Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

112th Session **Judgment No. 3097**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. M. against the International Labour Organization (ILO) on 13 January 2010 and corrected on 12 February, the Organization's reply of 14 May and the letter of 21 June 2010 by which the complainant informed the Registrar of the Tribunal that he would not file a rejoinder;

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 was born in 1968, has dual Algerian and French nationality. On 19 March 2007 the International Labour Office, the secretariat of the ILO, published a vacancy notice advertising the grade G.6 position of Document Production Assistant – Head of the Arabic Text-Processing Unit. This notice specified that "[s]uccessful completion of the Assessment Centre [wa]s required by […] all external candidates" and that the successful candidate would

be given a fixed-term appointment. The complainant, who applied as an external candidate, underwent technical evaluation and then assessment – which he failed – by the Assessment Centre. He was however appointed as Document Production Assistant in the unit in question, at grade G.5, under a special short-term contract covering the period from 14 January to 27 June 2008.

Tensions soon arose, which led the complainant to meet with the Mediator on 15 February 2008, but he did not wish to pursue that course. At the end of the month his supervisor asked him to sit a number of technical tests, the results of which were not regarded as satisfactory. After some mishaps during the processing of Arabic texts for the Office's Governing Body, on 5 March she decided to redistribute duties within the Arabic Text-Processing Unit, with the result that one of the complainant's colleagues was appointed acting supervisor of the unit whilst the complainant was assigned special duties. He then requested a meeting with his supervisor in order to "provide some clarification about working arrangements in the unit". During the meeting on 6 March he was informed that his appointment was going to be terminated. The following day he was handed a letter, dated 6 March 2008, informing him that his contract would be terminated with effect from 10 March in accordance with Rule 8.1(a)(3)[*] of the Rules Governing Conditions of Service of Short-Term Officials and that he would receive two weeks' salary in lieu of notice.

As the Director of the Human Resources Development Department (HRD) dismissed the grievance which he had submitted to her, on 12 August 2008 the complainant filed a grievance with the Joint Advisory Appeals Board, in which he objected on the one hand to the decision to grant him a "precarious employment contract" and, on the other, to the fact that this contract had been terminated without a valid reason. In its report of 2 March 2009 the Board pointed out that, since the complainant had failed the assessment by the

[*] Rule 8.1, entitled "Cessation of service", provides in subparagraph (a)(3) that the appointment of a short-term official may be terminated on the grounds that "his work or conduct is unsatisfactory".

Assessment Centre, he had not won the competition and could not therefore be given a fixed-term appointment. For that reason it recommended that the Director-General should dismiss the first part of the grievance as groundless. As for the second part of the grievance, the Board recommended that the Director-General should commission an administrative investigation "very soon" and "with the greatest possible transparency, respecting the rights of all the parties", in order to determine whether the termination of the complainant's contract was tainted with any flaw which would have enabled the Board, in the exercise of its limited power of review, to recommend its cancellation. By a letter of 4 May the complainant was informed that the Director-General had decided to adopt these recommendations and that this decision was final within the meaning of Article 13.3(4) of the Staff Regulations of the International Labour Office.

The investigator was appointed on 3 September. In her report of 30 September 2009 she explained that she had examined the documents made available to her by HRD and that she had questioned several people including the complainant, his supervisor and the Mediator. She added that, in the course of these interviews, she had obtained several "new documents" which had not been submitted to the Joint Advisory Appeals Board and which she annexed to her report. These documents included e-mails regarding the offer of mediation and an e-mail of 26 February 2008 concerning the antagonism in the Arabic Text-Processing Unit, in which the Mediator informed the complainant's supervisor that, in her opinion, he was not suited to working with the ILO. Although the investigator concluded that the termination of the complainant's contract was not tainted with any flaw, she stated that she regretted that the Board had not requested "additional information" enabling it to express an opinion on an issue which lay within its competence as defined in Annex IV to the Staff Regulations, namely whether there had been any procedural flaw. By a letter of 15 October 2009, enclosing a copy of the investigation report, the Director of HRD informed the complainant that the Director-General considered that this report "d[id] not call for any further action on [his] grievance" and that he had therefore decided to close the case. That is the impugned decision.

B. The complainant submits that the impugned decision is tainted with several procedural flaws. He takes the Joint Advisory Appeals Board to task for exercising only a limited power of review over the decision to terminate his contract and for breaching paragraph 11 of Annex IV to the Staff Regulations by merely recommending, rather than requesting, the holding of an administrative investigation. He contends that the adversarial principle was breached in that he was not able to consult the investigation report and the "new documents" annexed thereto until he was notified of the decision of 15 October 2009. On the basis of several passages in the report, he states that the investigator demonstrated obvious bias against him, particularly by repeating the accusations against him without checking their veracity and sometimes even expanding on them. He emphasises that his testimony, albeit provided over the telephone, was not incorporated in the report. Referring inter alia to Circular No. 649, Series 6, of 29 September 2004, concerning informal conflict resolution mechanisms, he alleges that the Mediator neglected her duty of confidentiality and impartiality. In support of this allegation he points to her e-mail of 26 February 2008 which, in his opinion, was "plainly designed to support a dismissal decision", and the fact that she agreed to be questioned by the investigator.

Furthermore, the complainant considers that the decision to end his appointment is flawed in several respects, particularly because he had no opportunity to defend himself before it was adopted. He also contends that misuse of authority occurred and that there is no evidence to substantiate the allegations regarding his unsatisfactory performance.

He asks the Tribunal to set aside the impugned decision and the decision to terminate his appointment, to order the payment with interest of the sums he would have received if his contract had not been terminated, and award him 25,000 euros in compensation for moral and material injury and 6,000 euros in costs. He also asks the Tribunal to rule that, if these sums were to be subject to national taxation, he would be entitled to obtain the reimbursement of the tax paid from the ILO.

C. In its reply the ILO makes it clear that the e-mails between the Mediator and the complainant's supervisor were exchanged in the context of the latter's "request for assistance" and that while the Mediator did have a duty of confidentiality, it was not towards the complainant but towards his supervisor. The Organization maintains that the conclusion reached by the Mediator in her e-mail of 26 February 2008 simply reflected the opinion of a "person who has no role to play in the decision-making process". It adds that in order to carry out the task assigned to her, the investigator had to hear all the people concerned, including the Mediator.

The ILO considers that the investigation report is of an "outstanding quality in terms of both its arguments and the thorough research" which was conducted. It emphasises that the investigator interviewed the complainant and that, since her brief was to determine whether the termination of his contract was tainted with any flaw, she was under no obligation to inform him of the content of the testimony she had obtained from his supervisor and the Mediator.

The defendant submits that the decision to terminate the complainant's appointment is not tainted with any flaw. Since this was a discretionary decision it is subject to only limited review and the complainant has not demonstrated the existence of any flaw warranting its setting aside. In its opinion, the evidence on file shows that the complainant's performance was plainly unsatisfactory.

The Organization contends that, quite apart from the fact that the claim for compensation for the moral and material injury allegedly suffered by the complainant is groundless, the amount claimed is exorbitant.

CONSIDERATIONS

1. In 2007 the complainant applied unsuccessfully for the grade G.6 position of Document Production Assistant – Head of the Arabic Text-Processing Unit. He was, however, appointed as Document Production Assistant, at grade G.5, under a special short-term contract covering the period from 14 January to 27 June 2008.

On account of the tensions which arose in the unit in question shortly after he had taken up his duties, the complainant met with the Mediator, but he did not wish to pursue that course. At the request of his supervisor he subsequently had to sit a series of technical tests. On 7 March 2008 he was handed a letter, dated 6 March, from the Director of HRD notifying him of the termination of his contract, with effect from 10 March 2008, due to his unsatisfactory performance and informing him that he would receive compensation corresponding to two weeks' salary in lieu of notice.

2. As the grievance which he had filed against this decision and against the decision to grant him a special short-term contract was dismissed, the complainant filed a grievance with the Joint Advisory Appeals Board. The Board concluded its report of 2 March 2009 with the recommendation that the Director-General should, on the one hand, dismiss the grievance insofar as it related to the granting of a special short-term contract and, on the other, commission an administrative investigation in order to determine whether the termination of this contract was "tainted with any flaw which would have enabled [it], in the exercise of its limited powers to recommend the cancellation of this termination".

By a letter of 4 May the complainant was informed that the Director-General had decided to follow these recommendations and therefore to order the holding of an administrative investigation. In her report of 30 September the investigator concluded that the termination of the complainant's contract was not tainted with any flaw.

On 15 October 2009 the Director-General, on the basis of this report, took the decision, which the complainant is impugning before the Tribunal, to close the file. The decision of 6 March 2008, which ended the complainant's appointment, was thus confirmed.

3. It should be pointed out that, since the decision of 4 May 2009 was described as "final" within the meaning of Article 13.3(4) of the Staff Regulations, it offered the complainant the possibility of filing a complaint with the Tribunal. As he did not avail himself of this possibility within the time limit laid down in Article VII,

paragraph 2, of the Statute of the Tribunal, he may no longer challenge the lawfulness of this decision insofar as it dismissed his grievance with respect to the granting of a special short-term contract or the lawfulness of the internal appeal procedure leading to that decision.

4. Since the outcome of the grievance, insofar as it related to the termination of the complainant's contract, depended on the findings of the administrative investigation, the Organization had a duty to ensure that he was in a position to defend his rights in the course of this investigation. Indeed, that was why the Director-General, in his decision of 4 May 2009, stressed that the investigation should be conducted "with the greatest possible transparency, respecting the rights of all the parties", as recommended by the Joint Advisory Appeals Board. Having stated that she regretted that the Board had not requested "additional information" enabling it to express an opinion on the existence of a possible procedural flaw tainting the decision to terminate the complainant's contract, although it was competent to do so, the investigator was bound to conduct her investigation with the utmost neutrality and care, thereby demonstrating her independence and impartiality, so as to preclude any possibility that the complainant might gain the impression that his right of defence had been ignored.

5. This requirement was not respected.

(a) Although the complainant was interviewed during the investigation, he was not asked to comment in detail on the "new documents" which the investigator said that she had obtained and which had not been submitted to the Board.

(b) In the particular circumstances of the case, the complainant should also have been given the opportunity to challenge, face to face, those of his former colleagues who had made the most serious allegations about his conduct, but this did not occur.

(c) The report of 30 September 2009 indicates that the investigator interviewed the Mediator. In addition, the annexes to this

report include an exchange of e-mails proving that mediation had been tried and an e-mail of 26 February 2008 which the Mediator had sent to the complainant's supervisor regarding the antagonism within the Arabic Text-Processing Unit.

The mediation process and its findings must remain confidential in keeping with its nature and purposes. Indeed, this is emphasised in paragraph 8 of Circular No. 649, Series 6, concerning informal conflict resolution mechanisms.

It has not been established that the complainant gave highly confidential information to the Mediator. However, while the above-mentioned exchange of e-mails merely shows that an offer of mediation was made to the complainant but that he did not wish to pursue that course, the same cannot be said of the e-mail of 26 February 2008 which, in reality, is tantamount to a very negative report on his conduct and skills. The Mediator had no authority to draw up such a report and, *a fortiori*, no account should have been taken of it in the investigation report on the lawfulness of the procedure for terminating the complainant's contract.

(d) These irregularities lead the Tribunal to find that the decision of 15 October 2009 is tainted with a breach of the right to be heard.

The complaint must therefore be allowed insofar as it seeks the setting aside of this decision, without there being any need to examine the complainant's other pleas.

6. The Organization must reopen the administrative investigation and entrust it to an official who appears objectively to be completely impartial. This investigation must comply with the adversarial principle.

7. The ILO's conduct has caused the complainant moral injury which it must redress by paying compensation in the amount of 4,000 euros.

8. The complainant is entitled to costs, which the Tribunal sets at 2,500 euros.

9. The complainant asks the Tribunal to rule that, if the sums awarded were to be subject to national taxation, he would be entitled to obtain reimbursement of the tax paid from the Organization. In the absence of a present cause of action in this regard, this claim will be dismissed.

DECISION

For the above reasons,

1. The Director-General's decision of 15 October 2009 is set aside.
2. The holding of a new administrative investigation shall be ordered, as indicated under 6, above.
3. The ILO shall pay the complainant 4,000 euros in compensation for moral injury.
4. It shall also pay him costs in the amount of 2,500 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 18 November 2011, 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 February 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet