Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

112th Session **Judgment No. 3098**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. M. against the International Labour Organization (ILO) on 12 February 2010, 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. Facts relevant to this dispute are to be found in Judgment 3097, also delivered this day, concerning the complainant's first complaint. Suffice it to recall that he was recruited by the International Labour Office, the secretariat of the ILO, for the period 14 January to 27 June 2008. The tensions which rapidly arose in his unit led him to meet with the Mediator, but he did not wish to pursue that course. By a letter dated 6 March, which was handed to him the next day, he was informed that his contract would be terminated with effect from

10 March 2008. The complainant brought the dispute before the Joint Advisory Appeals Board and the Director-General then decided, on the basis of the Board's report, to commission an administrative investigation in order to determine whether the above-mentioned termination was tainted with any flaw. The investigator concluded that this was not the case, and the complainant was then informed by a letter of 15 October 2009, enclosing a copy of the investigation report, that the Director-General had decided to close the case.

Having discovered that the e-mails which he had exchanged with the Mediator and the e-mail of 26 February 2008 in which she had informed his supervisor that, in her opinion, he was not suited to working with the ILO, were annexed to the investigation report, on 9 December 2009 the complainant wrote to the Director-General to object to the "blatant, serious breach of the duty of confidentiality which forms the whole basis of the Mediator's role". He said that he was "shocked" by what she had said about his competencies and by the conclusion she had drawn from this. He asked for 25,000 euros in compensation for the moral injury suffered. By a letter of 20 January 2010, which constitutes the impugned decision, the Director of the Human Resources Development Department (HRD) replied to the complainant that if he considered that the Mediator's participation in the administrative investigation might have a bearing on the lawfulness of the decision of 15 October 2009, he could raise this issue "in the appeal which [he was] entitled to file against [this] decision".

B. The complainant explains that, as he was not aware of the Mediator's actions to which he objects until he was notified of the "final dismissal decision" of 15 October 2009, he was unable to exhaust the internal means of redress. He contends, however, that the Tribunal accepts that redress for any injury caused by a flaw in the internal appeal proceedings may be sought from it directly. He invites the Tribunal to declare that Rule 9.1 of the Rules Governing Conditions of Service of Short-Term Officials is unlawful, since it stipulates that an internal complaint "shall be presented within 60 calendar days of the treatment about which the complaint is made", which means that an official may lose his or her right of appeal if the

treatment in question is not discovered for some time. Subsidiarily, he states that this rule must be construed as meaning that the period for lodging a complaint does not begin to run until the date on which the person concerned learns of the actions for which the Office is liable, or until the date on which the injury becomes apparent. In these circumstances, he considers that his request to the Director-General was validly submitted on 9 December 2009.

On the merits, the complainant expands on the plea which he entered in his first complaint that the Mediator breached her duty of confidentiality and impartiality. In his opinion, she "abused her role and the trust which [he] could reasonably place in her, thus deliberately causing him injury".

He seeks the setting aside of the impugned decision, an award of 25,000 euros in compensation for the moral injury suffered and costs in the amount of 4,000 euros. 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 Organization submits that the complainant has not exhausted internal means of redress, because the letter of 20 January 2010 cannot be interpreted as authorising him to file a complaint directly with the Tribunal. It adds that the complaint is irreceivable *ratione temporis* by reason of the above-mentioned Rule 9.1. On the merits, it repeats some of the arguments concerning the Mediator's role which it put forward in its reply to the first complaint.

CONSIDERATIONS

1. As the Tribunal stated in Judgment 3097, also delivered this day, on 15 October 2009 the Director-General of the International Labour Office dismissed the complainant's grievance insofar as it related to the termination of his special short-term contract and sent him a copy of the report of the administrative investigation on which he based his decision. On reading this report, the complainant learnt that the Mediator, whom he had met before the decision was taken to

terminate his appointment, had been interviewed by the investigator. He also discovered that the e-mails which he had exchanged with the Mediator concerning the offer of mediation and the e-mail of 26 February 2008 in which she had expressed the opinion that he was not suited to working with the ILO were annexed to the report.

2. On 9 December 2009 the complainant wrote to the Director-General to complain of this "blatant, serious breach of the duty of confidentiality" which the Mediator ought to observe and of what she had said about his competencies. He requested redress for the moral injury which this had caused him. In her reply of 20 January 2010 the Director of HRD denied that the documents supplied by the Mediator were confidential and invited him, if he so wished, to challenge the Mediator's participation in the investigation "in the appeal which [he was] entitled to file against the decision of 15 October 2009". It is this decision which the complainant impugns before the Tribunal.

3. The Organization submits that the complainant has not exhausted internal means of redress and that his complaint is also irreceivable *ratione temporis.*

These arguments are unfounded. Rule 9.1 of the Rules Governing Conditions of Service of Short-Term Officials lays down that an internal complaint "shall be presented within 60 calendar days of the treatment about which the complaint is made". The Tribunal considers that, contrary to the Organization's submission, the period of time specified in this rule can begin to run only as from the date on which the person concerned learns of the treatment about which the complaint is made and not the date of the treatment itself. In the instant case, the evidence shows that the complainant did not learn of the Mediator's actions to which he objects until 17 October 2009, the date on which he was notified of the decision of 15 October 2009. His letter to the Director-General of 9 December 2009, which must be construed as a complaint within the meaning of Rule 9.1, was not

therefore out of time. Furthermore, in her letter of 20 January 2010 the Director of HRD misled the complainant by saying that he could enter the plea regarding the Mediator's participation in the administrative investigation in the appeal which he was entitled to lodge with the Tribunal against the decision of 15 October 2009.

The Organization therefore has no grounds for objecting that the complainant has not exhausted internal means of redress. For this reason, not only is the complaint receivable, but the Organization has committed an unlawful action by denying the complainant the opportunity to have the dispute examined by the Joint Advisory Appeals Board. By so doing, it deprived him of a safeguard which, according to the Tribunal's case law, exists in addition to the right of appeal to a judicial authority. (See Judgments 3067 and 3068, also delivered this day.)

4. The decision must therefore be set aside and the case must be remitted to the Organization for submission to the Joint Advisory Appeals Board.

5. By denying the complainant access to the Board without justification, the Organization has delayed the final settlement of this dispute, whatever the outcome may be, and has caused the complainant injury for which fair redress may be given by ordering it to pay him 2,000 euros in compensation.

6. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The decision of 20 January 2010 is set aside.
2. The case is remitted to the ILO so that it may proceed as indicated under 4, above.

3. The Organization shall pay the complainant 2,000 euros in compensation for the injury caused by the delay in reaching a final settlement of the case.

4. It shall also pay him costs in the amount of 2,000 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