119th Session **Judgment No. 3448**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. G. L. against the International Labour Organization (ILO) on 17 January 2012 and corrected on 13 March, the ILO's reply of 20 June, the complainant's rejoinder of 17 August, and the ILO's surrejoinder of 16 November 2012;

Considering Article II, paragraph 1, 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. From June 1993 until January 2002 the complainant worked as a clerk at the ILO Office in Brasilia (hereinafter "the Brasilia Office"), but he was actually hired through a company which was a service provider contracted by the Brasilia Office. From February 2002 until 31 December 2009 the complainant was employed directly by the ILO under a series of fixed-term contracts as a Registry Clerk at the Brasilia Office. His employment was financed through Programme Support Income (PSI), which is extra-budgetary funding. Following the publication in May 2008 of Office Procedure No. 16 (Version 1) pertaining to the Management and use of Programme Support Income, it was determined that three positions at the Brasilia Office, including the complainant's, were funded by the PSI in breach of the Office Procedure. Consequently, to be maintained they would need to be transferred to the regular budget. The complainant's last fixed-term

contract expired on 31 December 2009. On 23 December he was offered a contract extension of one month from 1 January until 31 January 2010.

In a meeting held on 7 January, the Brasilia Office administration informed the local staff union representatives of the abolition of the three positions funded by the PSI and of the creation of three permanent positions funded by regular budget. The ILO decided that the complainant's post as Registry Clerk could not be maintained, that his functions would be redistributed amongst other staff members and that a new post of Finance and Human Resources Assistant would be created instead. It was also decided that the complainant's contract would be extended until 30 April 2010 in order to grant him a period of notice and that he would be given preferential consideration for the new position, if he applied and satisfied the requirements for the post.

By a letter of 20 January 2010 the complainant was formally informed of the non-renewal of his contract beyond 30 April 2010 due to budgetary and restructuring reasons. The complainant submitted a grievance to the Human Resources Development Department (HRD) challenging what he considered to be a dismissal and requesting reinstatement. HRD dismissed his grievance in November 2010 and the complainant filed an appeal with the Joint Advisory Appeals Board (JAAB). In its report of August 2010, the JAAB found that there was an "employment relationship" between the complainant and the ILO since 1993 and that his employment had been de facto terminated. It recommended that the Director-General grant the complainant an indemnity of twelve months of remuneration under Article 11.4.3 of the Staff Regulations of the International Labour Office and be given priority consideration for any vacant position at the Brasilia Office for which he possessed the necessary qualifications.

In his final decision of 20 October 2011 the Director-General disagreed with the JAAB's finding that the complainant had been employed by the ILO since 1993 and found that the non-renewal had been lawful. However, taking note of the JAAB's views on the manner in which the non-renewal had been handled, the Director-General decided to award him 25,000 United States dollars. That is the impugned decision.

B. The complainant contends that the impugned decision was taken in breach of Article 4.6(d) of the Staff Regulations, pursuant to which his last fixed-term contract should have been extended for at least one year until 31 December 2010. He asserts that he was in an employment relationship with the ILO since June 1993 under successive contracts for a period of over 16 years. The two short-term extensions were an artifice to make the termination of his employment look like a non-renewal in order to circumvent his right to an indemnity in line with his time of service under Article 11.4 of the Staff Regulations. The decision not to renew his contract should therefore be considered as a de facto termination taken in breach of Articles 4.6(d) and 11.4 of the Staff Regulations, as well as in violation of the ILO Termination of Employment Convention 1982 (No. 158) and Article 3.2(c) of the ILO Termination of Employment Recommendation 1982 (No. 166), both concerning termination of employment at the initiative of the employer. Based on these two international instruments, he argues that contracts for a specified period of time, when renewed on one or more occasions, are deemed to be contracts of indeterminate duration. He invokes a breach of due process of law on the ground that he did not have the opportunity to challenge his dismissal with the assistance of a representative who is a member of the ILO staff. Lastly, the complainant submits that he was not informed about the meeting held on 7 January 2010, neither was he invited to apply to the new position of Finance and Human Resources Assistant. He asserts that he did not apply to the position and considers that the recruitment procedure was unfair and in breach of the Staff Regulations.

The complainant asks the Tribunal to quash the impugned decision. He claims an indemnity of 12 months of salary under Article 11.4 of the Staff Regulations, as well as the salaries he would have received from May 2010 until December 2010. He requests to be granted priority consideration for any vacant position in the Brasilia Office for which he is qualified, especially the position of Assistant to Director and Driver when it becomes available. He seeks 5,000 United States dollars in moral damages as well as 5,000 United States dollars in costs.

C. In its reply the ILO recalls that fixed-term contracts do not give rise to a right to have the contract renewed and that the non-renewal of a fixed-term contract cannot be equated with a de facto termination. The decision not to renew the complainant's contract was made in compliance with the requirements laid down in the Tribunal's case law: the suppression of his post was based on a legitimate restructuring exercise; he was given reasonable notice and informed of the reasons for the decision. He was also granted a supplementary month *ex gratia* given the circumstances of the non-renewal. Concerning his allegation of a one-year minimum contract period for fixed-term contract extensions, the complainant fails to distinguish between an initial appointment and extension or renewal of contract. It is evident from a plain reading of Article 4.6(d) that an appointment decision to which the minimal time frame applies is not the same as a renewal decision. Moreover, the renewal of a fixed-term contract for a period of less than a year is in conformity with the Tribunal's case law. Article 11.4 of the Staff Regulations does not apply as his contract was not "terminated", rather it was not renewed beyond its date of expiry.

In addition, the international legal instruments invoked by the complainant are not applicable to the relationship between the ILO and its staff, which is governed by its own rules and regulations protecting their rights and entitlements. Furthermore, the ILO points out that Article 3.2(c) of Recommendation No. 166 is not binding even on Member States and merely serves as guidance. The complainant's argument, beyond lacking legal basis, also runs contrary to the Tribunal's case law according to which the principle of private contract law construing an implied renewal of an appointment does not apply to the international civil service, and fixed-term contracts do not give rise to a right to have the contract renewed or extended. The ILO contests that the complainant was employed by the ILO since 1993, because from 1993 to January 2002 his sole employer was a service provider contracted by the ILO and he only became an official of the ILO from 1 February 2002. Concerning the competition for the post of Finance and Human Resources Assistant, the ILO provides evidence that the complainant was sent an e-mail with information on the post opening and that he applied. His application was reviewed,

but it was determined that he did not comply with the minimum qualifications required. The Brasilia Office had no possibilities to retain him through reassignment to other posts, given its small size and budget and this was acknowledged by the staff representatives at the meeting of January 2010. He was invited to apply to any future available posts for which he may be qualified. The ILO considers that his claims are moot due to the compensation he has already received on account of the circumstances surrounding the non-renewal of his contract and his participation in the competition process.

D. In his rejoinder the complainant presses his pleas. He does not contest that he was informed about the vacancy for the post of Finance and Human Resources Assistant and about the competition process, but argues that the e-mail he sent to the Brasilia Office administration containing his curriculum vitae and a letter of recommendation was not an application to that post but rather a desperate request to find a post.

E. In its surrejoinder the ILO maintains its position in full.

CONSIDERATIONS

1. The complainant was employed by a private company from 1993 to January 2002, which company was sub-contracted by the ILO. He worked for that company on the premises of the ILO's Brasilia Office. He was then employed directly by the ILO on fixed-term contracts as a Registry Clerk at the said Brasilia Office from February 2002 until 31 December 2009. His employment was funded through Programme Support Income (PSI), coming out from extra-budgetary donor funding. On 23 December 2009 his contract was extended from 1 January 2010 to 31 January 2010 and on 7 January 2010 the ILO extended his employment until 30 April 2010. This last extension was expressly to provide him with a period of notice. He was informed that his employment would not be renewed after 30 April 2010 for budgetary reasons. The ILO also informed him that he would be given preferential consideration for a new position if he applied and met the

requirements. He challenges the decision not to renew his fixed- term contract.

2. In the impugned decision of 20 October 2011, the Director-General rejected the JAAB's recommendation to grant the complainant an indemnity of twelve months' remuneration. The JAAB had stated that this was because the non-renewal of his contract was a de facto termination of his employment in breach of Article 4.6(d) of the Staff Regulations. The Director-General rejected this recommendation on the ground that Article 4.6(d) refers to appointment and not to an extension of an appointment. The Director-General also rejected the JAAB's finding that the complainant was in an "employment relationship" with the ILO from 1993.

3. The Director-General noted that while the JAAB stated that reinstatement was an inappropriate remedy as the complainant's post was abolished, the JAAB recommended that the complainant should be given priority consideration for any vacancy at the Brasilia Office. The Director-General rejected this recommendation on the ground that the practice only applies following the termination of established officials in accordance with Article 11.5 of the Staff Regulations and not to a person employed on a fixed-term contract. However, the Director-General awarded him 25,000 United States dollars on account of the opinion of the JAAB concerning the manner in which the non-renewal of the complainant's contract and his participation in the competition process were handled.

4. On the merits of the complaint, Article 4.6(d) of the Staff Regulations states as follows:

> "(d) Appointments for a fixed term shall be of not less than one year and of not more than five years. While a fixed-term appointment may be renewed, it shall carry no expectation of renewal or of conversion to another type of appointment, and shall terminate without prior notice on the termination date fixed in the contract of employment."

5. This provision contains nothing that entitles the complainant to a twelve-month contract extension. Neither is there any statement in

the Tribunal's case law that there is a right or entitlement to an extension of this character.

6. Moreover, as the Tribunal has stated in Judgment 2171, under 4, the non-renewal of a fixed-term contract is not the same thing as termination and does not give rise to any termination indemnity. Article 11.4 of the Staff Regulations, which provides for the payment of indemnity upon the termination of a fixed-term contract during its currency, did not apply to the complainant. In any event, the complainant's claim to entitlement to twelve months' indemnity payment on the ground that he was employed by the ILO for over fifteen years is unsustainable. He shows no evidence that he had entered into a contract of employment with the ILO for the period 1993 to 2002, as the Tribunal's case law requires (see, for example, Judgments 817, under 8, and 2926, under 7-9). During that period he was employed by a firm which the ILO had sub-contracted. It is a contract with the ILO concluded in accordance with the rules in force which conferred on him the status of an official bound to the Organization during the period from 2002 to 30 April 2010 (see Judgment 2926, under 7).

7. It is well established in the Tribunal's case law that the non-renewal of a fixed-term contract is discretionary. Such a decision is subject to only limited review by the Tribunal, which respects the freedom of an international organization to determine its own staffing requirements and the career prospects of staff members. A person who is employed on a fixed-term contract does not have a right or a legitimate expectation to a contract extension. Accordingly, the Tribunal will not interfere with a decision not to extend such a contract unless the decision was made without authority, or in breach of a rule of procedure, or was based on a mistake of fact or of law, or overlooked some essential fact, or amounted to an abuse of authority.

8. The Tribunal's case law requires an international organization to give reasonable notice of the non-renewal of a fixed-term appointment. The letter of 20 January 2010, which informed the complainant that

his contract would not be extended beyond its expiration date, actually extended it until 30 April 2010 expressly to provide a notice period. That was a reasonable notice period. This issue would likely have been rendered moot in any event because of the Director-General's decision to pay the complainant 25,000 United States dollars having regard to the manner the non-renewal and his participation in the competition process were handled. The Tribunal notes, in passing, that the twelve months indemnity payment that the complainant claims would have amounted to about 24,500 United States dollars. Moreover, in his rejoinder, the complainant seemingly resiled from contesting the competition process.

9. The ILO provided the reason for the non-renewal of the complainant's appointment in keeping with the Tribunal's case law. The letter of 20 January 2010 stated that it was for budgetary reasons and the restructuring of the Brasilia Office. The Tribunal has consistently recognized these as legitimate reasons for the non-renewal of a fixed-term appointment so long as the discretion is exercised on objective bases (see, for example, Judgments 2510, under 10, 1231, under 26, and 3041, under 6 and 7). The evidence shows that the ILO conducted dispassionate studies and consultations over a period of time, which included the Staff Union of the Brasilia Office. The impugned decision cannot therefore be impeached on this ground, and given, additionally, that there is evidence that the Staff Union agreed with the restructuring in which the complainant's post was suppressed due to budgetary constraints.

10. The complainant contends that the ILO acted in breach of its own international instruments when it did not renew his contract. He specifically refers to ILO Convention No. 158 and Article 3.2(c) of ILO Recommendation No. 166. He submits that these provide authority for the proposition that when a contract for a specified period is renewed on one or more occasions it is deemed to be a contract of employment of indeterminate duration. There is no merit in this submission as this statement is not applicable to a person who is employed on the type of contract on which the complainant was employed. In the second place, these instruments create obligations for Member States and do not apply

to the relationships between the ILO and its officials. These latter relationships are governed by the terms of the contracts into which the person entered with the ILO and by the rules and regulations of the ILO, as interpreted and applied by the Tribunal's case law (see, for example, Judgment 2662, under 12). This aspect of the complaint is unfounded as these do not create for the complainant a contract of indeterminate duration.

11. For all of the foregoing reasons, the Tribunal holds that the ILO did not breach its rules or regulations, the due process of law or legal principle when it did not renew the complainant's contract after 30 April 2010, as the complainant contends. Additionally, although the complainant alleges, in effect, that the lack of representation diminished his chances of successfully challenging the non-renewal of his contract, he has not shown how that would have made a difference in the decision or that he was denied the assistance of a representative. The complaint is accordingly unfounded and will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ