

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

A. (No. 2)

v.

ILO

122nd Session

Judgment No. 3703

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr L. A. against the International Labour Organization (ILO) on 24 September 2013 and corrected on 13 December 2013, the ILO's reply of 15 April 2014, corrected on 28 July, the complainant's rejoinder of 30 September 2014 and the ILO's surrejoinder of 6 January 2015;

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 may be summed up as follows:

The complainant contests the extension by one month and the subsequent non-renewal of his fixed-term contract.

The complainant entered the service of the International Training Centre of the ILO (hereinafter "the Centre"), which is located in Turin, Italy, in 1993. In 2003 and 2004 he held the grade P.5 post of head of the unit in charge of a project jointly financed by the European Social Fund and the Government of Italy. Concerns over his management of this project were raised by an Italian magazine, by the Office of Internal Audit and Oversight of the International Labour Office (the ILO's secretariat)

and by the European Anti-Fraud Office (OLAF), which drew up an investigation report.

On 24 April 2012 the complainant's fixed-term contract, which was due to expire on 30 April of that year, was extended by one month (i.e. until 31 May 2012) to allow the Centre sufficient time to consider the complainant's observations on OLAF's investigation report. On 11 May the Director of the Centre informed the complainant of her intention not to renew his contract beyond 31 May and to pay him two months' salary in lieu of notice, on the grounds that his mismanagement of the above-mentioned project had led to an irretrievable breakdown in the confidence and trust which was fundamental to the relationship between the Centre as his employer and him as its employee. After considering the comments which the complainant had been invited to make, she "confirm[ed]" her decision on 28 May.

On 1 June 2012 the complainant filed an internal complaint in which he asked for the cancellation of the decision of 24 April and of that not to renew his contract, his reinstatement and the payment of appropriate compensation. On 17 July the Director of the Centre acknowledged receipt of this complaint and advised the complainant that, pursuant to Article 12.2 of the Centre's Staff Regulations, she proposed to seek the opinion of a joint committee to be set up under Article 10.3 of the Staff Regulations. The complainant agreed to this proposal.

In the meantime, on 8 June 2012, the Centre's treasurer had referred the matter to the Committee on Accountability, a body set up under Article 13.30 of the Centre's Financial Rules, whose role includes investigating cases of fraud, dishonesty, negligence or disregard of the applicable rules and procedures resulting in a financial or other loss to the Centre. By an e-mail of 10 October 2012 the complainant was informed that the Committee would be willing to interview him on a voluntary basis on 5 December 2012.

On 19 October 2012 the complainant filed a second internal complaint against the "decision" of 11 May, seeking, inter alia, its cancellation, his reinstatement with retroactive effect and compensation for the moral and material injury that he had suffered. On 19 November 2012 the Director of the Centre acknowledged receipt of his complaint. She noted

that the second complaint should be seen as a supplementary submission in support of the first complaint and would therefore be treated as part of the latter.

After an exchange of correspondence prompted by the fact that the Centre's Staff Union Committee was unable to appoint two officials holding at least the same grade as the complainant to sit on the Joint Committee, the parties eventually came to an agreement on the membership of the Joint Committee (two officials at a lower grade were appointed). Having decided to join the two complaints, the Joint Committee delivered its report on 6 May 2013. It unanimously concluded that the complaints should be dismissed as unfounded, as the Director of the Centre had properly exercised her discretionary authority in deciding to extend the complainant's contract by one month and then not to renew it. On 9 May 2013 the Director advised the Joint Committee that she considered it important that the complainant should have an opportunity to submit his observations on the comments that she had provided on 3 April 2013 concerning the two complaints. On 24 June, having received the complainant's observations, the Joint Committee adopted a supplement to its report of 6 May in which it reiterated its conclusions. By a letter of 28 June 2013, which constitutes the impugned decision, the Director of the Centre notified the complainant of her decision to accept the Joint Committee's conclusions.

In his complaint filed on 24 September 2013, the complainant requests the setting aside of the impugned decision, his reinstatement, compensation for the injury that he has suffered and an award of 8,000 euros in costs.

The ILO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant first takes issue with the internal appeal proceedings.

2. In his opinion the impugned decision is unlawful because it was adopted after the consultation of a body other than that provided for in Article 12.2 of the Staff Regulations of the Centre.

This provision reads as follows:

“Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations or with the terms of the contract of employment, or that he has been subjected to unjustifiable or unfair treatment by a superior official shall, except as may be otherwise provided in these Regulations, be addressed to the Director through the official’s responsible chief and through the Personnel Office within six months of the treatment complained of. The Director may refer any such complaint to the Staff Relations Committee for observations and report.”

Although the prior consultation referred to in the last sentence of this provision is optional, it does not follow that if the Director decides to have recourse to it, she or he does not need to abide by the established procedure for this consultation. In this case, when the Director of the Centre received the complainant’s complaint, she forwarded it not to the Staff Relations Committee but to a joint committee the membership of which had been agreed by the complainant’s Staff Union representative and the Centre. The defendant explains that the Staff Relations Committee had been replaced with a joint negotiating committee under an agreement between the Staff Union and the Centre’s staff. This agreement had led to amendments to the Centre’s Staff Regulations of which all the staff had been notified by a circular of 6 December 2001. Since both committees were or are collective negotiating bodies, the Joint Negotiating Committee would not have been competent to give its opinion on the merits of the individual complaint filed by the complainant. That is why the Director of the Centre, who had decided to resort to the consultative procedure, had proposed the setting up of an ad hoc joint committee whose members had been accepted by the parties to the proceedings.

It is true that the Centre’s Staff Regulations are by no means clear with regard to the definition of the advisory body to which the Director may turn for assistance when deciding on individual complaints. However, Article 12.2 of the Staff Regulations must be read together with Article 10.3(a), which provides for the setting up of an ad hoc joint committee “when functions assigned to Joint Committees [...] require to be exercised”. The proposal made to the complainant regarding the setting up of such a committee was therefore consistent with the existing regulations, and it was also apt to further the protection of his interests during the internal proceedings. Moreover, when the complainant accepted

the administration's proposal to proceed as was done in this case, he did so in writing, correctly citing the applicable provisions, without reservations, in full knowledge of the facts and in a fully independent manner. In these circumstances the plea that the establishment of an ad hoc joint committee rendered the procedure unlawful obviously fails.

3. The complainant then objects to the membership of the Joint Committee set up in this case on the grounds that two of its members were officials holding a grade lower than his own, which was contrary to the clearly specified requirements of Article 10.3(b) of the Centre's Staff Regulations. This contention borders on bad faith. While there is no denying that two of the four members appointed were performing duties at a grade lower than that of the complainant, he accepted this state of affairs through his Staff Union representative. The latter did draw attention to the fact that the membership chosen did not comply with the Staff Regulations, but he unequivocally accepted this situation given the circumstances and the need to avoid any undue delay in the proceedings. It is plain from the evidence in the file that no official of the same grade as the complainant was available and that the alternatives proposed by the complainant were either impracticable or contrary to the regulations in force, with the result that strict compliance with the applicable provisions was impossible here. The complainant himself acknowledges that in exceptional cases it is possible to depart from the same grade requirement, even though the soundness of this rule is beyond dispute. There is nothing in the file or in the complainant's submissions which raises any doubt that the situation thus described was indeed encountered in this case and there is nothing to suggest, as the complainant seems to imply, that this situation was deliberately created by the Centre, or that the latter did not make the necessary efforts to help the Staff Union Committee to find members of the Joint Committee meeting all the conditions laid down in the Regulations.

In his rejoinder the complainant enters a similar plea based on the fact that the Joint Committee was chaired by someone from outside the Centre and not by one of its officials. This criticism is devoid of merit. The wording of Article 10.3 of the Centre's Staff Regulations, read in conjunction with paragraphs 7 and 19(f) of the Joint Committee's terms

of reference, makes it plain that the chairperson of this committee, who does not participate in its deliberations on substantive issues, is not regarded as a member thereof. As noted above, the manner in which the members of the Committee are appointed is established by the aforementioned Article 10.3. Subparagraph (a) of this provisions lays down a method for appointing the chairperson which is different from that for appointing the Committee members. While the latter must be appointed jointly from among the Centre's officials and must in principle have at least the same grade as the author of the complaint, as far as the chairperson is concerned, the above-mentioned subparagraph stipulates only that she or he must be appointed "by the Director after consulting the Staff Union Committee". There is therefore nothing to prevent the Director of the Centre appointing someone who is not an official of the Centre to chair the Joint Committee.

The plea that the Joint Committee was improperly constituted and hence unlawful must therefore likewise be dismissed.

4. The complainant also submits that the impugned decision breached the adversarial principle, as he had no opportunity to comment on the additional submissions concerning case law which the Director of the Centre had provided at the request of the Joint Committee. Since he had been unaware of them, he had been unable to refer to them when responding to the Centre's comments of 3 April 2013. This plea is devoid of merit, since he had been provided with this information of a purely legal nature in April and he could have expressed his views on it in full, before the impugned decision was taken, in the observations which he was invited to submit on 10 May in response to the Centre's comments on his two complaints.

5. In the complainant's opinion, the impugned decision is unlawful because the Joint Committee's deliberations and opinion did not comply with the rules, as the Committee did not actually meet to examine his case and one of its members did not sign the supplement to the report of 6 May 2013.

The complainant does not question either the Joint Committee's authority to establish its own rules of procedure or their consistency with the requirements of procedural fairness. In accordance with these rules, the Joint Committee met twice, on 11 and 18 April 2013, before delivering its report on 6 May. On the other hand, it did not meet physically to discuss the case before adopting the supplement to its report on 24 June 2013. Although in principle the deliberations of a collegiate body may not be replaced with an exchange of individual opinions submitted in writing by its members, the Tribunal considers that in the particular circumstances of this case, the Centre may not be taken to task for not requiring all the committee members to travel to its campus. In the instant case, it was in fact unnecessary to hold a physical meeting merely to approve a supplement to a report which had been adopted earlier, when the members' written responses were unanimous.

Paragraph 19(f) of the terms of reference of January 2013 stipulates that Joint Committee's report must be signed by the chairman and the members. This is a rule of form which must be observed in order for the proceedings to be valid, though the ILO tries to infer the contrary from a precedent that manifestly concerned different circumstances (see Judgment 810, under 2). Having said this, the absence of the personal signature of one of the members of the advisory body tasked with providing a recommendation to the author of the impugned decision will not, in the instant case, lead to its cancellation, if only because the member in question, who had signed the report of 6 May, but who was unable to be present to sign the supplement to it on 24 June, had delegated his authority to sign to the secretary of the Committee in a form and in terms which left no doubt as to his support for the opinions expressed therein.

This plea will also be dismissed.

6. Lastly, the complainant contends for two other reasons that he was deprived of his right to an effective internal appeal. He holds that the Joint Committee refused to contemplate any solution other than the non-renewal of his contract and failed to take account of certain items of evidence in the file.

This criticism is completely devoid of merit.

It is true that, as the complainant submits, an advisory appeal body should not limit its power to review discretionary decisions in the same way as a judicial body would do (see Judgment 3125, under 12), but this was not what the Joint Committee did. The issue it had to resolve, having regard to the all the circumstances of the case, was that of the lawfulness of the non-renewal of a fixed-term contract. It might well have proposed a solution which it deemed to be more consonant with the principle of proportionality, but it was by no means obliged to do so, as it considered that the complainant's criticism was unfounded.

The complainant is mistaken when he asserts that the Joint Committee failed to examine the documents related to the investigations conducted by OLAF and by the Government of Italy or the complainant's comments thereon. The Joint Committee did not ignore these documents but merely considered, for perfectly admissible reasons, that it was not within its terms of reference to criticise their contents.

7. The complainant submits that both the decision to extend his contract for one month and that not to renew it on its expiry were taken in a manner which breached his right of defence. He maintains that the Centre advised him that it intended to extend his contract by only one month at too short notice for him to be able to prepare an effective defence. In his view the decision to terminate his appointment was adopted as soon as the Director of the Centre received OLAF's investigation report, which meant that the subsequent proceedings were no more than a paper exercise.

The sequence of events evidenced by the file belies this plea.

On 2 April 2012, scarcely four days after receiving OLAF's investigation report which revealed not only serious irregularities in the management of the project for which the complainant had been responsible but also the impact of these failings on the Centre's finances and credibility, the Director of the Centre wrote to the complainant inviting him to present his observations on his role in the events recorded in the aforementioned report. On 24 April, that is to say one week before the complainant's fixed-term contract was due to expire,

the Deputy Director of the Centre offered him a one-month extension of this contract as from the date of its expiry, i.e. from 30 April 2012.

On 11 May the Director of the Centre informed the complainant that, having considered his observations, she intended not to renew his contract beyond 31 May, the date on which the extended contract would expire, owing to the findings of OLAF's investigation report, which had led to an irretrievable breakdown of the confidence and trust which should exist between the Centre and him. Nevertheless, she invited him to submit any further observations he might have before she took her final decision. This decision, for which the reasons were duly stated, was adopted on 28 May after the Director had taken note of the complainant's further observations.

It may be concluded from the foregoing that the complainant was offered every opportunity to state his case throughout the proceedings and that he was fully aware of their purpose and possible outcome. Furthermore the Centre extended his contract precisely in order to allow him to comment on events which were liable to entail the non-renewal of his contract.

The Centre cannot therefore be taxed with having carried out a paper exercise and with not having given the complainant sufficient time to prove that the Centre could still have confidence and trust in him.

8. On the merits, the complainant first challenges the decision to extend his fixed-term contract by only one month. In his opinion, the decision rested on an error of law in the interpretation of Article 1.8*bis*(b) of the Centre's Staff Regulations, which governs the conclusion of this type of contract, its duration and its renewal. He holds that this decision was an abuse of authority in that the Centre made no attempt to meet the needs of the service but only to find an antidote to its lack of foresight, mismanagement or inertia. Lastly, the complainant argues that the procedure followed when extending his contract was contrary to what he refers to as the "principle of sound administration" because, owing to the Centre's failure to take the correct action in a timely fashion, it placed him in an insecure situation comparable to that of officials holding short-term contracts.

9. Article 1.8*bis*(b) of the Centre's Staff Regulations, entitled "Period of appointment", reads as follows:

"Appointments for a fixed-term shall be of not less than one year and 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."

The complainant is wrong to construe this provision as ruling out any possibility of extending a fixed-term contract. These contracts end on their date of expiry unless they are renewed for a period of one to five years. This rule cannot have the absurd effect of rendering it impossible, in exceptional circumstances such as those of the instant case, for the organisation and the official to agree to defer the expiry of the contract in the official's interests, or for the organisation to decide unilaterally in its own interests to end the official's appointment at the end of this extension of the contract.

The complainant was duly informed of the Centre's intention not to renew his contract. In addition, it was proposed that the expiry of this contract should be deferred for one month solely in order to enable him to respond to the criticism levelled at him. He cannot in good faith infer from this that his contract should have been renewed, or had been tacitly renewed, for at least one year.

The Centre committed no error of law, since its interpretation of Article 1.8*bis*(b) of the Centre's Staff Regulations was reasonable.

None of the complainant's submissions prove that the Centre opted for the solution in question in order to remedy any failings on its part and that the impugned decision was thus tainted with abuse of authority.

Nor did the Centre place the complainant, who had been duly informed of its intention, in an unacceptable insecure situation.

10. Secondly, the complainant challenges the decision not to renew his fixed-term contract and to end his appointment at the end of the extension of this contract in light of the facts recorded in OLAF's investigation report.

11. First, he taxes the Centre with failing to take account of an essential fact, since the investigation of the acts of which he was accused was still ongoing when the decision not to renew his contract was taken.

This plea is irrelevant. The sole reason for the decision not to renew the complainant's contract was that the Centre no longer had sufficient confidence and trust in him to retain him in its service. It was unnecessary formally to establish all the facts set forth in OLAF's investigation report in order to take this decision. All that was needed was for the general situation reflected in the report to warrant this loss of confidence and trust. The fact on which the complainant relies, namely that the Committee on Accountability, set up under Article 13.30 of the Centre's Financial Rules, considered that it would be worthwhile to interview him in December 2012 is irrelevant in this respect. The purpose of this interview was not to ascertain whether the Centre could have confidence and trust in the complainant, but to enable the Committee to make recommendations as to how to compensate for the financial losses caused by the mismanagement of the project for which he was responsible.

12. The complainant asserts that the decision not to renew his contract was based on an error of law insofar as the alleged loss of confidence and trust could not constitute a valid reason having regard to his responsibilities and the findings of the investigations conducted in particular by OLAF. In his view it also involved an abuse of authority as it did not really have anything to do with the interests of the service, but was simply prompted by antagonism towards him on the part of the Director of the Centre, who reacted in an inappropriate manner to the demand from the Government of Italy that the Centre should repay a substantial sum of money.

According to the case law, an employee who is in the service of an international organization on a fixed-term contract does not have a right to the renewal of the contract when it expires (see Judgment 3444, under 3). There must certainly be a valid reason not to renew a fixed-term contract and this reason must be given to the staff member (see Judgment 1911, under 6), but the Tribunal nevertheless recognises that the organisation enjoys wide discretion in this matter (see, for example,

Judgment 1349, under 11). The decision not to renew a fixed-term contract may be set aside only if it breaches a rule of form or procedure; or if it is based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgment 3586, under 6, and the case law cited therein).

In the instant case, the Centre plainly did not abuse its discretionary authority in considering that the complainant was no longer worthy of its trust. Irrespective of whether the allegations in the Italian press concerning the complainant were justified, the Director of the Centre had objective grounds for considering, on the basis of the facts set out in OLAF's investigation report, that the complainant had mishandled a situation which proved to be extremely damaging to the Centre. Moreover, there is nothing in the file to bear out the complainant's assertions that the Centre had hidden motives for separating him from its service. In these circumstances, the pleas regarding an error of law, failure to take account of an essential fact and abuse of authority must be dismissed.

13. The complainant contends that he did not receive a reasonable period of notice. Article 13.10 on payment in lieu of notice provides that "[w]hen the termination of an appointment requires the giving of a period of notice, the payment of a sum corresponding to the amount of salary and allowances for the period may be substituted for it". The submissions in the file show that, in accordance with these provisions, the complainant received two months' salary in lieu of notice. This plea is therefore groundless.

14. Since there had been a breakdown of confidence and trust in the complainant, the Centre did not commit any manifest error in deciding not to renew his contract, despite the fact that he had previously received favourable performance appraisal reports.

15. The pleas concerning a breach of the duties of fairness, good faith and care, as well as a breach of the provisions of the Centre's Staff Regulations governing disciplinary measures, must also be dismissed. In refusing to renew the complainant's fixed-term contract, the Centre,

for the reasons stated above, did not abuse its discretionary authority to consider, quite legitimately, that the mismanagement of the project for which he was responsible had gravely undermined the confidence and trust necessary for his further employment and that this warranted the termination of his appointment.

16. The complaint must therefore be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

ANDREW BUTLER