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

NINETY-SIXTH SESSION

Judgment No. 2307

The Administrative Tribunal,

Considering the complaint filed by Ms A. T. against the International Labour Organization (ILO) on 24 December 2002 and corrected on 7 January 2003, the ILO's reply of 2 May, and the complainant's letter of 9 August 2003 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant is an American citizen and was born in 1964. From July 1999 she was employed, initially on a short-term contract, as a Receptionist/Secretary at the ILO's New York Liaison Office with the United Nations. She was given a one-year fixed-term contract on 1 January 2000, which was extended to 31 December 2001. A first report on the complainant's services covered the period from 1 January to 30 September 2000.

On 16 March 2001 she lodged a "complaint" against her immediate supervisor, who had been appointed Officer-in-charge of the New York Liaison Office, alleging, *inter alia*, discrimination, exclusion, moral harassment and intimidation. She filed a further two on 23 March against two colleagues, alleging bullying, mobbing and moral harassment. The Director of the Human Resources Development Department (HRD) replied on 4 April, enclosing copies of the Collective Agreement on the Procedure for the Resolution of Grievances, and the Collective Agreement on the Prevention and Resolution of Harassment-related Grievances concluded in September 2000 and February 2001, respectively, between the International Labour Office (the ILO's secretariat) and the ILO Staff Union. He informed her that as the relevant procedure was not yet fully operational the Office would review her allegations following, to the extent possible, the principles under which both agreements had been established.

Ad hoc guidelines were drawn up setting out a procedure for reviewing her grievance. As provided for therein the complainant submitted her allegations to the "applicable line manager", who was the Director of the Bureau of External Relations and Partnership and the superior of her immediate supervisor. The line manager looked into the complainant's allegations and heard the officials concerned. On 2 July 2001 she produced a report on her investigation, noting in her conclusion that matters had taken a "disproportionate dimension" and that the complainant's allegations were "unsubstantiated" and "sometimes frivolous".

On 9 August 2001 the complainant was placed on special leave with pay. Her contract which was due to expire on 31 December 2001 was ultimately extended to 31 March 2002. A probationary appraisal report covering the period from 1 October 2000 to 30 June 2001 was drawn up in November 2001. Both that report and her earlier one were submitted to the Reports Board, which conducted "a probationary performance review". The complainant submitted comments dated 4 December to the Board, and on 12 December 2001 she filed an internal complaint alleging "inconsistent treatment" in the way her complaints had been dealt with.

In its report of 26 February 2002 the Reports Board recommended not extending her contract. The Director-General endorsed that recommendation. His decision was communicated to the complainant by a letter dated 15 March 2002. She was informed therein that she was entitled to submit an internal complaint pursuant to chapter

XIII of the Staff Regulations against the non-renewal, but could appeal the matters raised in her internal complaint of 12 December 2001 directly with the Tribunal. On 9 April 2002 she referred her grievance to the Joint Panel, alleging harassment and discrimination. The Panel issued its recommendation on 19 August. By a decision of 3 October 2002, which the complainant impugns, the Director-General upheld his earlier decision not to renew her contract.

B. The complainant submits that there was breach of due process in the procedure that led to the non-renewal of her contract, and misuse of authority on the part of certain officials. She objects to actions taken by the line manager during the investigation, particularly as in her investigation report that official assessed aspects of her performance and those comments later became the basis for the final appraisal report drawn up in November 2001. Her argument is that the line manager was not based in New York, was not her direct supervisor, and there was no provision in the ad hoc guidelines that gave her the authority to assess her performance.

She also contends that there were procedural irregularities in the way her final performance appraisal was drawn up. Not only was there delay in producing the report, but it was written when she was on leave. She has not seen the original copy and suspects that rather than being drawn up by her immediate supervisor in New York, it was drafted by the Director of HRD in Geneva and her supervisor's signature was added to it. Furthermore, although it was on the grounds of her performance that her contract was not renewed, at no stage did she receive any official warning that her secretarial skills were lacking.

She asks that "all original documents be submitted to the Tribunal". She wants the Tribunal and the members of the Reports Board to analyse them for their authenticity. Additionally, she seeks confirmation that her comments on her performance appraisal were seen by the Board and wants her immediate supervisor to be heard so that he can testify that he did sign her appraisal. She claims five years' salary, or, alternatively, the quashing of the impugned decision and reinstatement within the ILO. In either case she claims two million United States dollars in moral damages, as well as costs.

C. In its reply the Organization argues that there was no breach of due process in the investigation into the complainant's claims of harassment. The line manager conducted her investigation in accordance with the ad hoc guidelines that were drawn up by the Office. The complainant had agreed to the guidelines proposed and was given the opportunity to comment fully on the conclusions reached in the investigation report. Moreover, in August 2001 she indicated that she did not wish to pursue her allegations against her colleagues. It was appropriate for the line manager to assess aspects of her performance. As the complainant's second-level supervisor she would be required to make a contribution to her appraisal report.

The Organization points out that this case concerns its decision not to renew the complainant's contract, and so in order to evaluate that decision it has been necessary to consider her allegations of harassment. It submits that there was no legal flaw in reaching the decision not to renew her contract after the probationary period, that such a decision is discretionary and is subject to only limited review by the Tribunal. Her allegations that her immediate supervisor did not himself draw up her appraisal report of November 2001 are unfounded. Although not ideal, due to a misunderstanding a photocopy of the report was treated as the original for the purposes of the reporting exercise; the original signed by her supervisor has however been kept on file. The Organization explains that in drawing up the appraisal report he made specific paragraph references to the line manager's investigation report, thus incorporating some of her comments into the performance report. It recognises that references to such comments did not constitute "typical bases used in the appraisal process", but says that the information given in the appraisal report and the complainant's written response thereto necessarily became the only appropriate basis on which the Reports Board could make its recommendation. The Board reached the conclusion that it was not in the best interests of the Office to extend the complainant's contract.

CONSIDERATIONS

1. The complainant was recruited by the ILO on 1 July 1999 as a Receptionist/Secretary, at grade G.4, at the ILO's New York Liaison Office with the United Nations, under a short-term contract which on 1 January 2000 was converted into a fixed-term contract. Her first appraisal report covering the period from 1 January to 30 September 2000 was generally positive; it stated that she was more than qualified for the post she occupied, but that she should be less sensitive to comments concerning her work.

At the beginning of 2001, the working environment deteriorated, according to the complainant. In March she lodged internal complaints for moral harassment against the Officer-in-charge of the Liaison Office - her immediate supervisor - and against two of her colleagues. The Director of HRD acknowledged receipt of the complaints on 4 April 2001. He reminded the complainant that the administration had concluded the Collective Agreement on the Procedure for the Resolution of Grievances and the Collective Agreement on the Prevention and Resolution of Harassment-related Grievances with the Staff Union. He informed her, however, that the relevant procedure was not yet fully operational and that those agreements had not yet been followed up by amendments to the Staff Regulations. The Director added that, although neither of the new procedures could be applied to deal with the complainant's grievances, the principles under which both agreements had been established were still valid, in particular the principle whereby a grievance should be resolved informally, where feasible, through the complainant's immediate supervisor or a superior of that supervisor if, as was the case, the immediate supervisor was himself the subject of one of the complaints. He said that, according to the same principles, the assistance of facilitators could be requested, but emphasised that those available had not yet completed their training. He also mentioned that the Ombudsperson could make proposals for the resolution of grievances, but none had as yet been appointed. To conclude his very explicit letter, the Director asked the complainant if she would agree to submit the matter to Mrs D., the superior of her immediate supervisor, or whether she preferred to seek other means of resolution. He added that she had the right to be represented by a Union representative or by a past or present ILO official.

This "informal" procedure was therefore initiated and Mrs D. began her investigations in May 2001. These culminated in a report dated 2 July 2001, in which it was noted in conclusion that the complainant's allegations were disproportionate and not sufficiently substantiated. Owing to escalating tensions at the New York Liaison Office, the Director of HRD decided to place the complainant on special leave with pay on 9 August 2001. Her contract, which was due to expire on 31 December 2001, was extended twice, first until 28 February 2002 and then until 31 March 2002.

Meanwhile, a probationary appraisal report had been drawn up covering the period from 1 October 2000 to 30 June 2001. The complainant's immediate supervisor - who, she suspects, may not have drafted the report - considered that it was inappropriate to offer an assessment which might lead to non-renewal of the complainant's contract. He referred instead to the conclusions of Mrs D.'s report concerning the complainant's unsatisfactory performance, conduct and attitude, and said it would be for the Reports Board to make a recommendation as to the renewal or otherwise of the complainant's contract.

2. As the complainant contested her performance appraisal, the Reports Board examined the situation on 26 February 2002 and, in a carefully reasoned review, considered that the specific references to Mrs D.'s comments had been properly included as part of the probationary appraisal report, that the assessment regarding the complainant's technical capacity lacked specificity and should be left aside, but that her conduct gave rise to serious concerns regarding her ability to integrate within a team. The Board unanimously recommended that the complainant's contract should not be extended, a recommendation which was subsequently endorsed by the Director-General. According to a letter by the Director of HRD dated 15 March 2002, the Director-General had considered that, although the references made in the probationary appraisal report to Mrs D.'s report were not the "typical bases used in the appraisal process", it was in the best interests of the Office not to extend her contract. However, besides notifying the complainant of that decision, the letter of 15 March 2002 also appears to reject a complaint filed by the complainant on 12 December 2001 in accordance with Article 13.2 of the Staff Regulations, which had been rejected as "premature" on 24 January 2002, thereby putting an end to the ad hoc procedure initiated to examine her harassment complaint.

3. On 9 April 2002 the complainant referred her grievance to the Joint Panel set up pursuant to the Collective Agreement on the Procedure for the Resolution of Grievances of September 2000 and amendments to chapter XIII of the Staff Regulations. She requested the quashing of the decision not to extend her contract, reinstatement and two million United States dollars in moral damages. She also requested the disclosure of a number of documents, in particular the original of her performance appraisal bearing her immediate supervisor's signature.

4. After an exchange of briefs between the complainant and the Organization the Joint Panel issued its recommendation on 19 August 2002. It expressed some embarrassment in pointing to "the confusion between the ad hoc procedure and the normal procedure under the agreements", and to the fact that on 4 April 2002 the complainant had also approached the Ombudsperson, who had replied on 2 July 2002 that she would not be able to examine the alleged facts by the required deadline, thus leaving it to the complainant to pursue other available

remedies. The Panel recommended that the Human Resources Development Department be "invited to contact [the complainant] as soon as possible, in order to offer her fair and equitable terms which would settle the matter once and for all", provided that the complainant found this acceptable. If not, the Joint Panel deemed it appropriate for her to appeal directly to the Tribunal. The last paragraph of the Joint Panel's recommendation is worth quoting in full:

"The Joint Panel considers, inter alia, that the complainant has been placed at a definite disadvantage, to the extent that she has not had access either to the rights to which she is entitled or to the formalities and procedures provided under the aforementioned Collective Agreements. It is these shortcomings in the application of the Collective Agreements which have unduly complicated the search for a solution in this case. In the circumstances, the Joint Panel considers itself, in the light of [the complainant's] pleas and of the conclusions adopted by [the Human Resources Development Department] and the Ombudsperson, unable either to examine the different aspects of the treatment concerned with equanimity, or to issue a recommendation favourable to the complainant. The Joint Panel considers that it is not in a position to apply the spirit and the letter of the Collective Agreements, since legal proceedings have become unavoidable."

Following this recommendation, the Director-General took a decision, of which the Director of his Office informed the complainant on 3 October 2002 in the following terms:

"The object of your request was the decision you received on 25 March 2002 concerning the non-renewal of your contract. You considered that this decision amounted to harassment. In the light of the report and recommendations of the Joint Panel, in which the latter considers that it is not in a position to examine your complaint, the Director-General has found that there was no evidence of any harassment by the officials you named in your complaint. In accordance with the recommendation of the Reports Board of 26 February 2002, he has therefore decided to let the decision not to renew your contract stand in accordance with the provisions of Article 5.5 of the Staff Regulations."

5. That is the decision which has been referred to the Tribunal by the complainant, who requests the equivalent of five years' salary, or the quashing of the impugned decision and her immediate reinstatement, moral damages amounting to two million United States dollars, and costs. She also requests the disclosure of a number of documents.

6. The evidence shows that there has been an inextricable entanglement of procedures in this case, which is essentially a straightforward one. The Tribunal considers that, as a result of the confusion in the relevant texts, the multiplicity of conflicting remedies and the inability on the part of the existing mechanisms - admittedly established only recently - to exercise their new powers effectively, the officials of the Organization are unable to defend themselves in a clear and calm atmosphere against any irregularities that may occur in the management of staff. These difficulties have been further aggravated, in this case, by the use that was made, when the complainant's performance was assessed, of the investigation report produced in response to the complaints that she herself had filed. The result was that a procedure set up to protect officials who consider that they have been subjected to harassment has paradoxically rebounded against the very person who felt entitled, perhaps mistakenly, to complain.

7. There are two types of issues to be considered here, even though the ILO maintains in its reply that it is because the case concerns the non-renewal of the complainant's contract that it was necessary to consider the complainant's allegations of harassment. If one examines the impugned decision of 3 October 2002, there appears to be no doubt that the Director-General's intention was not only to reject as unfounded the complainant's objections to the procedure applied to investigate her allegations of harassment and endorse the letter of 15 March 2002 which took up a clear position in this respect, but also to reject her request for the quashing of the decision not to renew her appointment.

8. If one considers first the part of the decision concerning the complainant's complaints of harassment, with respect to which it is not possible to ascertain from the submissions whether they have been withdrawn or not by the complainant, the Tribunal finds, as the Director of HRD indeed admitted in his letter of 15 March 2002, that the new grievance resolution procedures were not operational at the time of the material facts and that an ad hoc procedure had to be applied. Furthermore, the suggestions made to the complainant on several occasions that she could use the services of a facilitator were never followed up. The fact that it was necessary, in the circumstances, to use an ad hoc procedure may be accepted, since that procedure was clearly adversarial and was conducted fairly, contrary to the allegations of the complainant. Nevertheless, it is regrettable that the possibility of resorting to a

facilitator - which the Organization, after the event, said would not have been useful - should have been so quickly disregarded. That fact alone, however, does not cause the procedure to be flawed, this issue being the only one that the Tribunal needs to consider at present.

9. Secondly, as regards the non-renewal of the complainant's contract, the confusion caused by the signatory of the probationary appraisal report, the severity of which led the Reports Board to recommend non-renewal, constitutes an error of law. The complainant's immediate supervisor thought it best to take shelter behind the assessment issued by Mrs D., who was not the complainant's immediate supervisor and was merely in charge of drafting a report so that the necessary action could be taken on her complaints. The Organization itself in fact recognised that the references made in the probationary appraisal report to Mrs D.'s report were not the "typical bases used in the appraisal process". That is the least that can be said about them. The investigation of a complaint filed by an international civil servant should not be used subsequently as the basis for an appraisal report, and even less to justify the termination of a contract.

10. The complainant is, accordingly, right in maintaining that the assessment which led the Reports Board to recommend that her contract should not be extended and the Director-General subsequently to endorse that recommendation, was based on information which should not have been taken into consideration. There is, therefore, no need to consider her other pleas or to order the disclosure of the documents she requests. The ILO sees fit to remind the Tribunal of its case law, particularly in Judgments 1183 and 1386, according to which decisions not to renew the appointments of probationers lie at the discretion of the administrative authority. Nevertheless, as firm precedent has it, the Tribunal has a duty to ensure that such decisions are not tainted with any error of law or of fact, or abuse of authority. In this case, the error of law committed by the administration must cause the impugned decision to be set aside.

11. It does not follow that the complainant should be reinstated in her job or in any other job in the ILO, as she requests. It may be concluded from all the evidence available that her reinstatement would be inappropriate and, availing itself of the possibility offered under Article VIII of its Statute, the Tribunal shall not order it. On the other hand, it considers that the complainant is entitled to compensation for the material and moral injury she has suffered and therefore orders the Organization to pay her in this respect an amount equivalent to two years' salary and the allowances to which she was entitled at the time her appointment came to an end.

12. As her claim partially succeeds, the complainant is entitled to costs set at 3,000 United States dollars.

DECISION

For the above reasons,

1. The decision of 3 October 2002 is set aside insofar as it confirms a previous decision not to extend the complainant's appointment.

2. The ILO shall pay her compensation equivalent to two years' salary and the allowances to which she was entitled at the time her appointment came to an end.

3. The ILO shall also pay her 3,000 United States dollars in costs.

4. Her other claims are dismissed.

In witness of this judgment, adopted on 19 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.