118th Session **Judgment No. 3367**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. Y. against the International Labour Organization (ILO) on 11 July 2012 and corrected on 5 September, the ILO's reply of 18 December 2012, the complainant's rejoinder of 15 February 2013 and the ILO's surrejoinder of 17 May 2013;

Considering Articles II, paragraph 1, 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, a former official of the International Labour Office – the ILO's secretariat – was employed from 11 November 2009 to 31 July 2011 under a series of temporary contracts, at the P.4 grade, as Senior Programme and Operations Officer with the Special Action Programme to Combat Forced Labour (SAP-FL), implemented by the Programme on Promoting the Declaration on Fundamental Principles and Rights at Work (DECLARATION). He was initially recruited under a Special Short-Term contract (SST),

which was extended once and, as from 21 April 2010, he obtained a Short-Term contract (ST), which was extended twice.

As of 1 November 2010, the complainant's appointment became subject to Rule 3.5 of the Rules governing the conditions of service of short-term officials (hereinafter "the ST Rules") and, as a result, the terms and conditions of a fixed-term appointment applied to him.

In May 2011 he was informed verbally of the non-renewal of his contract beyond its expiry date of 31 July 2011. This was confirmed by a Minute dated 15 July 2011, in which his supervisor stated that, with the expiry of the technical cooperation project under which his contract was currently funded and due to severe budgetary constraints, the ILO was not in a position to renew his contract.

The complainant submitted a grievance to the Human Resources Development Department (HRD) on 20 July 2011, challenging the decision not to renew his contract. It was rejected on 19 October, and he lodged a grievance with the Joint Advisory Appeals Board (JAAB) on 10 November 2011. In its report of 28 February 2012, the JAAB unanimously recommended that the Director-General dismiss his appeal as entirely groundless. It considered that the complainant had been lawfully employed under the series of SST and ST contracts, as he had been informed of the temporary nature of his appointment from the outset and his terms of reference did not imply any longer term employment. Further, as a technical expert, he was excluded from the scope of Circular 630, Series 6, of 10 July 2002, concerning the inappropriate use of employment contracts in the Office, as the funding for the activities of the project of which he was a part was only anticipated to be for a limited period. Referring to the Tribunal's case law on the distinction between fixed-term and temporary appointments, the JAAB found that it was lawful for his temporary appointment to expire without notice or indemnity, as such appointments do not carry any expectation of, or any right to, renewal. Lastly, the JAAB considered that there was no merit in the complainant's allegation that he should have been treated as non-locally recruited (and should therefore have received a daily subsistence allowance) because he was working in South Sudan when

he was recruited by the ILO, and that his claims concerning unfair working conditions were unsubstantiated.

The complainant was informed by a letter of 13 April 2012 that the Director-General had decided to accept the unanimous recommendation of the JAAB, but that he considered the two-week notice given to the complainant too short. Therefore, the Director-General had decided to compensate him by the award of one and a half months' pay. However, he considered that the complainant's subsidiary pleas were time-barred. That is the impugned decision.

B. The complainant contends that his employment under a series of SST and ST contracts beyond 364 days is contrary to Circular No. 630, Series 6. He argues that since his services were still required after 364 days of being employed under a short-term appointment, the ILO was under an obligation to offer him another type of contract. Further, the terms of reference provided to him with the job offer, as well as his initial discussions with the then Unit Head, implied a long-term appointment. Referring in particular to an e-mail of 20 October 2009 from the recruiting officer, he submits that he had legitimate expectations that he would be employed by the ILO for a longer term.

The complainant contends that the non-renewal of his contract was not motivated by lawful grounds and that he was not given sufficient notice. He challenges the statement that there was a lack of available funds and denies that he was made aware early on in his appointment of the funding situation of the SAP-FL Unit. He submits that, whilst one of the existing projects was coming to an end, a favourable decision to extend that project was widely anticipated. In addition, shortly after accepting his last ST contract, he was informed that several fixed-term contracts had been granted to other colleagues in DECLARATION, and that several posts had been created in the SAP-FL Unit after his departure, including a P.5 regular budget post and a P.4 post for which he should at least have been invited to apply.

The complainant alleges that the Officer-in-Charge of the Unit indicated to him in May 2011 that she had been briefed about the non-renewal of his contract by the Director of DECLARATION and

that she endorsed this decision because of his unsatisfactory performance. He challenged the Officer-in-Charge's criticisms in writing with a copy to the responsible Director, but received no reply. He submits that the real reason behind the termination of his contract was not unsatisfactory performance or lack of funds, but rather bias and prejudice towards him.

He contends that at the time of his recruitment, he was not residing in Switzerland but in Juba, South Sudan. He therefore considers that he should have been recruited as a non-local, and should thus have received a daily subsistence allowance (DSA) for the duration of his ST contract, in accordance with Article 2.2(a) of the ST Rules.

He claims that he was subjected to inappropriate and humiliating working conditions. In particular, he alleges that he was undermined and abused by his supervisor, who made arrangements for him to be supervised by a junior colleague; that he was made to travel in economy class on a route that warranted business class; that he was the only staff member in his Unit who was denied the use of a mobile phone; that he was humiliated by being assigned administrative and secretarial tasks beyond the scope of his duties; and that he was not granted more than one day of the four-day "mandatory" special leave to which he was entitled when his mother passed away in December 2009.

The complainant asks the Tribunal to quash the impugned decision and to award him material and moral damages, as well as 2,000 Swiss francs in costs. He also asks the Tribunal to order the ILO to convert his short-term contract into a fixed-term contract with full retroactive effect.

C. In its reply the ILO argues that the complaint is receivable only to the extent of reviewing the complainant's type of appointment and the reasons for its non-renewal. It considers that he has no cause of action as regards the allegedly insufficient notice period, given that he has been fully compensated in this regard. His plea regarding his status as a locally recruited staff member is time-barred, as he should have

challenged that decision within six months of his recruitment in November 2009. The same applies to his plea that he was not granted special leave when his mother passed away in December 2009, though the ILO denies that he requested special leave on that occasion.

The ILO argues that there was no breach of Circular No. 630, as the complainant's case does not fall within its scope. Indeed, paragraph 3 of the Circular excludes from its scope "technical cooperation experts and certain persons engaged under special extra-budgetary funds" on the ground that "the funding for the activities of the project of which they are a part is only anticipated to be for a limited period". It submits that the complainant's allegations that his appointment was expected to last more than one year, and that he should therefore have been engaged under a fixed-term contract, are unsubstantiated. In its view, the short-term nature of the complainant's employment situation was clearly stipulated in his offer of appointment dated 10 November 2009 as well as in his terms of reference. It points out that the draft terms of reference provided by the complainant as an annex to his brief are not the final ones that were accepted by him and that had been specifically amended to reflect the short-term nature of his job in light of the uncertain funding situation. Nor can the e-mail of 20 October 2009 reasonably be seen as having created a legitimate expectation of employment beyond one year, since it only referred to an offer of a four-month contract. The complainant was lawfully employed under an ST contract and at no point in time was he given the expectation of a career within the Office or any reason to expect longer employment.

The ILO maintains that the reduction of donor funding was the real and lawful reason for the non-renewal of the complainant's contract. The SAP-FL contracts at Headquarters were financed using technical cooperation funds that came to an end over the 2010/2011 biennium. New funding only became available in the course of 2012. Consequently, it was not possible to maintain previous staffing levels within SAP-FL. Only three staff remained in the Unit after the complainant's departure, all of whom had joined SAP-FL prior to his entry on duty and held fixed-term contracts. The decision to keep

those staff in service rather than the complainant was therefore rational and fair and based on objective criteria. Further, the complainant was fully aware of the funding situation of his contract. The ILO draws attention to a Minute dated 1 October 2010 in which the complainant's supervisor requested HRD to renew his appointment for the last time, indicating specifically that the complainant had been informed regarding the lack of funds and that he "underst[ood] that his contract w[ould] not be extended further". It explains that the creation of the P.5 post funded by the regular budget did not free any position; it only freed enough funds to maintain the existing positions. The other posts were created in mid-2012, nine months after his departure, and he was free to apply for them. The ILO denies that the decision not to renew his contract was based on any considerations related to his performance and considers that his allegations in this regard are unsubstantiated.

Concerning his place of recruitment, the ILO submits that prior to joining its service, the complainant had already been residing in Switzerland without interruption since 2001. Therefore, he was correctly classified as being locally recruited.

The ILO denies his allegations of inappropriate working conditions. It points out that there is no right to be provided with a mobile phone. As for the travel in economy class, he was given the opportunity to carry out a mission, in spite of very limited available resources, on the basis of a cost-sharing arrangement between SAP-FL and the ILO Abuja Office, which covered only the cost of an economy class ticket, and he agreed to the proposed arrangement. Lastly, the ILO explains that there is no such thing as a mandatory four-day special leave period, and that special leave with full or partial pay is granted at the discretion of the Director-General, in accordance with Article 4.5 of the ST Rules. The complainant could have requested four days of special leave, but did not do so.

D. In his rejoinder the complainant presses his pleas. He stresses that he has not received the compensation of one and a half months' pay

awarded by the Director-General due to the insufficient notice, and considers the amount insufficient.

E. In its surrejoinder the ILO maintains its position in full. It explains that the compensation payment has been made, with interest, but that it had not been made at the time of the submission of the rejoinder due to an administrative oversight.

CONSIDERATIONS

1. The complainant commenced employment with the ILO on 11 November 2009. His initial appointment was under a Special Short-Term contract (SST) expressed to expire on 10 March 2010. From 21 April 2010 until 31 July 2011, the complainant was employed under a series of Short-Term contracts (ST), the last of which commenced 1 November 2010 and concluded 31 July 2011. He was told orally in May 2011 that his employment would conclude on 31 July 2011 and this was communicated to him in writing on 15 July 2011.

2. On 20 July 2011 the complainant filed a grievance with HRD that was rejected on 19 October 2011. He submitted a grievance to the JAAB on 10 November 2011. The JAAB issued its report on 28 February 2012, recommending to the Director-General to dismiss the grievance as entirely groundless. In a letter dated 13 April 2012, the Officer-in-Charge, Management and Administration Sector, wrote to the complainant informing him that the Director-General had accepted the recommendation of the JAAB. However, the letter noted that the Director-General considered that the two-week written notice of non-renewal of the complainant's contract was too short and should have been in line with the practice in the ILO of giving two months' notice when not renewing a fixed-term appointment. Accordingly, the complainant was informed that the Director-General had decided that he should be compensated in the form of one and a half months' pay.

The letter also noted that the Director-General considered that the "subsidiary pleas made in [his] grievance" were time-barred. This is the impugned decision.

3. The central issue raised by the complaint is whether the conduct of the ILO in employing the complainant initially on an SST contract, which was extended once, and subsequently on a series of ST contracts over a period of a little over one and a half years, was in contravention of standards established by and for the ILO to prevent the inappropriate use of employment contracts within the ILO, including the repeated use of SST and ST contracts.

4. However, before addressing this issue, it is convenient to deal with several additional issues raised by the complainant in his brief. The first concerns his place of recruitment. He contends, in substance, that he should have been treated as a non-locally recruited rather than a locally recruited official. The complainant also catalogues a number of other grievances. He alleges that he was undermined and abused by his supervisor, that he was unlawfully or unreasonably deprived of a mobile phone, that he was deprived of a right to fly business class on certain flights, that he was unreasonably or unlawfully required to undertake administrative and secretarial tasks beyond the scope of his duties and that he was not granted the leave to which he was entitled on the death of his mother in December 2009.

5. The approach taken by the Director-General in the impugned decision was to treat these various subsidiary grievances as time-barred. The complainant has singularly failed to address in his brief or rejoinder why this conclusion of the Director-General was wrong or not open to him. On the limited facts revealed in the pleadings, these subsidiary grievances concern events occurring well before the complainant filed his grievance with HRD and later the JAAB. Moreover, the ILO argues in its reply that these aspects of the complaint (or at least some of them) are not receivable because the complainant has not exhausted internal remedies and, insofar as he

challenges the decision to recruit him locally, that should have been challenged within six months of his initial appointment in November 2009. The complainant has provided no details in his pleas about the time at which these various events occurred. In these circumstances, the complaint, insofar as it raises these subsidiary grievances, should be dismissed as time-barred.

6. The complainant bases his argument on an alleged breach by the ILO of standards it established for its own employment practices in Circular No. 630 (the Circular), promulgated in July 2002. There is no issue that, as a general proposition, the Circular declares that, in principle, a combination of SST and ST contracts cannot exceed a 364-day limit. Whether this prohibition applied to the complainant's employment depends on two considerations. The first involves the interpretation of the Circular. The ILO argues that on the proper interpretation of the Circular, it was not intended to limit the basis on which certain limited classes of officials might be employed under SST or ST contracts, including technical cooperation experts and certain persons engaged under special extra-budgetary funds. The complainant challenges this interpretation and argues the Circular is of general application, at least in relation to individuals employed after July 2002. The second consideration is whether, in fact, the complainant was employed in a class of employment to which the prohibition in the Circular was not intended to apply, assuming the ILO's interpretation is correct.

7. On the question of interpretation, the ILO argues that the Circular, properly construed, contains two parts and it is the first part which might, potentially, be applicable to the circumstances of the complainant. The argument is developed in the following way. The general subject matter of the Circular is described in a heading ("Inappropriate use of employment contracts in the Office") governing the entire Circular. Each of the two parts has its own heading which accurately describes the subject matter of each part. The first part is headed "Measures to prevent the recurrence of inappropriate use of employment contracts". The second part is headed "Measures to

address current cases of inappropriate use of employment contracts at Headquarters". The ILO argues that, in effect, the second part was intended to address circumstances existing at the time the Circular was promulgated and was intended to provide some relief for individuals who had been employed on "inappropriate temporary contract arrangements" and, in particular, "20 persons for whom no regular employment solution ha[d] been identified" (paragraph 17 of the Circular). On the other hand, the first part was intended to govern the use of short-term contracts into the future, that is, from July 2002 onwards. In the first part, there is one paragraph (paragraph 3) that identifies various classes of employment to which the limitations imposed by the Circular were not intended to apply. One such class was "Technical cooperation experts and certain persons engaged under special extra-budgetary funds". This class, the ILO argues, applies to the complainant.

8. The complainant approaches the interpretation of the Circular differently. The substance of his argument is that the first part contains several preliminary paragraphs (1 to 5) and then, under two subheadings, sets out the "Rules governing short-term employment and external collaboration" (paragraphs 6 to 13) and the "Measures to enforce the rules". The complainant argues that in the section setting out the rules there is no limitation on the application of those rules, nor, in particular, is there any limitation applicable to the type of employment for which he had been engaged.

9. The ILO's argument about the interpretation of the Circular is correct. A document of this type, having regard to its purpose, should not be interpreted legalistically or in a narrow technical way. However, the ILO's argument is entirely consistent with Judgment 3110, under 4 and 6, in which the Tribunal noted that paragraph 3 of the Circular identified jobs which were beyond its scope.

10. This leads to a consideration of the nature of the complainant's employment. In its reply, the ILO characterises the

complainant's appointment as that of "a technical cooperation expert on extra-budgetary funding". In his rejoinder, the complainant does not challenge this characterisation of his appointment, but rather seeks to rebut the ILO's reply by challenging the ILO's interpretation of the Circular (as just discussed). Not only was this characterisation not challenged by the complainant in his rejoinder, but on the material before the Tribunal this characterisation appears correct. The complainant's offer of appointment of 10 November 2009 had, as an annexure, terms of reference which made it tolerably clear that the complainant was engaged to provide technical cooperation support to facilitate the start-up of two projects to fight the trafficking of human beings from Nigeria, on the one hand, and Ethiopia, on the other, with the possible provision of further support for a similar project in Zambia. It is also clear that his employment was dependent on extra-budgetary funding derived from funds provided by the Netherlands, the United Kingdom and Ireland. It is additionally clear that the cessation of that funding was the reason for the non-renewal of the complainant's contract in July 2011. In these circumstances, there is no basis to reject the ILO's characterisation of the complainant's employment as of a type to which the Circular and its protections did not apply. Accordingly, it was open to the ILO to employ the complainant on a succession of short-term contracts without violating the provisions of the Circular. The complainant's claims to the contrary are rejected.

11. The complainant's pleas raise three further issues. The complainant contends that at the time of the decision not to extend his contract, funds were available and the reason for non-renewal was an unfounded performance appraisal. As noted earlier, it is clear that his employment was dependent on extra-budgetary funding derived from funds provided by the Netherlands, the United Kingdom and Ireland and that the cessation of that funding was the reason for the non-renewal of the complainant's contract in July 2011. The Tribunal's role in reviewing decisions not to renew contracts for budgetary reasons is extremely limited (see, for example, Judgments 1044, under 3; 2362, under 7; and 3103, under 8). The complainant has not

demonstrated that the decision not to renew his contract was flawed in any respect. This aspect of his claims should be rejected.

12. The complainant also contends that, at the time of his appointment, he had a legitimate expectation that his employment would be longer term. The complainant relies, in this respect, on the terms of an e-mail sent to him on 20 October 2009 and on terms of reference that had earlier been sent to him. The terms of reference the complainant refers to in his pleas were only a draft. A reasonable reading of the terms of reference accompanying the offer of appointment that the complainant signed in November 2009, and the terms of the offer itself, make it tolerably clear that the position was to be a short-term one focusing on initiating or supporting the initiation of several named projects. While the e-mail could have conceivably been read as suggesting or hinting at longer term employment, what was said had no real ongoing relevance having regard to the terms of the offer which the complainant accepted. This aspect of his claims should be rejected.

13. The complainant also contends that the notice he was given of the non-renewal of his contract was too short. So much was conceded by the Director-General in deciding to pay him a further one and a half months' salary. In his rejoinder the complainant simply asserts that this was insufficient compensation. The Tribunal is not persuaded this is so. This aspect of his claims should be rejected.

14. In the result the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 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 9 July 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ