

**116th Session**

**Judgment No. 3264**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs M. J. against the International Labour Organization (ILO) on 28 September 2011 and corrected on 9 December 2011, the ILO's reply of 14 March 2012, the complainant's rejoinder of 14 June, corrected on 2 July, and the ILO's surrejoinder of 1 October 2012;

Considering Article II, paragraph 1, 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, a South African national, was born in 1966. In October 2005 she joined the ILO Country Office for South Africa, Botswana, Lesotho, Namibia and Swaziland, which is located in Pretoria (South Africa). She initially held a three-month short-term contract as a Senior Finance and Administrative Assistant at grade L.7, step 5. With effect from 1 January 2006 she was granted a one-year fixed-term contract, which was subsequently extended for one year. In accordance with Article 5.1 of the Staff Regulations of the International Labour Office, she was on probation for the first two years following her appointment under a fixed-term contract.

The complainant was informed by a letter of 16 May 2007 from the Director of the ILO Country Office, who was her responsible chief, that with retroactive effect from 1 April 2007 she would be granted additional salary steps to take into account her new supervisory responsibilities in the context of the restructuring of the Finance and Administrative Unit. On 1 January 2008 the complainant's contract was extended for another year and, as a result of the reclassification of her post, she was promoted to the position of Finance and Administrative Officer.

On 29 May 2008 the Reports Board requested that the complainant's first and second probationary performance appraisal reports, concerning the periods from 1 January to 30 September 2006 and from 1 October 2006 to 30 June 2007 respectively, be completed as they were overdue. Both appraisals were completed on 17 June 2008, signed by the complainant and her responsible chief two days later and then by the complainant's higher-level chief. They were subsequently forwarded to the Reports Board for review.

In a minute of 22 January 2009 addressed to the complainant, the Secretary of the Reports Board stated that the Board had noted that her responsible chief had expressed serious concerns in the performance appraisal reports regarding her overall performance, and that although there was evidence of some improvements between the first and second reporting periods, additional substantial improvements were still required. However, given the late submission of the appraisal reports and the fact that they had both been completed at the same time, the Board considered that it had insufficient evidence to draw firm conclusions as to her overall performance, and it therefore recommended that she remain on probation until 30 June 2009. The Secretary also informed the complainant that the Board had asked the responsible chief to conduct an ad hoc appraisal for the period from 1 July 2007 to 31 December 2008 and to submit it to the Board by 28 February 2009. In another minute of 22 January 2009 the Secretary of the Board asked the complainant to give her consent to the retroactive extension of her probationary period for the period from

1 January 2008 to 30 June 2009 explaining that, according to Chapter V of the Staff Regulations, such an extension was an exceptional measure which, pursuant to Article 14.6 of the Staff Regulations, could only be taken if she agreed. The complainant accepted the extension on 13 February 2009. In the meantime, on 4 February, a new Director of the ILO Country Office in Pretoria was appointed; he became the complainant's new responsible chief.

Also in February 2009, the complainant and her former responsible chief signed her probationary performance appraisal report for the period from 1 July 2007 to 31 December 2008. The higher-level chief approved it in April 2009 and the report was forwarded to the Reports Board in May. The complainant's new responsible chief, who had been asked by the Board to give his opinion concerning the extension of her contract, recommended against it.

On 2 July 2009 the complainant was notified that the Reports Board had reviewed the ad hoc probationary performance appraisal report and had concluded that her probationary period should be extended for a further six months until 31 December 2009, because concerns remained as to certain areas of her performance. The complainant was also informed that the Board had asked the new responsible chief to complete a further ad hoc performance appraisal report, covering the period from 1 January to 31 August 2009, by 30 September 2009 at the latest, and to make a recommendation concerning the extension of her contract beyond the probationary period.

The said report was completed in early September and signed by the complainant on 23 September 2009. The responsible chief indicated therein that her overall performance was "very poor" and recommended against the extension of her contract. The higher-level chief endorsed that recommendation in November 2009, but the complainant's contract was extended until the end of March 2010 pending review of her last performance appraisal report by the Reports Board. In a minute dated 24 February 2010, the latter also recommended against the extension of her contract.

On 22 March 2010 the complainant's responsible chief informed her that, based on the Reports Board's conclusion and her comments on the performance appraisal report for the period from 1 January to 31 August 2009, it had been decided not to extend her contract because she was discharging her responsibilities inadequately. However, she would be granted three months' notice as from 1 April 2010, during which time she was not required to report for duty, to enable her to look for other employment opportunities. The complainant thus separated from service on 30 June 2010.

On 21 January 2011 the complainant submitted a grievance to the Joint Advisory Appeals Board (JAAB) in which she challenged the ILO's management of her probationary period and the decision not to extend her contract. In its report of 25 May the JAAB considered that the contested decision was discretionary and therefore subject to only limited review. According to the JAAB, the complainant's probationary period had been extended in a "legal and adequate" way, but it regretted that the probationary process had not been managed more effectively. The JAAB also considered that she had not suffered any prejudice from the extension of the probationary period and that her claim for compensation was not justified. Consequently, it recommended rejecting the appeal as devoid of merit. By a letter of 30 June 2011 the complainant was informed of the Director-General's decision to endorse the JAAB's recommendation. That is the impugned decision.

B. The complainant contends that the ILO breached the Staff Regulations in extending her probationary period beyond the maximum two-year period provided for therein, stressing that she remained on probation for 57 months. She submits that if there was serious concern about her performance, the matter should have been addressed during the initial probation period. She emphasises that, given the delay in establishing her first two performance appraisal reports and the fact that they were drawn up simultaneously, she had no option but to agree with the proposal to extend her probation, otherwise her contract would not have been renewed. She points out that her probationary period was extended with retroactive effect and

that an ad hoc performance appraisal report was established four months after the end of her initial probation period, which in her view was unlawful.

The complainant alleges mismanagement on the part of the ILO, insofar as she was promoted while being on probation, which is unlawful and does not make sense with respect to an official whose performance allegedly does not meet expectations. She criticises the ILO for having promoted her and assigned her additional duties at a time when she was supposed to focus on the tasks for which she was initially recruited, and for not having updated her job description. She explains that, in addition to her main duties as Finance Officer, she performed the functions of administrative assistant, human resources assistant and IT administrator with little or no support, but that her performance was not assessed against a job description reflecting all these functions; consequently, her first two performance appraisal reports should have been cancelled. As a result, the Reports Board did not have a full picture of the tasks she was performing when it reviewed her performance appraisal reports. In addition, she asserts that she did not receive feedback and support from her responsible chief, and that he was biased against her.

The complainant further contends that she was deprived of the right to an “effective internal appeal” because the JAAB considered that the decision not to extend her appointment at the end of the probationary period was discretionary and therefore subject to only limited review. She criticises the JAAB for having failed to take into consideration some facts, in particular the fact that she was unlawfully asked to perform functions not included in her job description and that she received no feedback or support from her supervisors during the extended probationary period.

She asks the Tribunal to set aside the impugned decision, to order that she be reinstated in her position and to grant her fair compensation, together with 5,000 Swiss francs in costs.

C. In its reply the ILO submits that, according to the Tribunal’s case law, a decision not to renew a fixed-term contract is discretionary and

that the complainant has not proved that the decision was manifestly mistaken in fact or in law, procedurally flawed, taken without authority or that essential facts were overlooked.

According to the ILO, the complainant is estopped from arguing that her probationary period was extended unlawfully, given that she expressly consented to the extension on 13 February 2009. It stresses that, in accordance with Chapter V and Article 14.6 of the Staff Regulations, the extension of a probationary period is an exception to the Staff Regulations which can be made if the official concerned gives his or her consent. Hence, the extension was made in conformity with applicable rules. It adds that the exception was made solely in the complainant's interest. It explains that since her first and second probationary appraisal reports – in which “serious concerns” were expressed with respect to her performance – were established late, it was decided to extend her probation period to give her the possibility to receive further guidance and to improve her performance.

The ILO asserts that the complainant was given feedback on her performance and that she had sufficient time to improve, but failed to do so. It considers that the Reports Board thoroughly and diligently reviewed her performance appraisal reports and points out that she was given the opportunity to provide comments during the Board's review. The Board's report and her comments were then submitted to the JAAB. The ILO therefore denies any breach of her right to an “effective” internal appeal and indicates that it could provide the Tribunal with the JAAB file for *in camera* review if need be.

The ILO acknowledges that the complainant's position was reclassified on 1 July 2008 with retroactive effect from 1 January 2008 due to the restructuring of the Finance Unit. However, it asserts that her performance was correctly assessed against the corresponding generic job description for the period in question. It stresses that her performance was unsatisfactory both before and after her reclassification.

It rejects the allegations of bias and argues that considerable efforts were made to allow her to improve her performance, not only

by giving her time to improve but also by redistributing some of her tasks amongst colleagues.

D. In her rejoinder the complainant submits, with respect to her right to an effective internal appeal, that the Reports Board is not a joint body and that the fact that she had submitted comments during the Reports Board's review of her performance appraisal reports was not enough, particularly given that the JAAB rejected her request for an oral hearing.

The complainant explains that she had already agreed to have her probationary period extended when she realised that it was not in her interest to do so and that this was in fact a way for the ILO to correct retroactively the late establishment of her performance appraisal reports. She adds that she was given no work plan or beginning of cycle report as required under the new Performance Management Framework.

E. In its surrejoinder the ILO points out that nothing in the JAAB's report indicates that the complainant had made an application for hearings and that, in any event, according to Article 10.5 of the Staff Regulations and Annex IV thereto, she had no right to be granted oral hearings.

The ILO emphasises that the complainant did not contest at the time of reclassification the decision to assign her new duties. With respect to her allegation concerning the application of the new Performance Management Framework, it explains that it became effective on 1 July 2009 for new officials taking up their duties after 30 June 2009; thus, it did not apply to the complainant.

## CONSIDERATIONS

1. The complainant joined the ILO's Country Office in Pretoria (hereinafter "the Pretoria Office") as a Senior Finance and Administrative Assistant on a three-month short-term contract. On

1 January 2006 she commenced a one-year fixed-term contract and subsequently received two one-year extensions of her contract. Effective 1 January 2008, as a result of a restructuring process, the complainant's post was reclassified and she was promoted to the position of Finance and Administrative Officer.

2. At this point it is convenient to note that all officials are subject to a statutory two-year probationary period from the time of appointment to a job other than of a temporary nature. In May 2008 the Reports Board wrote to the Pretoria Office asking for the complainant's probationary performance appraisals. It was discovered that the Pretoria Office had not completed performance appraisals for the complainant and the Board requested the appraisals for the periods from 1 January to 30 September 2006 and from 1 October 2006 to 30 June 2007. In June 2008 the Director of the Pretoria Office completed both the first and second probationary performance appraisals, which were reviewed and signed by the complainant's higher-level chief before being sent to the Reports Board for review.

3. In January 2009, after reviewing the complainant's probationary performance appraisals, the Reports Board had concerns about her performance. However, it considered that more information was needed to effectively evaluate her performance. The Board recommended a six-month extension of her probation to the end of June 2009 and requested an ad hoc performance appraisal covering the period from 1 July 2007 to 31 December 2008. The complainant consented to the extension of the probationary period. At this point the Tribunal notes that the complainant's appointment had already been extended from 1 January to 31 December 2009.

4. In February 2009, a new Director assumed responsibility for the Pretoria Office. In March he raised with the complainant the financial management of the office which he described as being in "an appalling state" and attributed a number of the deficiencies as falling within her area of responsibilities. The complainant disputed these assertions.



5. In June 2009, the Reports Board reviewed the complainant's ad hoc performance appraisal and decided that more information was needed to evaluate her performance effectively. The Board proposed another six-month extension of her probationary period and requested another ad hoc appraisal for the period from 1 January to 31 August 2009. The complainant consented to the extension.

6. The complainant's final performance appraisal, completed by the new Director of the Pretoria Office, was negative. He recommended that her contract not be extended. Pending the Reports Board's review of the appraisal, her contract was extended to the end of March 2010. The Reports Board called the complainant and the Director separately in January 2010 to discuss her performance with each of them. Ultimately, the Board issued a recommendation that the complainant's contract should not be extended. On 22 March, the Director advised her that her contract would not be extended and provided her with three months' notice, with effect from 1 April 2010, during which time she did not have to report for work.

7. In her January 2011 grievance from this decision to the JAAB, the complainant raised multiple grounds of appeal including the legality of the extensions to her probationary period and the performance appraisal process, the absence of support during her probationary period, the notice period for the non-extension of her contract and bias. In its report of 25 May 2011, the JAAB considered what may be broadly described as procedural or process matters. Beyond summarising some of the Reports Board's observations, it did not delve into the substance of the performance appraisals. The JAAB concluded that the complainant's "probationary period was extended in a legal and adequate fashion, although it [regretted] that the probationary process had not been more effectively managed". The JAAB added that the complainant "ha[d] not suffered prejudice from the extension of her probationary period" and recommended that her grievance be dismissed. In June 2011, the complainant was informed that the Director-General accepted the JAAB's recommendation and dismissed the grievance.

8. The complainant submits that the Staff Regulations in force at the material time did not provide for the extension of a probationary period and that the retroactive extension of her probationary period was unlawful. She claims that if there were serious issues of non-performance these should have been addressed within the statutory two-year probationary period rather than by prolonging her probation.

9. The complainant acknowledges that she consented to the extension of her probationary period. However, she maintains that given the delay in processing her performance appraisals and the fact that the two probationary appraisals were done simultaneously, she was faced with a *fait accompli* and had no other choice but to agree to the extension since a refusal would have resulted in the non-renewal of her contract. She also states that she would have accepted a genuine extension to assess her performance in good faith. However, in her case, more than four months after the end of her initial probationary period, the Reports Board requested a retroactive appraisal for a period already completed. The complainant explains that she came to the realisation too late that the extension was a means of covering up the Administration's mistakes and a mechanism to retroactively correct the delays and failings of her responsible chief.

10. The ILO submits that, in view of the complainant's express consent to the extension of her probationary period as permitted by Article 14.6 of the Staff Regulations, she is estopped from challenging the extension now. It claims that the exception made to the two-year rule was done in the complainant's best interests to give her additional time to improve her performance. Also, even if there was a procedural flaw it does not warrant the setting aside of the decision not to renew her contract. Given the broad discretionary nature of this type of decision and the serious doubts regarding the complainant's performance that remained at the end of the process it would not have been in the interest of the Organization or the complainant to extend her contract.

11. Before turning to a consideration of the parties' positions, it is useful to reiterate some well settled principles. The purpose of probation is to give an organisation an opportunity to evaluate a probationer's suitability for a position (see Judgment 2646, under 5). This gives rise to corollary obligations on the part of the organisation to warn a staff member in a timely manner that her or his performance is unsatisfactory, to give the staff member guidance and an opportunity to improve and to set objectives against which improvement can be measured. These are "fundamental aspects of the duty of an international organisation to act in good faith towards its staff members and to respect their dignity" (see Judgment 2414, under 23).

12. As will become evident in the reasons that follow, a determination in relation to the legality of the retroactive extension of the probationary period is unnecessary. At the outset, it is observed that the applicable Staff Regulations are those that were in force prior to the 1 July 2009 amendments. It is clear that the Organization breached its obligation under Article 5.5 of the Staff Regulations to complete a performance appraisal after the first 18 months of the probationary period. This is a particularly egregious breach given that the identified deficiencies in the complainant's performance that gave rise to the 2009 efforts were in relation to her performance during the first 18 months of her fixed-term contract. In addition to being a breach of its statutory obligation, it was also a breach of its duty set out above in consideration 11. As a consequence, the complainant was not given an opportunity to remedy the identified deficiencies in a timely manner or, indeed, challenge the appraisals. In this latter regard, it may be observed that the length of time before the appraisals were done calls into question the reliability of the recollection of the complainant's performance many months earlier.

13. The retroactive assessment of the complainant's performance is problematic for other reasons. Even if it could be said that the

retroactive extension of her probationary period in the circumstances was lawful, a finding in relation to which the Tribunal expressly does not make, there was no statutory authority for the use of ad hoc performance appraisals. Article 6.7, paragraphs 1 and 2, referred to in Article 5.5 of the Staff Regulations do not provide for the use of ad hoc performance appraisals and paragraph 3 of Article 6.7 limits their use to instances where certain action is contemplated: withholding of increment, special merit increment and special increments beyond the maximum salary.

14. As to that period of time during the extension of the probationary period, once having engaged the complainant in the process, its duty to act in good faith obligated the Organization to give the complainant guidance and a meaningful opportunity to improve measured against objective standards. This was not done.

15. Lastly, a question of procedural fairness arises in the circumstances. The Tribunal notes that the complainant was not given a copy of the Reports Board's report upon which the JAAB relied in making its recommendations and in turn the Director-General relied in reaching the impugned decision. It is well established in the Tribunal's case law that a "staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him". Additionally, "[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality" (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23).

16. Although Article 10.3 of the Staff Regulations provides that the "proceedings of the [Reports] Board shall be regarded as secret", this alone does not shield a report of the Board from disclosure to the concerned official. In the absence of any reason in law for non-disclosure of the report, such non-disclosure constitutes a serious breach of the complainant's right to procedural fairness.

17. In light of the above, a consideration of the remaining issues raised by the complainant is unnecessary. The complainant is entitled to moral damages in the amount of 15,000 Swiss francs for the fundamentally flawed probationary period, the breach of procedural fairness in the internal grievance process, and the Organization's failure to treat her with dignity and respect.

18. Given the passage of time reinstatement is not a viable option. However, the complainant is entitled to material damages for the lost opportunity to have her contract renewed in an amount equivalent to one year's salary, including all benefits, entitlements and emoluments, together with interest at the rate of 5 per cent per annum as from 1 July 2010.

19. Having succeeded in part, she is also entitled to costs in the amount of 1,200 Swiss francs.

#### DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The ILO shall pay the complainant moral damages in the amount of 15,000 Swiss francs.
3. It shall also pay the material damages in an amount equivalent to one year's salary, including all benefits, entitlements and emoluments together with interest at the rate of 5 per cent per annum as from 1 July 2010.
4. The ILO shall also pay the complainant costs in the amount of 1,200 Swiss francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo  
Dolores M. Hansen  
Hugh A. Rawlins  
Catherine Comtet