDT) Judgment 2012/092.

12. UNDT Judgment 2012/092 is based on a UN regulatory provision: the Secretary-General's Bulletin (ST/SGB/2005/21), which, as the ILO submits, is not provided in its regulatory regime. In the absence of a specific regulatory provision which puts the burden of proof on the Administration, the general principle that he who alleges must prove applies. Moreover, in Judgment 3138, consideration 7, it was recalled that this Tribunal is in no way bound by the case law of other international or regional courts. Additionally, in Judgment 4238, consideration 5, the Tribunal recently recalled its case law which has consistently stated that it is incumbent on the complainant to establish that actions or conduct complained of were retaliatory. In the premises, the JAAB made no mistake in considering that the complainant bore the burden of proof.

13. Regarding the Tribunal's role where the fact-finding of an internal appeal body is challenged, the Tribunal has reiterated, in Judgment 4171, consideration 5, for example, that its role is not to reweigh the evidence before such a body and that where an internal appeal body has heard evidence and made findings of fact, the Tribunal will only interfere in the case of manifest error.

14. The Tribunal observes that in addition to the detailed submissions which the parties made (including additional observations) and documents which they presented, the JAAB requested a range of further information and documents in its investigation of the case. The complainant was afforded the opportunity to comment on information and documents as he wished and at his request. There is no evidence that he named any person whom he wished to be called as a witness or that he requested the JAAB to interview anyone. It is obvious that the JAAB conducted a thorough investigation into the complainant's allegation that retaliation was the reason for the discontinuation of his post and the termination of his contract and that the JAAB properly considered the evidence before it. Its analysis of the relevant events and circumstances was fair and well-reasoned. The Tribunal sees no ground in the complainant's submissions which leads it to conclude that there was manifest error in the JAAB's conclusion, which was accepted in the impugned decision, that the decision to discontinue the complainant's post and not to extend his contract did not involve retaliation. That ground of the complaint is therefore unfounded.

15. It is noteworthy that the JAAB had stated, correctly, that the reasons for the 19 October 2017 decision were contradictory and that the ILO did not act transparently or in good faith towards the complainant in the reasons that it provided to justify its decision. Since the complainant does not challenge the Director-General's decision that reinstatement is not an option, the question is whether he was adequately compensated for "the flawed decision". He was awarded an amount equivalent to six months' salary, benefits and emoluments without any statutory deductions, based on his last pay-slip, which amount was also inclusive of "fair redress" for the delays in reviewing his grievance. The ILO has indicated that the amount involved was approximately 70,000 United States dollars.

16. The complainant's claim that he was entitled to be compensated for the remaining 30 months to the end of December 2020 because that was the end-date initially foreseen that he would have worked under the RMG Project is unsustainable. The fact is that he was employed under a twelve-month fixed-term project-based technical cooperation contract which was extended for one month to 31 December 2017 when it expired. At that time he had an expectation that his contract would have been extended. However, there was no certainty that it would have been

extended, and if so, whether it would have been extended for one, two or three years. A term in his contract stated that the extension of such a contract is subject to various elements, including the availability of funds; continuing need for the function and satisfactory conduct and performance. The complainant's financial entitlement for the flawed decision was therefore not for the remainder of a term that was initially foreseen, but for the loss of a valuable opportunity to have his contract extended for a specified duration. On that basis, the Tribunal determines that the complainant was adequately compensated for the flawed decision and for the delayed consideration of his grievance.

17. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ