Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

107th Session **Judgment No. 2838**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. S. against the International Labour Organization (ILO) on 7 January 2008 and corrected on 7 February, the Organization's reply of 18 April, the complainant's rejoinder of 14 May and the ILO's surrejoinder of 17 July 2008;

Considering Articles II, paragraph 1, and VII 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, who has dual Bulgarian and Swiss nationality, was born in 1947. She joined the International Labour Office, the Organization's secretariat, on 27 November 2001, on an external collaboration contract and was assigned to the Human Resources Information Systems Unit. This contract ended on 21 December 2001. She was subsequently given three further contracts of this kind, covering the period 2 January to 28 March 2002.

The complainant was then recruited at grade G.4 as a Finance Clerk in the Budget and Finance Branch, which is part of the Financial Services Department. She was granted a special short-term contract commencing on 2 April 2002 which, having been extended twice, expired on 31 August. As from 1 September 2002 she was employed under a one-year fixed-term contract which was extended several times and which expired on 31 October 2004. As from 2 November 2004 she was offered a special short-term contract, which was extended on several occasions for the period from 1 March to 21 April 2005, from 22 April to 30 June 2005, from 1 July to 31 December 2005 and lastly from 1 January to 28 February 2006. Rule 3.5[*] of the Rules Governing Conditions of Service of Short-Term Officials applied as from 1 July 2005. The complainant was informed by a letter of 3 January 2006 that her contract had been extended until 28 February 2006, when it would end without further notice.

On 17 July 2006 the complainant filed a grievance which was rejected by the Human Resources Development Department. On 15 December 2006 she referred the matter to the Joint Advisory Appeals Board, asking it to recommend that the Director-General redefine the whole of her employment relationship with the Office and set aside the decision not to renew her contract. In its report of 13 August 2007 the Board recommended the dismissal of her grievance. By a letter of 12 October 2007, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to dismiss her grievance as unfounded.

B. The complainant considers that it was unlawful to engage her on the basis of external collaboration contracts, since they were not concluded for the performance of a well-defined task where the output could be considered an end-product, and they therefore contravened the "overriding principle" established by the Organization itself

[*] This rule stipulates, inter alia, that "[w]henever the appointment of a short-term official is extended by a period of less than one year so that his total continuous contractual service amounts to one year or more, the terms and conditions of a fixed-term appointment […] shall apply to him […]".

in the provisions of Circular No. 11 (Rev.4), series 6, concerning external collaboration contracts as well as Circular No. 630, series 6, concerning the inappropriate use of employment contracts in the Office. On the contrary, under the said contracts she had performed "regular duties" which would have warranted the issuing of a short-term or fixed-term contract.

Moreover, the complainant contends that she worked for the Office virtually without interruption between 27 November 2001 and 28 February 2006, whereas according to Circular No. 630, series 6, she should not have been employed under short-term contracts for more than 364 days. She indicates that although she worked in two different departments, she always carried out the same type of duties. The permanent nature of these duties caused her to harbour legitimate expectations of a career.

The complainant adds that since January 2007 her former duties in the Budget and Finance Branch have been assigned to another official who also appears to have been unlawfully employed under a short-term contract for over a year. She infers from this that the Office did not do everything possible to find her another position, contrary to its assertions before the Joint Advisory Appeals Board. She alleges that in reality the Office did nothing to find an alternative to the non-renewal of her contract. She considers that there was no valid reason not to renew it and points out that she has never been given any such reason.

The complainant requests the setting aside of the impugned decision, compensation for the moral and material injury which she has suffered and her retroactive reinstatement or equivalent compensation. She also claims costs in the amount of 2,000 Swiss francs which she intends to pass on to the Office's Staff Union "for its constant assistance".

C. In its reply the ILO submits that the time limits for appeals regarding all the contracts concluded for periods prior to 31 October 2004 expired long ago. The complaint is therefore receivable only in respect of the non-renewal of the special short-term contract after 28 February 2006.

On the merits the Organization indicates that the special short-term contract beginning on 2 November 2004 was extended several times only because of special circumstances, namely an unusual and excessively heavy workload in the service, the maternity leave of a colleague and the imminent separation from service of an official. Moreover, the complainant was given the last of these extensions on account of her personal situation. The Organization states that since she was employed on a temporary basis in February 2006, it was under no obligation to find a solution to the non-renewal of her contract. It points out that, according to the Tribunal's case law, unless a temporary appointment is extended or converted into a fixed-term appointment, it expires according to its terms without notice or indemnity.

The ILO considers that the redefinition of the whole employment relationship is inconceivable, mainly for reasons of legal certainty. Furthermore, the complainant cannot allege that her contracts for periods prior to 31 August 2002 breached the provisions of Circular No. 630, series 6, since that circular was not published until August 2002. It concurs with the Joint Advisory Appeals Board that the granting of a fixed-term contract – which matched the length of the secondment of an official from the Financial Services Department – did not entitle the complainant to the redefinition of the short-term or other contracts preceding it. The ILO draws attention to the fact that although it was under no obligation to find another position for the complainant when that contract expired, it nevertheless enabled her to stay in a job for a further 16 months. Indeed, the complainant was given a special short-term contract on 2 November 2004. This was extended several times and the terms of employment were in due course amended to comply with those applicable to short-term contracts and then with the provisions of Rule 3.5. The Organization asserts that, apart from during her period of employment under external collaboration contracts, the complainant carried out duties and responsibilities identical or similar to those performed by core Office staff, which is consistent with the provisions of paragraph 6 [*recte* 7] of Circular No. 630, series 6. It submits that the complainant is misinterpreting this circular when she says that she ought not to have

been employed on short-term contracts for more than 364 days, since the circular did not repeal Rule 3.5.

The Organization states that a person who has not been recruited in accordance with the procedures laid down in the Staff Regulations cannot harbour legitimate expectations of a career.

Lastly, it emphasises that the fact that the complainant's successor did not take up her duties until January 2007 proves the sporadic nature of these duties.

D. In her rejoinder the complainant reiterates her arguments. She denounces "the well-established practice of not renewing the contracts of 'precariously employed' officials who formally complain about their unlawful contractual situation" and she says that she was unable to challenge "her contractual situation" until her appointment ended. She maintains that the ILO has violated an overriding principle, because Circular No. 11 (Rev. 4), series 6, of 15 July 1988, forbids the use of external collaboration contracts save in cases where there is a specific task to be performed. In this connection she points out that it was held in Judgment 2708 that violation of a principle such as this may justify the redefinition of a contract. She denies that she was covered by Rule 3.5 and adds that, in any case, that rule does not allow short-term contracts to be granted successively for a period of more than a year.

E. In its surrejoinder the ILO reiterates its position.

CONSIDERATIONS

1. As the grievance which the complainant had filed on 17 July 2006 with the Human Resources Development Department did not meet with a favourable response, she lodged an appeal with the Joint Advisory Appeals Board on 15 December 2006, asking it to recommend that the Director-General redefine her whole employment relationship with the Office and set aside the decision not to renew her contract.

2. The Executive Director of the Management and Administration Sector informed the complainant by letter of 12 October 2007 that the Director-General had decided to approve the Board's recommendation and consequently to dismiss her grievance. That is the decision that the complainant impugns before the Tribunal.

3. The complainant's claims are set out under B, above.

Receivability

4. The Organization states that it concurs with the conclusion reached by the Joint Advisory Appeals Board that "any grievance concerning the terms and conditions of the complainant's various contracts is irreceivable because it is time-barred, except insofar as it may be of relevance to her request for the redefinition of her whole contractual relationship with the Office, the setting aside of the decision not to renew her contract and for 'the drawing of all legal consequences'" and it invites the Tribunal to follow this line of reasoning. It argues that the complainant is trying to have her complaint declared receivable "by obfuscating the fact that 'the whole contractual relationship' in fact encompasses three types of contract which [she] signed". It submits that much of the complaint is irreceivable because, save for the part concerning the non-renewal of the last special short-term contract beyond 28 February 2006, the time limits for appealing against the various types of contract expired long ago.

5. The complainant contends that she "had no choice but to await the end of her appointment before challenging her precarious contractual situation". She contends that by granting a series of unlawful contracts the Organization was able to keep her in a subservient relationship and that any action which she might have taken to obtain the regularisation of her situation would have resulted in the non-renewal of her contract.

6. The Tribunal considers that, in the instant case, as it found in Judgment 2708, even if it is understandable that the complainant could not challenge the lawfulness of her first external collaboration contracts for the reasons she has stated, the same was not true of the following contracts, which ought to have been challenged within the prescribed time limits if her appeal was not to be time-barred and at the latest after the non-renewal of the fixed-term contract, which expired after several extensions on 31 October 2004, i.e. almost two years before she filed a grievance with the Human Resources Development Department on 17 July 2006. In view of the prescribed time limits, this grievance could concern only the special short-term contract which had been extended until 28 February 2006 and which had been concluded for the performance of one-off temporary duties meeting the Organization's immediate needs, but not the fixed-term contract which expired on 31 October 2004. The grievance of 17 July 2006 was therefore irreceivable insofar as it concerned the external collaboration contracts, the last of which ended on 28 March 2002, the first special short-term contract the final extension of which expired on 31 August 2002, and the fixed-term contract which was extended until 31 October 2004. All these contracts were accepted without reservation by the complainant, and on each occasion the Organization plainly wished to establish with her new working relations governed by the applicable texts.

In accordance with the Tribunal's case law and pursuant to Article VII, paragraph 1, of its Statute, the fact that the grievance was irreceivable as regards the contracts preceding the last special short-term contract necessarily implies that the complaint is irreceivable to the same extent on the grounds that internal means of redress have not been exhausted (see Judgments 2297 and 2708). The complaint will therefore be entertained only in respect of the non-renewal of the last special short-term contract and, if appropriate, the redefinition of the employment relationship.

The merits

7. The complainant submits that the non-renewal of her contract beyond 28 February 2006 was unlawful because the duties which she performed were of a permanent nature.

She argues that the special short-term contract beginning on 2 November 2004 was unlawful since she should have been offered a fixed-term contract, that she should have been given a valid reason when the decision was taken not to renew her contract, that no such reason existed because a few months later the Organization recruited a "precariously employed official" to replace her and that the Office did nothing to find an alternative solution permitting the extension of her appointment, to find her another position or to give her preferential consideration for any other vacant post.

Lastly, she submits that Circulars Nos. 11 (Rev.4) and 630, series 6, the Organization's practice and the Staff Regulations have been breached.

8. Circular No. 630, series 6, on which the complainant relies, relevantly provides that:

> "10. A Special Short-Term (SST) contract may be issued for a minimum of 30 days up to a maximum of 171 days (or 5 months and 3 weeks) within any 12 consecutive months. A series of SST contracts may be issued successively, up to a maximum of 171 days."

In the instant case the complainant was employed on the basis of a special short-term contract as from 2 November 2004, which was extended several times, ultimately until 28 February 2006. Thus, in breach of paragraph 10 of Circular No. 630, series 6, and contrary to the provisions of the contract concluded for the period 2 November 2004 to 28 February 2005, this contract was extended beyond 171 days, or 5 months and 3 weeks, within 12 consecutive months. It follows that the extensions from 22 April to 30 June 2005, from 1 July to 31 December 2005 and from 1 January to 28 February 2006 were unlawful.

In an attempt to deny that it acted unlawfully, the defendant contends that the terms of the complainant's contract had been adapted to the rules in force in that the terms of employment were in due course amended to comply with those applicable to short-term contracts and

then with those established by Rule 3.5. These reasons cannot be accepted, since it is clear from the evidence on file that it was in fact the special short-term contract beginning on 2 November 2004 which was extended several times, even though the Organization, being aware of the restrictions imposed by paragraph 10 of Circular No. 630, series 6, deemed fit to specify that Rule 3.5 would apply as from 1 July 2005 and that this extension was due to a "temporary arrangement".

The Tribunal considers that since the file shows that the period of 171 days, or 5 months and 3 weeks, specified in the circular would perforce be exceeded while the complainant's services were still required, the Organization was under an obligation to offer her another type of contract differing in length and terms from a special short-term contract.

The impugned decision must therefore be set aside.

9. The complainant asks the Tribunal to order her retroactive reinstatement or the award of equivalent compensation.

In view of the circumstances of the case, the Tribunal considers that there are no grounds for ordering reinstatement, because the complainant was recruited to perform duties meeting immediate, one-off needs resulting in particular from an unusual and excessively heavy workload, the maternity leave of a colleague and the imminent separation from service of an official from the branch. Moreover, that was why her contract was not renewed.

The Tribunal further notes that the complainant, who was not recruited according to the procedures laid down by the Staff Regulations, could not have any expectation of making a career within the Organization; nor was she entitled to any preferential treatment when a vacant post was filled.

10. However, the unlawful act identified above, under 8, does justify an award of compensation for the moral and material injury suffered by the complainant, which shall be set *ex aequo et bono* at 30,000 Swiss francs.

11. The complainant is entitled to costs in the amount of 2,000 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The ILO shall pay the complainant 30,000 Swiss francs in compensation for the injury suffered.
3. It shall also pay her costs in the amount of 2,000 francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 April 2009, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet