Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

108th Session **Judgment No. 2888**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J.-D. M. against the International Labour Organization (ILO) on 16 May 2008 and corrected on 26 June, the ILO's reply of 22 October, the complainant's rejoinder of 1 December 2008 and the Organization's surrejoinder of 2 February 2009;

Considering Articles II, paragraphs 1 and 4, 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. The complainant is a Swiss national born in 1960. In 2002 he performed some work for the International Labour Office, the Organization's secretariat, as an employee of CORIS, an information technology company which had signed a service contract with the Office. For the period 2 June to 24 December 2003 the Office employed him directly under an external collaboration contract to work in the Information Technology Services. Thereafter, the complainant continued to provide services to the Office through his company *Macherel Informatique* – of which he was the sole

employee – with which the Office concluded three external collaboration contracts covering the periods 5 January to 30 June 2004, 1 July to 22 December 2004 and 3 January to 30 June 2005, followed by a series of service contracts covering the periods 1 July to 21 December 2005, 2 January to 22 December 2006 and, finally, 8 January to 21 December 2007.

In the meantime, on 9 March 2007 the complainant had filed a grievance, through the ILO Staff Union, seeking the reclassification of his contractual relationship with the Office. As the Human Resources Development Department did not reply to this grievance, the complainant referred the matter to the Joint Advisory Appeals Board on 11 June. In its report of 20 December 2007 the Board stated that the complainant's work, by its very nature and the conditions in which it was carried out, "[wa]s scarcely any different to that of an official in the core staff of the user service" and that it was not that of an independent provider of information technology services for which the use of external collaboration contracts or service contracts would be warranted. It therefore recommended that the Director-General should reclassify all the contracts between the complainant's company and the Office as short-term contracts and that all the consequences under the Staff Regulations should be drawn. By a letter of 20 February 2008, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to reject the Board's recommendation, but that he had nevertheless taken note of the fact that the conditions in which the service contracts had been performed might have "give[n] rise to ambiguity" and that, in those circumstances, the Office was prepared to find an administrative solution to his grievance by offering him a symbolic *ex gratia* payment of 3,000 Swiss francs.

B. As a preliminary matter the complainant contends that, since the Executive Director of the Management and Administration Sector furnished no proof of a delegation of authority by the Director-General, the impugned decision was not taken by the competent administrative authority and must therefore be set aside.

On the merits he submits that the duties which he performed on the basis of external collaboration contracts and service contracts were exactly the same, but they did not match the description of those which are supposed to be carried out by a service company or by an external collaborator since, according to the applicable texts, the latter should be recruited only where there is a specific task to be performed, whereas in reality his duties were those of a "fixed-term official". In this connection, the complainant emphasises that in May 2004 the Director of the Financial Services Department had provided him with a certificate attesting that he was an official, even though he was an external collaborator. He holds that the provisions of Circular No. 630, series 6, concerning inappropriate use of employment contracts in the Office, have been breached and that the purpose of giving him service contacts was to "evade the scrutiny" of the Staff Union, which is trying to combat the improper use of certain types of contracts at the Office. He adds that the Organization's intention in concluding contracts with him which did not reflect the true nature of his duties was to avoid giving him the status of an official so as to have greater flexibility with respect to his remuneration and the non-renewal of his appointment.

The complainant also draws the Tribunal's attention to the fact that he worked normal hours and had a leave card, telephone number and e-mail address like any other official of the Office. He says that the Organization "was quick" in removing this number and address once he had submitted his grievance to the Joint Advisory Appeals Board.

The complainant seeks the quashing of the impugned decision, his reinstatement, the reclassification of his contracts with the Office as fixed-term contracts, 320,000 Swiss francs in compensation for the material and moral injury suffered and costs in the amount of 5,000 francs, which he intends to donate to the Staff Union Committee.

C. In its reply the Organization submits that the complaint is clearly irreceivable. It considers that the Tribunal is not competent *ratione personae*, because the complainant has never been an ILO official or subject to the provisions of the Staff Regulations. In its opinion, if the complainant wished to challenge his status as external collaborator,

he ought to have complied with the standard clauses appended to the contracts which he signed and to have filed a complaint under Article II, paragraph 4, of the Statute of the Tribunal. Since the last external collaboration contract ended on 30 June 2005, any claim concerning these contracts is, in the Organization's view, time-barred. Moreover, if the complainant wished to challenge the terms of the service contracts, he ought to have initiated arbitration proceedings before the United Nations Commission on International Trade Law, pursuant to paragraph 11.2 of Annex 1 to the said contracts. The Organization adds that much of the complainant's grievance should have been declared irreceivable *ratione temporis* by the Joint Advisory Appeals Board.

As to the form of the impugned decision, the ILO states that the wording of the decision makes it clear that it was indeed taken by the Director-General, who authorised the Executive Director to inform the complainant thereof.

On the merits it points out that the Office signed external collaboration contracts with the complainant's company only because he so requested, since the use of this type of contract is not appropriate when a company is involved. That is why service contracts were subsequently concluded. According to the Organization, the complainant's presence on its premises was needed owing to the nature of his duties as an information technology consultant, but it denies that he had a leave card. It contends that the complainant should have been aware that he could nourish no hope of a career at the Office without first following the normal recruitment procedure.

The ILO observes that no reasons are stated for the claim to compensation in the amount of 320,000 francs and it considers that this amount is "scandalous".

D. In his rejoinder the complainant endeavours to show that the impugned decision was taken by the Human Resources Development Department and the Executive Director of the Management and Administration Sector, and that it was not endorsed by the Director-General.

On the merits he explains that his contract was not renewed after he had filed his grievance and that he is claiming compensation because he was denied certain rights and opportunities on account of his unlawful status. He considers that the fact that in May 2004 the Director of the Financial Services Department provided him with a certificate attesting that he was an official must be seen as evidence of his real employment relationship with the Office.

E. In its surrejoinder the Organization reiterates its position. It submits that the contracts offered to the complainant were perfectly lawful, and in this connection it emphasises that he accepted them without reservations. It points out that the certificate of May 2004 was wrong, since at that time the complainant was an external collaborator, and it submits that the non-renewal of the contract with the complainant's company had nothing to do with his filing a grievance.

CONSIDERATIONS

1. In 2002 the complainant, a Swiss national, provided services to the Office as an employee of CORIS, an information technology company which held a service contract for the provision of assistance with the setting up of a new resource information system, known as IRIS.

At the end of this contract, which was not extended, the Office concluded with the complainant, in his personal capacity, an external collaboration contract for the period June to December 2003, in order that he might provide further assistance in this respect.

From January 2004 to June 2005 the complainant continued to supply his services under other external collaboration contracts which, however, were no longer concluded with him directly, but with *Macherel Informatique*, a Swiss law company which he had set up in 1998 and of which he was the sole owner.

As from July 2005 the complainant continued to provide services to the Office within the different legal framework of service contracts, likewise concluded with *Macherel Informatique*, until the provision of

the services in question came to an end in December 2007, when the last of these contracts was not renewed.

2. In the meantime, on 9 March 2007, the complainant, acting through the Staff Union, had filed a grievance with the Human Resources Development Department on the basis of ILO Staff Regulation 13.2. He submitted that, since the duties given to him were in fact equivalent to those of an official and the conclusion of contracts with his company was merely a legal device, the Organization had made inappropriate use of the various external collaboration contracts or service contracts under which he had worked since 2003. He therefore requested their reclassification.

As this grievance went unanswered, the complainant then referred the matter to the Joint Advisory Appeals Board which, in its report of 20 December 2007, recommended that the Director-General should reclassify all the contracts between the complainant's company and the Office as short-term contracts.

3. However, on 20 February 2008 the Executive Director of the Management and Administration Section informed the complainant that the Director-General had decided, notwithstanding this recommendation, to dismiss his grievance. The complainant was simply told, in the same letter, that as "the conditions in which [his] service contracts were performed could [have] give[n] rise to ambiguity", and "[i]n the exceptional circumstances of this case", the Office was "prepared to find an administrative solution to [his] grievance by offering [him] a symbolic *ex gratia* payment" of 3,000 Swiss francs.

It is this decision dismissing his grievance that the complainant is now challenging before the Tribunal. He asks for the setting aside of this decision, his reinstatement in the Organization, the reclassification of the contracts in question as fixed-term contracts, an award of compensation for the material and moral injury which he believes he has suffered and an award of costs.

4. The Tribunal will not entertain this complaint until it has ascertained, as the Organization expressly invites it to do, that the complainant's claims lie within its jurisdiction and are not irreceivable in any respect. It must be noted that in both respects the complainant's claims encounter some legal obstacles.

5. Insofar as the complainant's request for reclassification concerns the service contracts concluded with *Macherel Informatique* for the period July 2005 to December 2007, it lies outside the Tribunal's jurisdiction.

Annex 1 to the contracts in question, entitled "ILO Conditions for Service Contracts", which in accordance with clause 8 of these contracts formed an integral part thereof, stipulated in paragraph 11.2 that "[a]ny dispute, controversy or claim arising out of or relating to [these] Contract[s]" which could not be resolved by mutual agreement should be settled by arbitration in accordance with the terms and conditions defined in that annex. The Tribunal has already had occasion to rule that it has no jurisdiction to hear a dispute relating to a contract concluded with an independent contractor or collaborator which contains such an arbitration clause (see Judgments 2017, under 2(a), and 2688, under 5).

6. It is true that the direct application of this case law might give rise to misgivings in a case such as this, where the controversy hinges on whether the disputed contract should be reclassified as a contract appointing an official. In such circumstances, the question of the Tribunal's jurisdiction in fact touches on the merits of the case, since were the complainant to be recognised as an official by the Tribunal, he would be entitled to bring his claims before the Tribunal. It might therefore seem logical not to decide this issue until the merits of the request for reclassification have been examined. However, this line of reasoning cannot be applied where, as in the present case,

jurisdiction to hear any dispute concerning the contract is expressly attributed to another judicial or arbitral body. A request that a contract be reclassified constitutes by its very nature a dispute relating to that contract. The Tribunal will not overstep the limits of its jurisdiction, as defined in Article II of its Statute, by giving a ruling of any kind on the merits of claims which it should not entertain at all.

7. Insofar as the complainant's claim concerns the other contracts in respect of which reclassification is requested, namely the earlier external collaboration contracts concluded with the complainant himself or with his company for the period June 2003 to June 2005, it does fall within the jurisdiction of the Tribunal. Although these contracts expressly stated that their holder was not considered to be an ILO official, they did contain a clause specifically attributing jurisdiction to the Tribunal to deal with any dispute arising out of their application or interpretation, in accordance with the provisions of Article II, paragraph 4, of the Statute of the Tribunal.

8. However, as the Organization rightly points out, the complainant filed his grievance in this connection out of time.

It is true that the contracts in question did not themselves set any time limit for submitting a grievance in connection with them. But since the complainant's intention was to obtain recognition as an official, he ought to have filed his grievance within the time limit applicable to any ILO official under Article 13.2(1) of the Staff Regulations, in other words within six months of the treatment complained of (see Judgments 2708, under 6 to 8, and 2838, under 4 to 6). Admittedly, it would in practice have been awkward for the complainant to dispute the lawfulness of the very first of these contracts, because he might have jeopardised further employment by the Organization; moreover, it would have been difficult for him to prove at the outset that, as he submits, he was engaged in ongoing duties. These considerations do not, however, hold good for the subsequent contracts, and in any case all the external collaboration

contracts in question ought to have been challenged at the latest within six months of the non-renewal of the last contract of this kind, which ended on 30 June 2005. The period of time allowed had therefore clearly expired when the complainant filed his grievance with the Organization on 9 March 2007.

9. In accordance with the Tribunal's case law and pursuant to the provisions of Article VII, paragraph 1, of its Statute, the fact that this grievance was out of time means that on this point the complaint is irreceivable for failure to exhaust the internal means of redress offered by the Organization, which may not be deemed to have been exhausted unless recourse has been had to them in compliance with the formal requirements and within the prescribed time limit (see, for example, Judgments 2010, 2326 or 2708). The Tribunal notes, moreover, that the complainant does not in any way dispute this irreceivability in his written submissions.

10. It may be concluded from the above that the complainant's request for reclassification of his contracts must be dismissed, as part of it does not fall within the Tribunal's jurisdiction and the remainder is irreceivable. The complaint must consequently be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2009, Mr Seydou Ba, Vice-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 3 February 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet