

NINETY-EIGHTH SESSION

Judgment No. 2402

The Administrative Tribunal,

Considering the second complaint filed by Mrs M.H. L. d. M. against the International Labour Organization (ILO) on 11 December 2003 and corrected on 15 January 2004, the Organization's reply of 8 March, the complainant's rejoinder of 7 April and the ILO's surrejoinder of 17 May 2004;

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 and the pleadings may be summed up as follows:

A. The history of the complainant's employment at the International Labour Office – the ILO's secretariat – and other facts relevant to the present case may be found in Judgment 2370, delivered on 14 July 2004, on the complainant's first complaint, by which she appealed against the Director-General's dismissal of a harassment grievance she had filed against her supervisor.

While that grievance was pending, the complainant filed two further grievances with the Joint Panel. In a grievance filed on 13 December 2002 she alleged that the Office had retaliated against her for filing a harassment grievance, by not extending her contract and by preventing her from working under normal conditions. She also alleged that her supervisor had breached his duty to maintain confidentiality with regard to the pending harassment grievance. On 28 March 2003, before the Panel had examined her new grievance, the complainant filed another concerning the non-renewal of her contract. At a preliminary hearing on 2 April 2003 the Joint Panel joined these two grievances, but after having received the complainant's brief it decided that it would not address the issue of breach of confidentiality by the complainant's supervisor, which it considered to be an internal disciplinary matter to be resolved by the Human Resources Development Department (HRD) with the supervisor directly. The Secretary of the Joint Panel informed the parties accordingly by a letter dated 9 July 2003 and invited the Office to confine its submissions to the issues of retaliation and non-renewal of contract.

The Joint Panel received the complainant's brief on 11 June 2003 and the Office's on 8 August, both parties having been granted an extension of their respective deadlines for submissions. By a letter of 13 August the Secretary of the Panel, referring to "comments from HRD to the effect that the process must be completed within 60 days or the Joint Panel will have no further jurisdiction", invited the parties to attend hearings in Geneva on 28 and 29 August. Counsel for the complainant replied on 20 August that the complainant, who was then living and working in Brazil, would not be able to attend hearings at such short notice. He proposed alternative dates in October and November 2003.

By a letter of 22 August 2003 addressed to the Director of HRD and to the Chairman of the ILO Staff Union, the Joint Panel asked the parties to the Collective Agreement under which the grievance resolution procedures had been established – namely the Office and the Union – to agree to extend the deadline for examining the case until 30 November 2003 in order that the hearings could take place. The Staff Union was in favour of an extension and informed the Joint Panel accordingly in a letter of 25 August 2003. The Office, however, considered that although the 14 days' notice of hearings given by the Joint Panel was inadequate, the Panel's request for an extension was not the appropriate solution in this case, and that it would be in the best interests of all parties to refer the case directly to the Tribunal. This opinion was conveyed to the Panel by the Director of HRD in a letter received by the Panel on 2 September 2003.

On 16 September 2003 the Secretary of the Panel wrote individually to the parties informing them that "since the Office [would] not grant an extension of time limits in this case [...] the Joint Panel [was] unable to issue a recommendation on this case". That is the impugned decision.

B. The complainant contests the legality of the Joint Panel's "decision" not to hear the case. In her view, the arbitrary application of time limits constitutes a breach of due process, and the fact that the Office can halt proceedings on an ad hoc basis on the grounds that the time limits for hearings have been exceeded amounts to a "*détournement de pouvoir*".

She asserts that the Office's failure to renew her contract and her "incompletely effected" transfer to another unit undermined her dignity, and that these measures were taken in retaliation following the filing of her harassment grievance. After her "illusory" transfer, she was prevented from continuing her work on the Minimum Income for School Attendance (MISA) project in Mozambique – a project she had initiated whilst working for the InFocus Programme on Socio-Economic Security – and the Office failed to provide her with meaningful work. Furthermore, a research assistant working for the Programme had attempted to obtain from an external researcher whom she had never met a statement to the effect that she had behaved in an unprofessional manner towards him.

With regard to the non-renewal of her contract, the complainant considers that this decision also constituted a "*détournement de pouvoir*", because it was based on ill will and prejudice rather than on the absence of funding, and because it was contrary to the recommendation of the Reports Board. She also contends that it was based on irrelevant facts and erroneous conclusions and that it was a disguised disciplinary measure, since the Office's assertion that there was no funding for her post is not credible. Moreover, in January 2001 her supervisor had provided her with a written statement indicating that her contract would be renewed for a further four years. The complainant relied on this promise of long-term employment and the Office therefore could not renege on it by refusing to renew her contract.

She claims that the Office's failure to find her a suitable position was a "*détournement de procédure*". The proposed post in Dakar did not match her skills, training and experience, whilst those in Harare and Yaoundé were at a lower grade. All these offers were designed to remove her unlawfully from the Organization.

Lastly, she contends that she suffered unequal treatment in comparison with another staff member, who was rapidly transferred when she complained of harassment and whose post continued to be funded by her previous unit after the transfer, whereas the complainant had to wait 15 months for a transfer and was eventually told that there was no funding for her post beyond the expiry date of her contract.

The complainant seeks the annulment of the Director-General's decision of 28 February 2003 not to renew her contract; immediate reinstatement in a position commensurate with her previous appointment, under a two-year fixed-term contract at her current grade, with retroactive effect from 31 May 2003; and an award of damages and costs in respect of the proceedings before the Joint Panel. Alternatively, she claims two years' salary and emoluments as compensation for all economic loss suffered. As a further alternative, she claims damages in respect of "the total loss of earnings she suffered as a result of her displacement to Geneva in reliance upon the representations of [her former supervisor] that her post would be long-term and secure, including without limitation all her lost earnings due to unpublished work in the amount of US [dollars] 40,000". In addition to the above, she claims 250,000 dollars in moral damages and an award of costs in respect of the proceedings before the Tribunal, with interest at "the market rate" on all amounts awarded to her by the Tribunal. She asks the Tribunal to order internal disciplinary sanctions against any officials found to have participated in the alleged retaliation against her, and to grant "such other relief that [it] deems necessary, equitable and just". She also seeks permission to question witnesses at a public hearing and asks the Tribunal to order the defendant to produce numerous documents connected with the case.

C. In its reply the Organization contends that the complainant's requests for damages and for a public hearing based on the alleged illegality of the Joint Panel's "decision" not to hear the case are irreceivable for failure to exhaust internal remedies. It also considers the complaint to be irreceivable as regards the alleged breach of confidentiality by her supervisor, since the Director-General's implicit acceptance of the Joint Panel's decision not to address that matter was not challenged by the complainant in due time.

On the merits, the Organization submits that the complaint is ill founded. The complainant's initial transfer was a protective measure taken in view of the conflict between her and her supervisor. She was offered a job description corresponding to her experience and skills but rejected it. After extensive discussions with the complainant, the Office agreed to transfer her again as a temporary measure until a suitable funded position could be found. Her new supervisor offered her work assignments compatible with the temporary nature of her transfer but she declined these offers. He then allowed her to work on tasks of her own choosing, but he could not allow her to undertake a

mission to Mozambique to launch the MISA initiative for two reasons: firstly, no funding was available for such a mission in his unit, and secondly, the implementation of the MISA initiative by the complainant implied that she would be available to provide support for at least seven months, and her supervisor was unwilling to commit the Office to providing that support when her contract was due to expire two and a half months later.

As regards its efforts to find another post for the complainant, the Office submits that no suitable position was available in Geneva, but that three field posts which matched her qualifications and would have enabled her to pursue her work on the MISA project were proposed. The complainant rejected these proposals and, according to the Organization, demonstrated a categorical refusal to consider a position in the field, despite the fact that the offer of appointment she signed on joining the ILO expressly mentioned the possibility of a transfer to another duty station within the first five years of appointment.

The defendant points out that fixed-term appointments carry no expectation of renewal, and that although a first renewal is subject to a positive recommendation from the Reports Board, it is also governed by other factors, such as financial circumstances or the existence of a post corresponding to the profile of the official. The sole reason for the non-renewal of the complainant's contract was her refusal to accept a transfer.

It submits that her former supervisor was not competent to make a promise as to the duration of her employment. Consequently, no valid and binding promise of renewal was made. As for the allegation of unequal treatment, the Office observes that since the situation of the official to whom the complainant refers is neither the same nor similar to her own, no breach of the principle of equal treatment occurred.

D. In her rejoinder the complainant presses her pleas. She maintains that the "truncation" of the proceedings before the Joint Panel constitutes a breach of her fundamental right to due process.

E. In its surrejoinder the Organization submits that the "grievance" concerning the alleged "truncation" of the proceedings before the Joint Panel is distinct from the grievance on which the present complaint is based, and that the internal remedies have not been exhausted as regards the former. It maintains its arguments on the merits.

CONSIDERATIONS

1. The complainant, a Brazilian national who joined the Office in April 2000 under a short-term contract, worked in the InFocus Programme on Socio-Economic Security (IFP/SES) as a Senior Economist at grade P.5 under a fixed-term contract which took effect on 1 September 2000. After having submitted a grievance to the Organization's Ombudsperson alleging harassment by her supervisor, which is the subject of Judgment 2370 concerning her first complaint, the complainant was transferred on 4 April 2002 to a unit of the Social Protection Sector, where she remained until 31 August 2002. As from 1 September 2002, she was transferred to another branch of that same sector until her contract, which was originally due to end on 28 February 2003, expired on 31 May 2003 following a three-month extension granted by the Director of the Human Resources Development Department.

2. The complainant lodged two grievances with the Joint Panel, which, in accordance with Article 13.2.2 of the ILO Staff Regulations, makes recommendations to the Director-General concerning measures to be taken in the event of a dispute between an official and the Organization. On 13 December 2002 she complained that the Office had taken retaliatory action against her, affecting her career and her working conditions, because of the harassment grievance she had filed, and that the official whom she had accused of harassment had failed to honour his duty of confidentiality. On 28 March 2003 she lodged a second grievance with the Panel, specifically concerning the decision not to renew her contract as notified to her on 28 February 2003.

3. On 9 July 2003 the Secretary of the Joint Panel informed the complainant's counsel that the Panel had decided to examine all matters related to the efforts to transfer the complainant to a suitable post and the decision not to renew her contract. It would not examine matters regarding harassment, which were the subject of a another grievance, nor the issue of breach of confidentiality by the official against whom the harassment grievance was directed, which it viewed as an internal disciplinary matter to be handled by the Human Resources Development Department with that official directly.

4. On 13 August 2003 the Secretary of the Joint Panel wrote to the parties on behalf of the Chair of the Panel

to explain the delays incurred in the proceedings and to inform them that, since the Panel would have no further jurisdiction upon the expiry of a period of 60 working days beginning on 11 June, the date on which it had received the complainant's brief, the hearings required for the examination of the case would take place on 28 and 29 August 2003. The parties were reminded that the Panel would consider only matters relating to the allegation of "retaliation" on the part of the Office.

5. Counsel for the complainant replied on 20 August 2003 that his client, who was then in Brazil, was unavailable on the dates indicated and that she would only be available during the week beginning 13 October or in November. He also contested the restriction of the scope of the hearings which the Panel intended to hold and concluded that if the Panel would not reschedule the hearing dates, it should advise the Director-General that it was unable to issue recommendations in this matter.

6. The Joint Panel then asked the parties to the Collective Agreement between the Office and the Staff Union to extend the deadlines for examining the case until 30 November 2003; however, although the Union was in favour of an extension, the Director of the Human Resources Development Department replied, in an undated letter received by the Panel on 2 September 2003, that the Office could not agree to it and that, since the deadlines had expired, it would be in the interests of all the parties concerned to refer the case directly to the Tribunal.

7. It was in that context that the Secretary of the Joint Panel informed the Director-General and the complainant's counsel on 16 September 2003 that, "since the Office [would] not grant an extension of the time limits" and thereby allow for hearings, which would have been "appropriate and useful", the Chair of the Panel regretted that the Panel was unable to issue a recommendation on the case.

8. The complainant filed a complaint with the Tribunal on 11 December 2003 impugning the "decision" of 16 September 2003. She has submitted numerous claims, which are summarised under B, above. She disputes the legality of the Joint Panel's "decision" not to issue a recommendation on her grievances and, for the most part, reiterates the arguments put forward in those grievances concerning the retaliatory action to which she was allegedly subjected and the non-renewal of her contract.

9. As regards the first point, it is doubtful that the Joint Panel, which is merely a consultative body, actually took a "decision" that could be challenged before the Tribunal. Nevertheless, the defendant does not deny that it did, and even goes so far as to consider that the said "decision" ought to have been the subject of an internal appeal, and that the complainant cannot challenge it now because she has not exhausted the internal remedies available to her. The Tribunal will not dwell on these arguments and will simply observe that, contrary to the view put forward by the complainant, the Joint Panel did not contravene the procedural rules or misuse its authority by considering itself bound by the time limits resulting from a strict application of the rules established by Article 13.2.2 of the Staff Regulations. The application of that article, though it led to the regrettable consequence that the Joint Panel did not issue a recommendation on a case which plainly fell within its jurisdiction, is not in itself tainted by arbitrariness.

10. Since the internal appeal mechanisms failed to operate, the Tribunal must consider itself validly seized of the claims directed against the implicit decision of the Director-General, whose silence can only be interpreted as signifying rejection of the grievances submitted by the complainant to the Joint Panel.

11. As stated above, in her grievance filed on 13 December 2002 the complainant alleged inter alia that her former supervisor had breached the rules of confidentiality in the context of the harassment dispute between them. On this issue, the defendant points out that the Secretary of the Joint Panel had informed the complainant's counsel, by a letter of 9 July 2003, that this was an internal disciplinary matter to be resolved by the Human Resources Development Department with the official against whom the grievance was directed, and that it would therefore not be examined by the Panel. The defendant argues that the Director-General, who had taken no express decision on that part of the grievance, must therefore be deemed to have taken an implicit decision confirming the position of the Joint Panel, in accordance with Article 13.2.2, paragraph 3, of the Staff Regulations, which states that:

"The reasoned report of the Joint Panel, containing its proposal, shall be submitted to the Director-General [...]. If the Director-General fails to take any decision on the grievance within 20 working days from receipt of the Joint Panel's report, he [...] shall be deemed to have taken a final decision to take the action proposed in the Joint Panel's report. [...]"

According to the ILO, the ninety-day time limit for filing a complaint with the Tribunal against that final decision had expired by the time the complaint was filed.

12. In this case, it is doubtful that the letter from the Secretary of the Joint Panel referring to the views of the Chair can be regarded as a reasoned report, and indeed it cannot be ascertained from the evidence on file whether or when the letter of 9 July 2003 was brought to the attention of the Director-General. Under such circumstances, the argument whereby an implicit decision of rejection was taken by the competent authority at a date from which the time limits for appeal began to run, and the corresponding part of the claims was submitted to the Tribunal too late, is unsustainable.

13. The allegations concerning a breach of confidentiality by the complainant's former supervisor in circumstances rendering the Organization liable represent but one aspect of the criticism levelled at it regarding the way in which the complainant was treated after the filing of her harassment grievance. Nevertheless, these allegations must be dismissed: the fact that the complainant's former supervisor held a reception at which he allegedly celebrated what he considered to be the successful outcome of the grievance proceedings in question cannot, in any case, render the Organization liable.

14. In order to assess the merits of the complaint's pleas to the effect that she was penalised and even harassed by the Organization as a result of the harassment grievance she had filed, and that the "retaliation" to which she was subjected culminated in the non-renewal of her contract, it is worth recalling the principal stages of her career.

15. As stated above, the complainant was recruited by the Office in April 2000 as a Senior Policy Economist in IFP/SES and, as from 1 September 2000, held a fixed-term contract. On 26 January 2001, at the complainant's request, her supervisor signed a statement declaring his "intention to renew [her contract] for the next four years to permit her to continue the important work she [was] carrying out on Minimum Income schemes, a vital part of [the] work programme". In November 2001 she submitted a grievance to the Ombudsperson in accordance with Article 13.15 of the Staff Regulations, alleging that she had been subjected to psychological harassment by her supervisor. In April 2002, having received the Ombudsperson's report, the Office decided to transfer the complainant to the Management Support Unit of the Social Protection Sector (ED/PROTECT/MSU). But the complainant objected that she had been recruited for her skills as a researcher and not as a manager, and in September 2002, following protracted discussions, she was assigned to the Social Security Policy and Development Branch (SOC/POL). In that new position she hoped to be able to devote most of her time to the implementation of an important pilot project on the Minimum Income for School Attendance, in Mozambique, known as "MISA". However, her position was still being funded by her former programme (IFP/SES) and her transfer to SOC/POL had not been accompanied by a transfer of funding. Her new supervisor did not allow her to undertake a mission to Mozambique, because the funding of her position was to revert to her former programme at the end of her contract, which was imminent since the contract was due to expire on 28 February 2003. Under those circumstances, her supervisor considered it inappropriate to entrust her with missions to Mozambique relating to a project which would have required her involvement beyond the date on which her contract was due to expire. Since it could neither maintain the complainant in her post nor find her an alternative post in Geneva, the Office offered her three posts in the Social Protection Sector which were liable to suit her, in Dakar, Harare and Yaoundé. In the meantime, the complainant had received a first appraisal report for the period 1 September 2000 to 31 May 2001 with considerable delay, further to which the Reports Board had decided on 3 June 2002 that a technical assessment should be conducted by an "independent, outside and anonymous" evaluator, after which it would make a recommendation on the assessment of her probationary period. On 30 September 2002, in the light of the complainant's entire file, including the said technical evaluation, the Reports Board "confirmed" her employment at the end of her probationary period and "approve[d] the extension of [her] contract".

16. Following these events, the Director of the Human Resources Development Department wrote to the complainant on 28 February 2003, that is to say on the very day when her contract was due to expire, to inform her that the Office had been unable to identify a suitable post for her at headquarters corresponding to her preferences. Having recalled that by a letter of 27 January 2003 she had refused the three P.5 field posts which had been proposed for her, and to allow her additional time to think about those proposals, the Director offered her a three-month extension of her contract in Geneva, which she accepted. Her appointment thus ended on 31 May 2003.

17. Contrary to the view expressed by the complainant, the Office did not show bad faith in dealing with the delicate situation in which it found itself, and it cannot be considered to have taken the decisions concerning her career in "retaliation": the decisions concerning the MISA project and her planned missions to Mozambique were

based on sound management concerns which the Tribunal cannot criticise. The posts offered to the complainant – whose contract stipulated that she could be transferred – matched her grade and skills, even though the drafting of the job description for the post in Dakar may have been somewhat inadequate. Furthermore, the complainant had no right to renewal of her contract and the Tribunal, which exercises only a limited power of review over decisions taken in such matters by the competent authority, finds no error of fact or of law in this case, nor any misuse of authority: although the Reports Board was in favour of renewal, the Organization was not bound by the Board's recommendation and was entitled to draw the consequences of the complainant's refusal of the transfer proposals that were made to her. The evidence most favourable to the complainant's case does not support the conclusion that the decision not to renew her contract was taken in bad faith or in "retaliation" for her harassment grievance. Consequently, the requested public hearing and witness hearings are unnecessary. As regards the complainant's request for the production of numerous documents, the Tribunal considers itself sufficiently informed by the existing submissions and sees no need, in view of the evidence already submitted by the parties, to authorise the "fishing expedition" sought by the complainant.

18. The Office found itself in a delicate situation to which the complainant's transfer, first to ED/PROTECT/MSU and subsequently to SOC/POL, on the whole constituted a reasonable response. As for the allegation that a staff member of the Organization put pressure on an external researcher with a view to obtaining false statements regarding the complainant's conduct, it is not a matter for which the defendant could be held liable in this case.

19. Nevertheless, the complainant may legitimately complain:

- that she was encouraged to embark on a career with the Office and to leave her country and previous job in the reasonable hope that the projects in which she would be involved would last several years;
- that she was transferred to SOC/POL without her post and the appurtenant funding being transferred with her;
- that she was placed in a situation in which she was not given tasks genuinely corresponding to her skills and grade for the period of several months between her initial transfer and the moment when she refused the posts offered to her; and
- that her performance appraisals were subject to incomprehensible delays.

Whilst the Tribunal will not call into question the decision not to renew the complainant's appointment beyond the extensions already granted to her, and although it rejects her plea of unequal treatment, it considers that compensation is due in respect of the injury to her dignity resulting from the circumstances described above and, without prejudice to the measures to be taken pursuant to Judgment 2370, awards her 30,000 Swiss francs in compensation.

20. Since she succeeds in part, the complainant is entitled to an award of costs, which the Tribunal sets at 3,000 francs.

DECISION

For the above reasons,

1. The ILO shall pay the complainant 30,000 Swiss francs in compensation.
2. It shall also pay her 3,000 francs in costs.
3. All further claims are dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.