Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session **Judgment No. 3362**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O.A.R. P. against the International Telecommunication Union (ITU) on 12 October 2012, the ITU's reply of 21 January 2013, corrected on 29 January, and the email of 6 February 2013 in which the complainant informed the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, 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 took up employment with the ITU in May 2009 as a grade G.5 statistical assistant in the Telecommunication Development Bureau (BDT). His initial six-month short-term contract was subsequently renewed several times.

On 15 July 2009 Service Order No. 09/06, concerning the policy on short-term contracts, was published. Paragraph 4 provides that "recourse to short-term contracts for work of a regular and long-term

or permanent nature, or for work in established posts, should be avoided". Paragraph 5 of the Annex to the Service Order provides that consecutive short-term contracts should not exceed a total period of 23 months. Beyond that term, a staff member is ineligible for further employment on a short-term appointment before a six-month period has elapsed, and "no commitment or promise concerning a possible renewal or new contract may be made to [him] by any supervisor in the ITU until a staff request has been approved by the Secretary-General". If the tasks performed by the staff member are "of a long-term or permanent nature, and provided that necessary funding is available, a fixed-term vacancy notice shall be published for competition, using, wherever possible, an existing vacant post".

Although the complainant had completed 23 consecutive months of employment, the Secretary-General exceptionally, at the request of the BDT Director, twice granted extensions of his appointment in order to ensure continuity of service pending the creation and filling by competition of a post of assistant statistician that was budgeted for the subsequent biennium. In the meantime, a reorganisation of the BDT, which had begun in April 2011, had resulted in October, following approval of the budget, in the reallocation of certain funds, including those intended for the assistant statistician post, to extra support for regional and area offices. On 15 December 2011 the complainant was informed by the head of the section in which he was working that his contract, due to expire on 31 December, would not be renewed because no assistant statistician post was to be created.

In a letter of 19 December 2011 the complainant requested the Secretary-General to review the decisions not to renew his contract and not to advertise his post. When his request was refused, on 24 February 2012 he appealed to the Appeal Board, which concluded, in its report of 29 May 2012, that the ITU had no obligation to renew his contract or to create a post of assistant statistician. However, the Board recommended that the complainant be paid moral damages equivalent to one month's salary on the grounds that he had been led to believe, in good faith and because of decisions contravening Service Order No.09/06, that his administrative situation would

perhaps be regularised. On 26 July 2012 the Secretary-General made a final decision to dismiss the complainant's appeal, without granting him any compensation. That is the impugned decision.

B. Although he concedes that the promise to create a post cannot be equated with a promise to appoint him to that post, the complainant contends that a "written and implicit" promise to advertise his post can be inferred from Service Order No. 09/06, and from the fact that he was exceptionally granted contract renewals beyond the limit of 23 months. That promise had in fact prompted him to accept the renewed contracts and thus made the creation of the planned post an acquired right, albeit one which was disregarded by the ITU, and had it not existed the contract renewals could only have been granted in breach of Service Order No. 09/06. Moreover, if as a result of the restructuring exercise that began in 2011 the necessary funds for the creation of the post were no longer available, the Director of the BDT should have been aware of that, in which case he could not be justified in asking for the complainant's contract to be extended in June 2011, and then in October of that year.

The complainant also casts doubt on the true extent of the restructuring exercise to which the ITU refers, noting that not a single post was eliminated in the BDT, where in fact 12 new posts were created.

The complainant alleges that in an interview with his head of division in December 2011, she offered him a Special Service Agreement contract (an SSA contract) commencing on 1 January 2012. He considers that this offer, which he rejected because it would entail an unacceptable deterioration in his conditions of employment, represents an abuse of authority. Moreover, it proves that budget funds were in fact available.

The complainant asserts that he and his family suffered great psychological and financial harm owing to the fact that he was informed only on 15 December 2011, just one week before the end of the year, that his contract, which was due to expire on 31 December, would not be renewed.

He therefore seeks the cancellation of the decision not to renew his contract, payment of his full salary, including pension fund and health insurance contributions from 1 January 2012, "the advertising of a grade G5 assistant statistician post on a one-year fixed-term contract", compensation for moral and material harm, and costs.

C. In its reply, the ITU argues that the complaint is irreceivable to the extent that it challenges the decision not to create the complainant's post and not to advertise it, given that no promise to that effect had been made to him. Since that decision was a managerial measure of a general nature, it was not an individual administrative decision open to appeal. The only decision open to appeal is the decision not to renew the complainant's contract.

On the merits, the ITU argues that it was under no obligation to create and advertise a post of assistant statistician. It was quite legitimate for contract extensions to be granted, exceptionally, to the complainant by the Secretary-General in the exercise of his discretion and on the recommendation of the Director of the BDT, before the ITU budget was approved by the Council. According to the ITU, these extensions were granted in order to meet the need for continuity of service pending the possible creation and advertising of the post in question. The intention, on the part of the BDT Director, to create the post cannot be interpreted as a commitment to do so or as giving rise to a promise to the complainant. The latter has not proved the existence of such a promise, which would in any case have amounted to placing his personal interests above the general interest of the ITU itself. When the last exceptional extension of the complainant's contract was granted, no final decision had been taken to create a post. The ITU also refutes the complainant's argument that he had an acquired right to the creation of the post, since a measure of this kind does not constitute a fundamental and essential condition of employment.

The ITU contends that the decision not to renew the complainant's short-term contract was lawful under Rule 4.G b) and Rule 9.E of the Staff Rules applicable to staff members engaged for

conferences and other short-term service, and under the terms of the contracts he had signed, as well as according to the consistent case law of the Tribunal. The decision was also justified because the reason why the contract had been extended by way of exception, that is, to ensure continuity of service pending the creation and advertising of an assistant statistician post, no longer existed.

Although in the course of the complainant's interview in December 2011 with his head of division the possibility of an SSA contract may have been mentioned informally, no formal offer could have been made, because the complainant's head of division was not the competent authority for deciding to grant a contract of that kind, nor had she received any instructions to that effect from her superiors. Such a contract, if granted, would have been intended to cover a limited transitional phase during which the duties of the assistant statistician would have been redistributed within the division. Moreover, since it is not possible to transfer funds from the budget line used to finance an SSA contract to the one used to finance short-term and fixed-term contracts, the ITU maintains that the funds needed to create the post held by the complainant were not available.

CONSIDERATIONS

1. The complainant was recruited by the ITU in May 2009 under a short-term contract, initially for six months, to work as an assistant statistician in the Telecommunication Development Bureau (BDT). His appointment was later extended five times until, on 1 July 2011, he reached the maximum period of 23 months during which a staff member can be employed at the ITU under such contracts, as stipulated in paragraph 5 of the Annex to Service Order No. 09/06 of 15 July 2009, setting out the policy on short-term contracts.

2. Since it was intended at the time to create a post of assistant statistician in the BDT under the draft budget for the biennium 2012-2013, the complainant's contract was again renewed twice, by way of exception, to 31 December 2011. However, on

15 December 2011 the complainant was informed by his head of division that this appointment would not be renewed again, because the post in question would not now be created. Indeed, it had been decided in the meantime, in the context of a restructuring of the BDT that had begun in April 2011, to reallocate funds intended for the financing of certain posts, including the post in question, with a view to increasing the funds allotted to the regional and area offices of the ITU.

3. Having unsuccessfully requested the Secretary-General to review the decisions not to renew his contract and not to advertise the post which it was intended to create, the complainant lodged an appeal with the Appeal Board.

In its report, issued on 29 May 2012, the Board concluded that the ITU had no obligation to extend the complainant's appointment, but recommended that he be paid moral damages equivalent to one month's salary, since he had been led to believe in good faith, by a series of administrative decisions contravening the provisions of Service Order No. 09/06, that his administrative situation might be regularised.

The Secretary-General chose not to follow that recommendation and decided, on 26 July 2012, to simply dismiss the complainant's appeal.

4. That is the decision impugned before the Tribunal. In addition to its cancellation, the complainant is claiming compensation in various forms for the injury he considers he has suffered, and an award of costs.

5. Rule 4.G b) of the Staff Rules applicable to staff members engaged for conferences and other short-term service provides that: "A short-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment." Rule 9.E a) provides that: "Short-term appointments shall expire automatically and without prior notice on the expiration date of the period specified in the letter of appointment."

The purport of these provisions, which are quite unambiguous, was moreover expressly stated in each of the short-term contracts signed by the complainant, including his last ones, which he received after the end of the maximum period of 23 months referred to previously.

The provisions in question also reflect a position consistently taken by the Tribunal concerning the legal regime governing contracts of this nature. It is sufficient to refer to Judgment 2362, under 6, which states that:

> "Precedent has it that, at the discretion of the executive head, a temporary appointment may be extended or converted to a fixed-term appointment, but it does not carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity (see Judgments 2198, under 13, and 1560, under 4)."

6. Accordingly, the short-term contract renewals granted to the complainant by the ITU beyond the maximum period mentioned above did not imply in any way a subsequent extension of his appointment, and the Appeal Board was wrong in considering that these measures gave him a right to compensation if his situation were not regularised.

7. The impugned decision would nevertheless be unlawful if the complainant were able to rely, as he contends, on an implicit promise to advertise the assistant statistician post which it was initially intended to create. However, apart from the fact that such a promise would not in itself imply a promise to renew his contract until the post was advertised, and that there was no guarantee that the competition to fill the post would result in his appointment, the complainant is not justified in claiming that the two extensions of his appointment that he had received after 1 July 2011 intrinsically conveyed such a promise.

Although these extensions were clearly decided upon by the ITU in the expectation that the planned post would be created, the Tribunal cannot infer from this, as the complainant would have it, that the two contracts in question were "different in nature" from those that had

preceded them simply because, being intended to prolong his temporary appointment beyond the prescribed maximum period, they necessarily entailed an obligation for the ITU to proceed thereafter to the actual creation of the post concerned. Indeed, the conclusion of these contracts cannot in any way be seen as implying in itself the existence of a formal promise to do so.

8. In this case, the existence of such a promise could therefore only be admitted if it were established by other evidence before the Tribunal. It must however be concluded that no such evidence is present. In particular, although it is clear from the memoranda sent by the BDT Director to the Secretary-General on 20 June and 26 September 2011, in support of requests for the renewal of the complainant's contract, that the writer firmly intended to obtain from the competent authorities the creation of the post then envisaged, they do not show that the complainant had been led to believe that this plan would definitely come to fruition.

Moreover, although he points out that these memoranda were written after the restructuring of the BDT had begun and that the person who signed them ought to have ascertained, before requesting recruitment to the post in question, that the necessary funds were still available, these matters likewise do not establish that the alleged promise actually existed.

9. It follows from the foregoing that the first condition according to the case law of the Tribunal, originating in Judgment 782 and consistently restated since then, for a staff member to be entitled to fulfilment of a promise made by an international organization, namely that "the promise should be substantive", is not met in this case. The complainant's arguments that such a promise was disregarded, that there was a consequent error of law and that what he considers to be an "acquired right" was violated, therefore cannot be upheld.

10. It is true that, contrary to the assertions of the defendant, the two short-term contracts under which the complainant continued to be

employed after the expiration of the maximum period of 23 months set in paragraph 5 of the Annex to Service Order No. 09/06 were concluded in an irregular manner, since the Order does not allow for any exception to the rule. However, in this case the irregularity, which affects contract renewals prior to the impugned decision and has no impact on the lawfulness of the decision itself, did not injure the complainant in any way. In fact, even though the post to which he aspired was ultimately not created, these measures were nonetheless favourable for him, since they enabled him to prolong his employment with the ITU for several months. Moreover, the complainant freely consented to sign these contracts, and although he states that it was the prospect of a competition being held for the post, as was then envisaged, which prompted him to make that choice, the Tribunal notes that he does not in any case mention any other employment opportunity which he was induced at the time to turn down.

11. The complainant expresses doubt as to the actual scale of the restructuring of the BDT that began in April 2011 and argues that, in the light of the ITU's available budget funds, this reform did not render it impossible to create the post that was initially planned. But the Tribunal cannot accept this argument.

12. There is no doubt that the defendant is clearly mistaken in claiming that the decision not to create a post, and the subsequent decision not to advertise it, are not open to appeal. Although these decisions are certainly within the managerial authority of the Secretary-General, they are nevertheless administrative acts with adverse effects. As such, they can therefore be appealed by staff members who are adversely affected by them.

13. But the decision not to create a post, like all decisions relating to the management of posts or the organisation of services, is a discretionary decision the wisdom of which the Tribunal obviously cannot judge, having only a limited power of review (see, for example, Judgments 1131, under 5, and 2856, under 9).

In this case, the written submissions, especially a report by the Secretary-General dated 10 May 2012 and another decision taken by him on the following 16 July, produced by the defendant as annexes to its reply, show that the ITU did in fact, in the context of the above-mentioned restructuring, carry out various reallocations of posts to its regional and area offices. Moreover the ITU, which does not deny that it would, theoretically, have been possible to finance the assistant statistician post which it was originally planned to create, points out that it merely decided it was preferable in the meantime to give priority to measures relating to this policy of supporting its field offices.

In the light of these various factors, the Tribunal finds that the decision in question is not vitiated by any error of fact or obvious error of judgement.

14. The complainant alleges that in the meeting with his head of division on 15 December 2011 an offer was made to him to continue working for the ITU under an SSA contract, and he argues that the impugned decision was flawed by an abuse of authority. He refused the offer in any case, and he infers from the fact that it was made that the reason why the responsible officers of the ITU chose not to create a post of assistant statistician is that they intended that "he should continue working under an even more precarious contract than [his] short-term contracts".

The evidence on file shows, however, that the idea of granting the complainant an SSA contract, an idea attributable to the head of division concerned, arose from the impossibility of continuing to employ him in any other way, given the decision of the Secretary-General to refuse to create the post that had originally been planned. It was therefore a consequence of that decision, not a reason for taking the decision itself. Moreover, if the ITU's true intention had been to employ the complainant in future under an SSA contract, it is difficult to see why it would first have given him new short-term contracts beyond the maximum period specified in the applicable rules. Nor does the fact, also mentioned by the complainant, that another staff

member had been compelled to accept an SSA contract offered to her in similar circumstances, suffice to show that the ITU deliberately set out to make inappropriate use of contracts of that kind.

15. Accordingly, without there being any need to determine whether the idea of granting the complainant an SSA contract had only been mentioned, as the ITU claims, in a purely informal way, or whether it would have been legally possible to employ him under such a contract having regard to the nature of the duties he would have been given, the alleged abuse of authority has not been established.

16. Lastly, the complainant objects to the fact that he was notified only on 15 December 2011 of the non-renewal of his last contract, which was due to expire on 31 December of that year. As already stated under 5 above, it is clear from the actual wording of Rule 9.E a) of the Staff Rules applicable to staff members engaged for conferences and other short-term service, expressly reproduced in that contract, and from the consistent case law of the Tribunal, that a short-term contract ordinarily ends automatically, without prior notice, on the expiration date of the period for which it was concluded. It is true that, according to the case law, an international organisation is nevertheless obliged to give a reasonable period of prior notice where a staff member has been employed continuously under such contracts for a period of time exceeding that which corresponds to a purely temporary assignment (see Judgments 2104, under 6, and 2531, under 9). But in the particular circumstances of this case, where the complainant could not be unaware, since the maximum period of 23 months specified in the Annex to the Service Order of 15 July 2009 had expired, that his appointment would probably end when his contract expired, the Tribunal considers that the prior notice of 15 days he was given by the ITU must be regarded as reasonable.

17. It follows from the foregoing that the impugned decision is not open to criticism and that the complaint must therefore be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 April 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
SEYDOU BA
PATRICK FRYDMAN

DRAŽEN PETROVIĆ