

## **EIGHTY-FIFTH SESSION**

***In re Peroni***

### **Judgment 1750**

The Administrative Tribunal,

Considering the complaint filed by Mr. Antonio Peroni against the International Training Centre of the International Labour Organization (ILO) on 28 May 1997, the Centre's reply of 13 August, the complainant's rejoinder of 15 September and the Centre's surrejoinder of 28 October 1997;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, an Italian who was born in 1959, was employed by the ILO's International Training Centre on short-term appointments from 2 April 1990 to 28 March 1991 and from 21 January to 20 March 1992. From 17 May 1993 to 31 October 1996 he served for three months in the Documentation Section and then in the Budget and Control Section, later called the Budget Section, on short-term appointments of from one to six months. Rule 3.5 of the Rules Governing Conditions of Service of Short-Term Officials of the Centre applied to him as from 24 December 1993. Before being amended in December 1996 that Rule read:

"Changes in Conditions of Service upon Extension of Appointment

(a) If the appointment of a short-term official is extended so that his total continuous contractual service is one year or more, the terms and conditions of a fixed-term appointment under the Staff Regulations of the Centre shall apply to him as from the date of the contract which creates one year or more of continuous service, to the exclusion of any conflicting provisions of these Rules, but with the following exceptions:

(1) for the purpose of calculating entitlement to education grant, home leave travel expenses, travel of dependants, travel to visit dependants and maternity leave, service shall be calculated as from the date of the initial short-term contract; and

(2) installation allowance shall not be paid except in special cases.

(b) For the purposes of this Rule continuity of service shall be considered to have been broken by an interruption which exceeds thirty days."

In July 1996 the chief personnel officer told him orally that his appointment would not be renewed beyond the date of expiry, 31 October 1996. The Deputy Director of the Centre confirmed that decision in a letter of 30 August 1996: he said that the upshot of discussion about the future of short-term staff in the Budget Section was that keeping them on was no longer warranted; but because they had served well and came under Rule 3.5 he would let each of them have an indemnity equivalent to six weeks' pay. The complainant then worked half time in the Administration Service until 31 October 1996. With help from the Committee of the Staff Association he got a two-month extension, still on half time, in the Training Department. His appointment at the Centre ended on 31 December 1996, though he had been on sick leave since 18 December. By a letter of 30 January 1997 he filed a "complaint" with the Director against the decision not to renew his appointment. The Deputy Director rejected it on the Director's behalf in a letter of 6 May 1997. That is the decision he is impugning.

B. The complainant submits that the Centre failed to give reasons for its decision. It simply told him that it could no longer justify keeping him on and that for staff covered by Rule 3.5 extension of appointment was at the Director's

discretion. It committed an abuse of authority by putting an "arbitrary construction" on Rule 3.5: his duties were continuous and he had been performing them for years; so how could it make out that extension was unjustified? By failing to account for its decision it offended against Article 13.4(b) of the Centre's Staff Regulations, which is about fixed-term appointments and applied to him by virtue of Rule 3.5.

In his submission the impugned decision refuses to acknowledge that someone covered by Rule 3.5 is on a par with the holder of a fixed-term appointment. The Centre's attitude is "arbitrary and discriminatory": it bars short-term officials from internal competitions yet allows exceptions. It discriminated against him by keeping on two others who were in the same position as he, and it broke its promise to help him to find another job.

He says that the reason given by the Centre for not extending his appointment until the end of his sick leave was that he had not asked it to: that just goes to show how "pedantic and grudging" its whole approach is.

He seeks the quashing of the decision not to renew his appointment; his reinstatement as from 1 January 1997; payment of interest on the sums due as from that date; and awards of 10,000 United States dollars in material and moral damages and 2,000 dollars in costs.

C. In its reply the Centre submits that the complainant's plea that it refused him extension up to the end of his sick leave is irreceivable: it took no decision on the issue because he had never asked for any such extension. The impugned decision was one outcome of the policy of reform that it began in 1994. Of the thirteen notices of vacancy it sent him the complainant did not act on a single one, and he never responded to its many attempts to help him to find another job. He even turned down an offer of a five-month contract on the grounds that it denied his acquired rights.

Though he objects to the exclusion from internal competitions of staff to whom Rule 3.5 applies he has never expressed interest in entering such competitions. Each contract he signed included a clause saying that it would end without notice and was for a short-term appointment that did not entitle him to enter internal competitions.

It did account properly for the impugned decision and the complainant knew full well why his appointment was not being extended. The two others who did get extensions were not in like case: they were in the Finance Section. His claims are overblown and groundless.

D. In his rejoinder the complainant submits that the Centre may not rely on a study done three years earlier to justify the refusal of extension. It did not help him to find other work and the notices of vacancy it sent him reached him too late or did not match his qualifications.

Citing its policy on short-term appointments, he observes that it has been extending such appointments for years and so keeping many of its staff on tenterhooks. The standard clause it "made such a point of adding to some dozen contracts was just a formality", and he had no choice but to consent. Rule 3.5 entitled him to the "terms and conditions of a fixed-term appointment" and he seeks a ruling on the lawfulness of barring him and others covered by that Rule from internal competitions.

The Centre gave him no clear reasons for the impugned decision. By baldly stating that it had no justification for keeping him on it fell short of its duty to account for its decisions as the case law requires.

E. In its surrejoinder the Centre points out that it put him *ex gratia* on a par with holders of fixed-term appointments and he could not expect to fare any better. Whether or not the policy of reform was right is not an issue for the Tribunal to rule on. In any event the decision not to extend the complainant's appointment was in line with that policy, which it had been pondering for several years.

## CONSIDERATIONS

1. The complainant joined the ILO's International Training Centre on 2 April 1990. It gave him a short-term appointment from that date to 4 May 1990 and employed him as a clerk at grade G.2 in accounts. It granted him an extension of appointment until 28 March 1991. After a break of ten months it employed him again as a G.2 clerk in the Budget and Control Section from 21 January to 20 March 1992. On 17 May 1993 he went back to serve for three months at grade G.1 in the Documentation Section. He then served almost without break from 23 August 1993 to 31 October 1996, usually as a clerk in the Budget and Control Section, later called the Budget Section, on short-term contracts for four, five, six, five, five, one, two, two, three and five months.

The Centre's finance and budget services underwent internal and external audit. The ILO's internal auditor said in his report of January 1994 that for the sake of efficiency the Budget and Control Section should be merged with the Finance Service, while budget, accounting and finance should remain distinct. The external auditor agreed. In a minute of 14 August 1995 about action on his proposals the internal auditor observed that since the end of 1993 the new Budget Section had taken on another two short-term officials but that, the workload having fallen, there should be no need to keep them. In May 1996 the Director of the Centre endorsed the proposals for reform.

By a letter of 30 August 1996 the Centre told the complainant that it would not be extending his appointment beyond 31 October 1996; because his work had been "satisfactory" and because his contract was subject to Rule 3.5 of the "Short-term Rules" he would get six weeks' pay in termination indemnity; as he knew, the need for short-term staff in the Budget Section had become moot in the last few months, and the conclusion was that keeping them on was "no longer justified".

He was put on a half-time post in the Administration Service until the end of October 1996 and at his own request got another two months, again half time and up to 31 December 1996, in the Training Department.

Having been told that there his appointment must end, he asked the Deputy Director on 16 December 1996 to explain the reasons for the decision not to renew it. He says that the Centre did not answer; the Centre that it did and that it gave him the reasons.

The Centre offered to help him to look for another job. While he was working there he could have applied for twenty-three posts it put up for external and internal competition and for three open to internal candidates, including short-term staff covered by Rule 3.5. Shortly before and after termination it told him of thirteen other vacancies but he showed no interest: he merely said they would not do, but without explaining why. In 1997 it offered him a short-term appointment for five months but he turned it down, partly on the grounds that by then his case was pending.

2. On 30 January 1997 he had indeed filed a "complaint" with the Director of the Centre against the decision not to renew his appointment. He objected to the Centre's failure to answer his request of 16 December 1996 for an explanation but acknowledged that it had "given the reasons orally". In his submission Rule 3.5 entitled him to an extension and the Centre could have kept on someone with his skills; the impugned decision was discriminatory; it was "distressing" not to have got an extension at least until the end of the few weeks' of sick leave he had had.

On 6 May 1997 the Deputy Director told him that the Director rejected his "complaint". Despite Rule 3.5 - he said - short-term appointments did not become fixed-term ones. Even staff who held fixed-term appointments were not *ipso facto* entitled to renewal. The whole point of giving a short-term contract was to preclude a career. That was why short-term staff were not allowed to enter internal competitions. The complainant knew the reasons for non-renewal from the letter of 30 August 1996. He had had opportunities of entering competitions but had let them go by. Though the Director knew that he had been on sick leave from 18 December 1996, he had not asked for any extension to cover the period of sick leave; so for want of a decision his claim on that score could not but fail.

The complainant is asking the Tribunal to quash the impugned decision, reinstate him with payment of salary as from 1 January 1997, and award him 10,000 United States dollars in material and moral damages and 2,000 in costs. His main plea is that the Centre did not abide by Rule 3.5, which entitled him to get a full explanation with its decision not to renew his contract. In support of his plea of breach of 3.5 he points out that short-term staff covered by that rule are barred from internal competitions. He was discriminated against, he believes, because two others on such appointments in the Finance and Budget Service got extensions beyond 31 December 1996. The reason offered for not extending his contract to cover his sick leave is evidence of the Centre's "pedantic and grudging" attitude. In terminating a fixed-term appointment it has to observe certain safeguards, and it should apply them to staff covered by Rule 3.5 as well. To him it did not.

In its reply the Centre asks the Tribunal to dismiss the complaint. It submits that the complainant may plead breach of Rule 3.5 only to impugn an individual decision. It did fulfil its duty to account for its decision; it gave him the reasons, both orally and in its letter of 30 August 1996. Notwithstanding Rule 3.5, short-term contracts still come under the Short-term Rules when it is a matter of not renewing them. At all events the Centre was helpful: it gave him due notice, a termination indemnity reckoned according to length of unbroken service, and a two-month extension in half-time employment in another unit. It made him an offer of help - to which he paid little or no heed

- in looking for another job and in 1997 even offered him an appointment for five months, which he spurned. There was no discrimination against him: of the four holders of short-term appointments in the Finance and Budget Service only one was, like him, in the Budget Section, and that one fared no better than he. The other two were in the Finance Section and, though they too had been expected to go, were needed, as things turned out, for somewhat longer.

In rejoinder and surrejoinder the parties press and enlarge on their pleas.

### *Receivability*

3. Under Article VII(1) of the Tribunal's Statute a complaint will be receivable only if the complainant has exhausted the internal remedies.

Any claim to an extension of his appointment to cover the period of his sick leave would fall outside the ambit of his claim to an ordinary extension: see Judgment 1425 (*in re* Schickel-Zuber Nos. 2 and 3), and 1494 (*in re* Mossu). For it to be receivable he would have had to include it in an internal appeal and exhaust all his internal means of redress.

A claim must be cast in such language that the organisation will gather that a decision is expected of it. Sometimes it may be inferred from circumstances, for example where the claimant has little law. But as one who professes a degree in international law the complainant might, if he was putting a claim to the Centre, have been expected to make it tolerably clear. The Centre was therefore right not to treat his mere sending of a medical certificate in mid-December 1996 as a claim to an extension to cover the period of sick leave and, then, to maintain that no such claim had formed the subject of internal appeal or decision.

The complainant does not, at least in so many words, take the Director to task for having failed to answer the claim. Even in his internal appeal he described it as no more than "distressing" that he got no extension to cover the period of his sick leave. Someone with a grasp of law who wanted to make the claim would surely have said so plainly. If he still wanted to make it he could later have done so separately. There is nothing "pedantic" about the impugned decision on that score: the claim is irreceivable because he has failed to exhaust his internal remedies.

4. The complainant dwells at length, and apparently expects a ruling, on the rights of short-term staff under Rule 3.5 and on such issues as whether they may enter internal competitions. But the only receivable claims are the ones for which he has tried all his internal remedies. To rule on those claims the Tribunal need not determine just how far Rule 3.5 goes.

### *The merits*

5. Precedent leaves renewal of a short- or fixed-term appointment to the organisation's discretion. The decision must stand unless it was taken *ultra vires*, shows a formal or procedural defect, errs in fact or in law, ignores some material fact, amounts to an abuse of authority, or makes a blatantly wrong deduction from the evidence.

6. Offering not always the same arguments, the complainant has accused the Centre of failing to explain, as it ought, the reasons for refusing him renewal.

A steady line of precedent does indeed have it that non-renewal and valid reasons for it must be duly notified so that the staff member may act accordingly and in particular exercise the right of appeal: see, for example, Judgments 1544 (*in re* Gery-Pochon) and 1583 (*in re* Ricart Nouel) and the rulings cited therein.

(a) In his internal "complaint" the complainant did not deny getting an explanation for the non-renewal of his contract. What he did say was that he got no particular explanation in the text of the decision telling him that the two months' extension up to 31 December 1996 for half-time work would be the last one.

The case law does not require that the reasons be stated in the text that gives notice of non-renewal. Though the Centre granted the complainant the last extension in his own interests, so as to soften the blow, his departure was held over only for a short while and he got only part-time employment. So the reasons underlying the non-renewal held good. He got an adequate explanation from the text of the decision granting him the last extension, taken together with the communications and discussions that both preceded and followed it.

(b) The complainant doubts whether the reforms were politic.

The Tribunal will not say whether they were or not. The only material point is that they show no abuse of discretion or misuse of authority.

(c) The complainant contends that the reasons the Centre gave him were false and covered up its wish to get rid of him.

The burden of proof lies on him and he has failed to discharge it.

7. He pleads discriminatory treatment.

The Centre's answer is plausible. It explains how it disposed of the four holders of short-term appointments in the Finance and Budget Service. The complainant and another were both in the Budget Section and were treated alike: they both had to leave. The other two, who were in the Finance Section, were to go too, but the Centre kept them on for a while because they were needed either in the Finance Section or elsewhere.

So those in the Budget Section were put on a par, whereas the Finance Section had a rather different need, having urgent work still in hand. Besides, when just a few of its staff must leave, an organisation has to choose them at discretion and such a decision is subject, as was said above, only to limited review. The Centre's account again shows no evidence of abuse of that authority.

8. The complainant baldly contends that under Rule 3.5 he was entitled to the same safeguards against non-renewal as the holder of a fixed-term appointment. The Centre challenges the contention, and it is right. Although according to precedent an organisation has discretion in the matter of renewal, it must do its utmost to ease hardship: see for example Judgment 1450 (*in re* Kock and others) under 23 and 24.

In this case the Centre did. It gave the complainant due notice, a two-month extension on half-time employment in another job and payment, by way of indemnity for abolition of post, in an amount he is not objecting to. It offered to help him to get a new job either by entering its own competitions or by going to some other organisation. There is no reason to doubt the genuineness of its offer, though the complainant seems to have shown no interest. In 1997 it offered him an appointment for five months. He declined on the grounds that his case was pending. That is an unconvincing reason since nobody ever said that the offer hinged on his withdrawing suit.

The conclusion is that the Centre fulfilled its obligations.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

*(Signed)*

Michel Gentot  
Julio Barberis  
Jean-François Egli

A.B. Gardner