L.-K. (No. 8)

v.

ILO

127th Session **Judgment No. 4103**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr C. D. M. L.-K. against the International Labour Organization (ILO) on 9 March 2017, the ILO's reply of 13 April, the complainant's rejoinder of 24 May, the ILO's surrejoinder of 2 June and the complainant's additional submissions of 12 December 2017, no final comments having been submitted by the ILO;

Considering Articles II, paragraph 1, and VII 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 may be summed up as follows:

The complainant contests the decision not to grant him mission status during the first six months of his assignment to a field post.

The complainant joined the International Labour Office – the ILO's secretariat – in 2001. At the material time he held a contract without limit of time and occupied a regular budget position at the ILO headquarters.

Further to his successful application for the position of Chief Technical Adviser (CTA) of a technical cooperation project in the ILO Liaison Office in Myanmar (ILO-Yangon), the complainant was informed on 2 April 2014 that, for the period of his assignment as CTA,

his rights as the holder of a contract without limit of time would be "suspended in conformity with the Staff Regulations and practices of the Office". He was also informed that at the end of this assignment he would revert to his contract without limit of time and his previous position at headquarters.

These terms were reiterated in the offer of appointment to the CTA position, dated 15 April 2014. The complainant accepted this offer on 22 April 2014 with two reservations. In particular, he indicated that he could not accept the suspension of his appointment without limit of time in accordance with the "practices" of the Office, as these were not published and could be subject to change or re-interpretation without his knowledge, but that he "accept[ed] the detachment in accordance with all applicable rules and regulations". The complainant's assignment to ILO-Yangon began on 1 June 2014 and ended on 31 January 2016, at which point he returned to his earlier position at headquarters.

By an email of 9 December 2014, the complainant inquired with the Director of the Human Resources Development Department (HRD) about the Office's practice of granting officials mission status during the first six months of their assignment to a field post (which involved payment of the Geneva post adjustment together with the daily subsistence allowance at the rate applicable to the duty station) and he asked that it be applied to him. The Director of HRD replied by an email of 19 December 2014 that, as the Office's practice was to grant mission status only to officials transferring between regular budget positions and not to officials assigned to technical cooperation positions, there was no "already-in-place" practice that could be applied to the complainant's situation. He added that the complainant had been duly informed of the conditions of his appointment to ILO-Yangon in April 2014.

On 23 December 2014 the complainant submitted a grievance to HRD against the decision not to grant him mission status during the first six months of his appointment as CTA in ILO-Yangon, asking the Administration to take appropriate corrective measures and to compensate him accordingly. By a letter of 2 April 2015, the Director of HRD rejected his grievance as irreceivable (time-barred) and, subsidiarily, as devoid of merit. The complainant filed a grievance with the Joint

Advisory Appeals Board (JAAB) on 6 May 2015 challenging the rejection of his earlier grievance to HRD and requesting that he be compensated and that he be granted mission status during the relevant period in accordance with the established practice.

In its report of 14 October 2016, the JAAB concluded that the complainant should have benefited from the mission status practice and it recommended that his request be granted. By a letter of 12 December 2016, the complainant was informed that the Director-General had decided to reject his grievance as irreceivable and devoid of merit. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 12 December 2016, to order the ILO to grant him retroactively the status of an official on mission during the first six months of his assignment to ILO-Yangon and to draw all consequences from that decision. He seeks interest on the resulting remuneration arrears from 1 June 2014, the effective date of his assignment to ILO-Yangon. He claims 2,000 Swiss francs in moral damages and a further 2,000 francs in costs, plus interest as from the date of the public delivery of the Tribunal's judgment in this matter.

The ILO asks the Tribunal to dismiss the complaint as time-barred and thus irreceivable and, in any event, as entirely devoid of merit.

CONSIDERATIONS

1. The complaint is irreceivable as the complainant failed to exhaust all internal means of redress in accordance with Article VII, paragraph 1, of the Tribunal's Statute. The complainant's grievance was time-barred when he submitted it to HRD on 23 December 2014. Under Article VII, paragraph 1, of the Tribunal's Statute, a complaint will not be receivable unless the impugned decision is a final decision and the complainant has exhausted all the internal means of redress. This means that a complaint will not be receivable if the underlying internal appeal was not filed within the applicable time limits. As the Tribunal has consistently stated, the strict adherence to time limits is essential to have finality and certainty in relation to the legal effect of

decisions. When an applicable time limit to challenge a decision has passed, the organisation is entitled to proceed on the basis that the decision is fully and legally effective (see Judgment 3758, under 10 and 11, and the case law cited therein).

2. In accordance with Article 13.2, paragraph 1, of the Staff Regulations, the complainant should have submitted his grievance to HRD within six months of the treatment of which he wished to complain. The six-month time limit started to run from 22 April 2014, when the complainant signed the offer of appointment dated 15 April 2014 which contained complete information on the terms and conditions of his new appointment to the position in ILO-Yangon. The granting of the requested mission status during the first six months of the complainant's assignment to Yangon would have entitled him to payment of the Geneva post adjustment and of the daily subsistence allowance at the applicable rate for Yangon. With regard to the offer of appointment signed by the complainant on 22 April 2014, the Tribunal notes that: (1) it did not include an express provision stating that the complainant would be on mission status for six months from the date of his arrival in Yangon; (2) the post adjustment was set at the rate applicable to the Yangon duty station; and (3) the space for the daily subsistence allowance was left blank. These three elements clearly indicated that the complainant was not placed on mission status for the first six months following his appointment to the position in ILO-Yangon.

3. The act which defined the conditions of the complainant's appointment to the position in ILO-Yangon was the ILO's offer of appointment of 15 April 2014, which became definitive and effective with the complainant's signature on 22 April 2014. It was from this date that the six-month time limit for filing a grievance with HRD about the conditions of his appointment started to run. Accordingly, the complainant's grievance was time-barred when he submitted it to HRD on 23 December 2014. The email from HRD of 19 December 2014 does not constitute a decision. In that email, the Director of HRD, responding to the complainant's request of 9 December 2014, confirmed that the mission status practice could not be applied to the complainant's

appointment and also that the complainant had been duly informed of the conditions of his appointment prior to signing the relevant offer of appointment on 22 April 2014. A response to a request to clarify a decision does not trigger a new deadline within which to challenge the initial decision. The recognition of such a principle would render ineffective the purpose for which the time limit was established.

4. The JAAB's statement, according to which the six-month time limit started to run when the complainant received his first pay slip following his assignment to ILO-Yangon, is not correct. As noted above, the complainant could not have been unaware of the fact that the terms of his appointment did not include the granting of mission status. In this regard, the Tribunal draws attention to the following statements in Judgment 3614, considerations 12 and 13:

> "12. The fundamental rationale for enabling an official to rely on payslips as establishing a cause of action is to provide a mechanism whereby a particular decision underpinning the payment or non-payment of a benefit can be challenged and often in circumstances where the official might have no standing to otherwise challenge that decision. [...]
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> 13. In contrast, the rationale for time limits is to ensure that, while an aggrieved official has an opportunity to challenge decisions that adversely impact on her or him, the time frame within which such a challenge can be made is not open ended. The reason for limiting the time frame is to ensure that legal certainty is created, in due course, between both an individual staff member and staff more generally and the organisation employing them. Certainty, in this context, can be of particular significance to an organisation in relation to, amongst other things, budgeting and staffing. The time limit is intended to create a fair balance between the interests of officials and the interests of international organisations employing them."

5. In light of the above considerations, the complaint must be dismissed, without there being any need to consider the other issues raised by the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ