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

101st Session **Judgment No. 2544**

The Administrative Tribunal,

Considering the complaint filed by Mr E. D. against the International Labour Organization (ILO) on 14 March 2005 and corrected on 30 March, the Organization's reply of 27 May, the complainant's rejoinder of 13 July and the ILO's surrejoinder of 31 August 2005;

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

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

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

A. The complainant, a French national born in 1961, was first given an external collaboration contract by the International Labour Office, the secretariat of the ILO, as Organizational Change Management Expert for its project to implement a personalised enterprise resource planning (ERP) system (hereinafter referred to as the "IRIS Project"), starting 1 June 2002. Following the publication of a vacancy notice, he was appointed at grade P.5 to perform the same duties as from 19 August 2002, under a two-year fixed-term contract.

On 15 January 2004 the complainant received an annual report form for fixed-term technical co-operation officials covering the period from 19 August 2002 to 30 April 2003. He sent the form back with a note indicating that he doubted whether the report would serve any useful purpose, since it would cover only a few months and would be written almost one year after the period in question, and that it would be more appropriate to have the report written by his supervisor, the Project Director.

Following a modification of the IRIS Project in March 2004, a new Organizational Change Management Expert was appointed as from 4 April and the complainant was assigned other tasks than those for which he had been recruited.

Referring to past discussions the complainant's supervisor reminded him, in an e-mail of 7 July 2004, that his contract would not be renewed upon its expiry in August and asked him to attend a meeting the following day. At the complainant's request, another meeting took place on 15 July in the presence of an official from the Office of the Legal Adviser and a representative of the ILO Staff Union. On 27 July, following that meeting, the Project Director sent the complainant a note attributing the non-renewal of his contract to his unsuitability for the tasks for which he had been recruited and his poor performance.

On 17 August 2004, i.e. one day before the expiry of his contract, the complainant lodged a grievance with the Joint Panel challenging the non-renewal of his contract. In its report dated 11 November 2004 the Joint Panel recommended paying the complainant two weeks' salary. By a decision of 20 December 2004 the complainant was informed that that recommendation was accepted by the Director-General. That is the impugned decision.

B. The complainant points out that the ILO's constant and recognised practice is to give two months' formal written notice of a decision not to renew a contract. He does not deny that he discussed the possibility of his contract not being renewed, but he maintains that he never had the impression during those discussions that a final decision had been taken. He argues that formal, written notice is particularly important in the international civil service, where "jobs are not secure and where information concerning the maintenance of posts and financing is often contradictory". He asserts that "[i]t was only when [he] received written notice on 7 July 2004 that [he] felt sure that his contract would not be renewed".

The complainant contends that the reasons given by the Organization to justify the non-renewal of his contract have tended to vary. In his view, this variability of the reasons implies that there was prejudice against him, which is further confirmed by the fact that he never received a performance appraisal.

Lastly, while the complainant does not deny that he had no right to the automatic renewal of his contract, he maintains that he entertained “strong expectations” that it would be renewed. He argues that the Organization never made him sign the type of contract usually offered to technical cooperation staff, which would have mentioned the limited duration of the project. In fact the project is still running in the ILO and is scheduled to be gradually incorporated in the Organization’s regular budget.

The complainant asks the Tribunal to set aside the decision not to renew his contract and to order the ILO either to reinstate him or to award him compensation equivalent to the sum he would have been paid had his contract been “normally” renewed. He also claims 200,000 United States dollars in compensation for moral and material injury, and 6,000 Swiss francs in costs.

C. In its reply the ILO submits that the offer of employment which the complainant signed on 17 July 2002 shows clearly that he was recruited as an Organizational Change Management Expert and not as an official, and this was confirmed to him not only orally, but also in writing in several documents. The complainant therefore had to be aware that his appointment would not be extended beyond the duration of the project for which he had been recruited. The post of Organizational Change Management Expert was limited to one or two years, as stated in the vacancy notice, which referred to the end of 2003 for the conclusion of the project, and there is a difference between experts recruited for projects and officials recruited to carry out permanent duties.

The defendant Organization points out that no requirement of written notice at the end of a fixed-term contract appears either in the Staff Regulations or in the Tribunal’s case law. It asserts that the complainant appears to be confusing the need to give notice and the need to give reasons in writing for not renewing a contract. It submits that the complainant received notice well before 8 July 2004. He was in fact informed a year before the end of his contract that it would not be renewed and he was reminded of that fact on several occasions.

The ILO denies that there was any prejudice against the complainant and maintains that he was informed of the reasons for the non-renewal of his contract in the Project Director’s note sent on 27 July 2004.

The fact that the complainant never received a performance appraisal was due, according to the defendant, to a lack of cooperation on the part of the complainant, who deliberately omitted to fill in the report form.

D. In his rejoinder the complainant rejects the distinction drawn by the Organization between experts and officials and contends that he was recruited as an official, as shown by a written statement issued by the Office.

He points out that the vacancy notice did not specify that the post was limited to one or two years, but did on the other hand state that the initial contract would be for a one to two-year period with the possibility of an extension, which explicitly emphasises that the appointment was renewable in the same way as “regular budget” posts.

The complainant reiterates that he never received any information in writing regarding the non-renewal of his contract prior to July 2004 and that the oral information he was given was invariably confused and contradictory.

Lastly, the complainant contends that the IRIS Project Director’s prejudice against him was due to the fact that he denounced “management practices which were extremely damaging to the Organization”.

E. In its surrejoinder the ILO argues that, even though the term “temporary” did not appear in the offer of employment, the post for which the complainant was recruited was, in the etymological and legal sense of the term, temporary, meaning which lasts or should last only for a limited time. It adds that the statement supplied to the complainant, which describes him as an “official”, cannot be used as evidence of the permanent nature of his appointment.

The defendant categorically rejects the complainant’s assertion that his denunciation of management practices that were extremely damaging to the Organization gave rise to any prejudice against him. It points out that this argument was not raised before the Joint Panel and was added belatedly to the file in order to fill out a very slim case.

Lastly, while the ILO acknowledges that the performance appraisal was issued late, it considers that this delay did not justify the complainant’s refusal to comply with what was at least a reciprocal obligation regarding the assessment of his work.

CONSIDERATIONS

1. When the complainant joined the ILO, he was given an external collaboration contract. As from 19 August 2002 he obtained a two-year fixed-term contract as an Organizational Change Management Expert for the IRIS Project, following the publication of a vacancy notice for that post by the defendant.

This contract was not renewed when it expired on 18 August 2004 and the complainant challenged the non-renewal decision before the Joint Panel. In support of his challenge he contended, firstly, that the defendant had not given him sufficient, appropriate notice of that decision and, secondly, that the reasons given were not valid.

In its report of 11 November 2004 the Joint Panel concluded that it had not been established that the non-renewal was unlawful. Nevertheless, it recommended granting the complainant compensation equivalent to two weeks' salary on the grounds that "by not seeking to have the performance appraisal drawn up the Office [had] failed to honour an obligation relating to the performance of the complainant's contract of employment".

By letter of 20 December 2004 the Executive Director of the Management and Administration Sector informed the complainant of the Director-General's decision to accept the Joint Panel's recommendation. That is the impugned decision.

2. The complainant's claims are given under B above.

3. He submits that the fact that he did not receive written notice renders the impugned decision unlawful. He adds that he was exposed to prejudice, as reflected in the variability of the reasons given for the non-renewal of his contract and the failure to comply with the appraisal procedure. In addition he accuses the defendant of having caused him serious injury by thwarting his "strong expectations" that his contract would be renewed.

Regarding the issue of notice

4. According to the complainant, the defendant's constant practice is to give two months' formal written notice in the event of the non-renewal of a fixed-term contract.

While acknowledging that he had discussed the possibility of his contract not being renewed with his supervisor, he maintains that at no stage of the discussions had he gained the impression that a final decision had already been taken. He says that on several occasions he had asked his supervisor to follow the practice of giving formal notification of any decision, which in the event was done, according to him, only 29 days before the end of his contract.

The Organization asserts that, for the termination of a fixed-term contract, no notice is required by the Staff Regulations, which stipulate only that one month's notice must be given if a contract of that type is terminated before its expiry date, which was not the complainant's case. It recognises, however, that in practice, and for the sake of good staff management, it notifies non-renewal as early as possible or grants compensation where it has not been able to inform the staff member reasonably in advance.

It argues that in this case, contrary to the view put forward by the complainant, notice was given well before 8 July 2004; that the complainant was informed one year before the end of his contract that it would not be renewed; that he was reminded of that fact on several occasions; and that the Project Director was therefore only "repeating on 8 July 2004, in other words more than one and a half months before the end of his contract, what he already knew".

5. Article 4.6(d) of the Staff Regulations provides that: "[...] a fixed-term appointment [...] shall terminate without prior notice on the termination date fixed in the contract of employment". As recalled above, however, the defendant has adopted a practice of giving "reasonable notice" to officials whose contract is not to be renewed.

This practice was acknowledged by the Tribunal in Judgment 1145 under 4, where it stated that "[n]otwithstanding the terms of [Article] 4.6(d) the practice in the ILO is to give at least two months' notice of non-renewal of a fixed-term appointment".

In this case there is no doubt that notice was given. The question is whether it was given soon enough.

On this point the Tribunal agrees with the Joint Panel that the evidence in the file shows "that by May 2004 at the latest, [the complainant] could not reasonably have been unaware of the intention not to renew his contract". He had been relieved of his duties in the IRIS Project for which he had been recruited and had been replaced by a new expert; his duties were thenceforth restricted to tasks unrelated to the IRIS Project. The complainant himself acknowledges that he asked his supervisor to give him formal notification of the decision taken. This implies that he was well aware that a decision not to renew his contract had already been taken.

It may be concluded from the aforegoing that the messages of 7 and 27 July 2004 merely confirmed the decision already taken not to renew the contract, of which the complainant was aware well before the beginning of the required two-month period. It is clear, therefore, that the practice of giving reasonable notice was followed, bearing in mind that written notice is required neither by the Staff Regulations nor by the Tribunal's case law.

Regarding the non-renewal of the contract
and the lack of a performance appraisal

6. The complainant contends that the reasons given for the non-renewal of his contract varied and are not valid. He states that on 7 July 2004 he was informed without further explanation that the defendant was unable to renew his contract, like a number of other contracts, which had led him to believe that his post had been suppressed due to budgetary constraints. Yet on 27 July 2004, in order to justify the non-renewal of his contract, his supervisor emphasised his unsuitability for the tasks for which he had been recruited, despite the fact that no performance appraisal had been drawn up. According to the complainant, this points to a change of reasons which, added to the fact that he had denounced irregularities in the management of the IRIS Project, implies prejudice, which is confirmed by the lack of a performance appraisal.

He contends that in view of the last reason mentioned, namely his unsuitability for his tasks, the assessment procedure should have been a precondition for the non-renewal of his contract. Yet no assessment was made of his work in the two years he spent in the service of the Organization.

The defendant recalls, firstly, that the complainant's contract was coming to an end, as were the contracts of other experts in the same situation. This was the message conveyed in the Project Director's e-mail of 7 July 2004, which in the defendant's view did not give a reason but merely stated that the complainant's contract would not be renewed when it came to an end.

It argues, secondly, that the reasons for the non-renewal of the complainant's contract are clearly spelt out in the Project Director's note sent on 27 July 2004, which essentially indicates that the complainant was unsuitable for the tasks for which he had been recruited. It considers that the complainant can hardly complain that he received no performance appraisal considering that he himself had returned the report form without filling it in as requested.

It adds that the fact that the complainant did not demur when informed that he was being replaced as Organizational Change Management Expert surely confirms that he was fully aware of his shortcomings in the performance of his tasks and that he was probably not keen to see those shortcomings spelt out in writing.

7. From the evidence available in the submissions, the Tribunal understands that the complainant had been recruited as an expert for a project which was limited in time and which was subsequently extended beyond the termination date of his contract. The non-renewal of his contract could therefore not have been justified by the end of the Project, which was to have led to the suppression of his post. The reason for non-renewal can therefore only be the one notified to the complainant orally by his supervisor, repeated by the latter in the note sent on 27 July 2004 and confirmed before the Joint Panel, namely the complainant's unsuitability for the tasks for which he had been recruited, or unsatisfactory performance.

That being said, a question remains as to how it was ascertained that the complainant was unsuited to the tasks for which he had been recruited and that his performance was unsatisfactory.

8. As the Tribunal has consistently held, performance appraisals are the only criterion of performance where international civil servants are concerned (see Judgment 1351).

In this case, since the reason for not renewing the complainant's contract was his unsuitability for his tasks or his poor performance, the only means of verifying whether that reason was valid or not was to refer back to performance appraisal concerning the complainant. According to consistent precedent, the Organization should

have examined the complainant's performance appraisal before any decision was taken not to renew his contract (see for instance Judgement 2096). Yet it has been established that no performance appraisal report was available in the complainant's case at the time the disputed decision was taken. In order to justify this lacuna, the defendant argues that the complainant had not cooperated in drawing up the said report since he had not felt obliged to fill in the form he had been sent on the grounds that his supervisor was in a better position to do so. It therefore considers that he could hardly complain at the lack of a performance appraisal.

The Tribunal cannot accept the defendant's explanations. Since in this case consideration of the performance appraisal before a decision was taken not to renew the contract was a fundamental obligation, and since failure to comply with that obligation constituted a procedural flaw which had the effect of excluding an essential fact from consideration (see Judgment 2096), the Organization should have made every effort to ensure that the appraisal was duly drawn up. The submissions show, however, that after the report form had been sent to the complainant in January 2004, that is, with considerable delay, the defendant took no particular steps either with the complainant or with his supervisor to ensure that the report was completed.

It may be concluded from the above, as the Joint Panel has done, that "by not seeking to have the performance appraisal drawn up the Office failed to honour an obligation". As a result, the impugned decision is tainted with a procedural flaw.

That procedural flaw does not, however, lead to the conclusion that the said decision was based on prejudice, as argued by the complainant, who indeed produces no evidence to support his allegation concerning the mismanagement of the project.

Regarding compensation

9. The complainant acknowledges that he had no right to the renewal of his contract. He states, however, that he held "particularly strong expectations" that his contract would be renewed.

The Tribunal finds that this assertion rests on no evidence in the submissions. On the contrary, it is clearly established that the complainant had been recruited as an expert for a project of limited duration and that the post he had been offered was also limited to a one or two-year period, as indicated in the vacancy notice published by the Organization, even though the project was subsequently extended. Furthermore, as early as August 2003, as he himself admits, his supervisor had informed him that he wished him to leave the project before the end of his contract. It is clear from the above that the complainant could not, as he maintains, have held "strong expectations" of having his contract renewed. In the circumstances, the Tribunal will not order the requested reinstatement or grant compensation equivalent to the sum the complainant would have received had his contract been renewed.

Nevertheless, the complainant is entitled to compensation for the injury due to the fact that the impugned decision was tainted with a procedural flaw and was therefore unlawful. Over and above the compensation already granted by the Director-General in the decision of 20 December 2004, the Tribunal sets at 10,000 Swiss francs the amount the Organization should pay him under that head.

10. Since he partially succeeds, the complainant is also entitled to costs, which the Tribunal sets at 2,000 francs.

DECISION

For the above reasons,

1. The Organization shall pay the complainant the amount of 10,000 Swiss francs in compensation for injury.

2. It shall also pay him 2,000 francs in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 17 May 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.