118th Session **Judgment No. 3368**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Miss T. B. against the International Labour Organization (ILO) on 7 November 2011 and corrected on 9 December 2011, the ILO's reply of 14 March 2012, and the complainant's e-mail of 16 October 2012 in which she informed the Registrar of the Tribunal that she wished to pursue her complaint;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 3110, delivered on 4 July 2012, concerning the complainant's first and second complaints. Suffice it to recall that the complainant was employed under a series of special short-term and short-term contracts between 7 December 2005 and 31 August 2008. Upon receiving her extension of contract for the period from 1 September to 31 December 2007, she was informed that Rule 3.5 of the Rules governing conditions of service of short-term officials (hereinafter "Rule 3.5")

would apply to her as from 1 September. Rule 3.5 relevantly provides that, whenever the appointment of a short-term official is extended by a period of less than one year so that her or his total continuous contractual service amounts to one year or more, the terms and conditions of a fixed-term appointment shall apply to her or him as from the effective date of the contract which creates one year or more of continuous service. In her first complaint, filed on 9 April 2010, the complainant asserted that (during the aforementioned period) her employment under short-term contracts for a continuous period exceeding 364 days was a violation of Circular No. 630, Series 6, concerning the inappropriate use of employment contracts in the Office. She further argued that the ILO's application of Rule 3.5 to the terms and conditions of her employment was unlawful. She asked the Tribunal inter alia to order the ILO to convert her short-term contract to a fixed-term contract with retroactive effect and she sought moral and material damages and costs.

In the meantime, following a break in service, in October 2008 the complainant was employed under another short-term contract as a Helpdesk Assistant in the ILO's Information Technology and Communications Bureau (ITCOM). This contract was extended several times without interruption until 31 May 2010. As from 1 October 2009 Rule 3.5 was applied to her. On 7 December 2009 the complainant was offered an extension of contract for the period from 1 January to 31 May 2010. The letter of extension of appointment indicated that the extension had been approved on an exceptional basis and did not carry any expectation of a further extension beyond 31 May 2010 or of a career within the ILO. It further indicated that her contract would come to an end on 31 May 2010 without notice. Her contract was not extended beyond its expiry date.

On 6 October 2010 the ILO issued a call for expression of interest in a temporary appointment for the position of IT Service Desk Assistant in ITCOM. The complainant applied but she was not placed on the shortlist.

The complainant submitted a grievance to the Human Resources Development Department (HRD) on 4 November 2010 in which she

requested that her short-term contract be converted into a fixed-term contract as of the date when it became subject to Rule 3.5. On 25 February 2011 HRD rejected her grievance as without merit. On 25 March she lodged a grievance with the Joint Advisory Appeals Board (JAAB) in which she challenged her employment under a short-term contract for a continuous period exceeding 364 days, the lawfulness of the decision not to renew her contract, and the failure by the Office to provide her with sufficient notice of non-renewal of that contract. She also alleged that she was being "punished" for having been placed on extended sick leave and for having previously filed a grievance. In its report of 12 July the JAAB unanimously recommended that the complainant's grievance be dismissed as devoid of merit. By a letter of 9 August 2011 she was informed that the Director-General had accepted the JAAB's recommendation and had decided to reject her grievance accordingly. That is the impugned decision.

On 4 July 2012 the Tribunal delivered Judgment 3110. With respect to the complainant's first complaint regarding her employment between 7 December 2005 and 31 August 2008, it ordered the Director-General to cancel the extensions to her short-term contract covering the period from 15 February 2007 to 31 August 2008 and replace them with a fixed-term contract for the same period. It also ordered the ILO to pay her material and moral damages in the amount of 30,000 Swiss francs for the failure to offer her a fixed-term contract for that period.

B. The complainant points out that the short-term contract she entered into in October 2008 was extended several times and, referring to Circular No. 630, she contends that she should have been offered a fixed-term contract upon reaching 364 days of service under a short-term contract.

She asserts that, according to the Tribunal's case law, a decision not to renew a contract must be based on valid reasons and the staff member concerned must be provided with sufficient notice of that decision. However, the Administration only informed her of the

non-renewal of her contract during a meeting on 6 May 2010. Furthermore, in her view, the reasons given for the decision, i.e. that her supervisor was "nervous" about her working under a Rule 3.5 contract and that HRD was not in favour of such contracts, are unlawful.

The complainant emphasises that she was not even shortlisted for the temporary position of IT Service Desk Assistant, and she asserts that her treatment by the Administration was punishment for being on extended sick leave and for filing a previous internal grievance and a complaint before the Tribunal.

She asks the Tribunal to set aside the impugned decision and to order the ILO to "reconvert her short term contract to a fixed term contract with retroactive effect". She seeks 30,000 Swiss francs in material and moral damages, and costs in the amount of 2,000 francs.

C. In its reply, as a preliminary matter, the ILO asks the Tribunal to join the present complaint with the complainant's first and second complaints on the grounds that they are based on similar facts and contain similar claims for relief.

The ILO objects to the receivability of the complaint on several grounds. First, referring to the case law, it submits that the complaint is receivable only to the extent that the complainant claims the conversion of her contract covering the period from 1 January to 31 May 2010 (her last contract extension) from a short-term contract to a fixed-term contract, and that any claims related to her previous contracts are time-barred and thus irreceivable. Second, because Rule 3.5 was applied to her with effect from 1 October 2009, as from that date she benefited from the application of the terms and conditions of a fixed-term appointment under the Staff Regulations. Therefore, she has "no present and personal interest" in having her short-term contract under Rule 3.5 converted into a fixed-term contract; her claim is moot and irreceivable for lack of a cause of action. Third, to the extent that she challenges her non-selection for the temporary position of IT Service Desk Assistant, her complaint is irreceivable for failure to exhaust the internal means of redress.

On the merits, the ILO states that during the material time, the complainant worked as a temporary Helpdesk Assistant. It submits that this position was similar to that of information technology consultants whose services may be contracted by the Office for extended but limited periods of time but whose employment is excluded from the scope of Circular No. 630. Consequently, it considers that the Circular did not apply to the complainant.

Without prejudice to the foregoing, the ILO argues that Circular No. 630 was not violated because Rule 3.5 was properly applied to the complainant's contract as from 1 October 2009. The Rules governing conditions of service of short-term officials have a higher authority than circulars, and the issuance of Circular No. 630 did not amend those Rules. Indeed, the Circular provides for certain exceptions, which allow for the application of Rule 3.5. Thus, a short-term contract can be extended beyond the 364-day limit in situations where, due to operational constraints, there is no reasonable alternative to such an extension.

The ILO contends that the complainant was given sufficient notice of the decision not to renew her short-term contract. It points to the fact that the last extension of her contract explicitly indicated that that extension was granted on an exceptional basis, that it did not carry an expectation of renewal beyond 31 May 2010 and that it would come to an end on that date without notice. Furthermore, on 6 May she also received verbal notice of the non-extension from the Administration. In addition, the ILO disputes her claims regarding the reasons for the non-renewal decision and asserts that it was properly motivated. It denies her allegations of bias and submits that she has provided no evidence to support them.

With respect to her application for the temporary position of IT Service Desk Assistant, the ILO states that the sole reason she was not placed on the shortlist was because her professional experience did not meet the minimum requirements stipulated in the vacancy notice.

Lastly, the ILO asserts that the complainant has not suffered any material loss as a result of not being granted a fixed-term contract. Through the application of Rule 3.5 she benefited from the terms and

conditions of a fixed-term appointment under the Staff Regulations. Indeed, given that her functions were of a temporary nature, she would have qualified only for a fixed-term contract under Article 4.2(e), fifth indent, which provides for fixed-term contracts of a temporary nature of up to two years, of a specialist nature, which are not expected to lead to a career in the ILO. Had she been granted a fixed-term contract under this provision, she would not have received any benefits in addition to those to which she was already entitled pursuant to her short-term contract under Rule 3.5.

CONSIDERATIONS

1. This case is concerned with the complainant's employment as a Helpdesk Assistant in ITCOM on a short-term contract in the ILO from 16 October 2008 to 31 May 2010. Her contract was extended from 1 January to 31 May 2009; 1 June to 30 September 2009; 1 October to 31 December 2009; and from 1 January to 31 May 2010 when it was not extended further. She was employed during these periods in replacement of the substantive holder of the post who was on leave without pay. It was upon being informed that that person would not return to work on 31 May 2010 that the Office invited expressions of interest in a temporary appointment for the position of IT Service Desk Assistant in ITCOM. The complainant seeks to have her short-term contract converted to a fixed-term contract for the period of her employment exceeding 364 days, in other words, as of the date when she became subject to Rule 3.5 of the Rules governing conditions of service of short-term officials of the ILO ("Rule 3.5"). This was 1 October 2009.

2. Having been verbally informed on 6 May 2010 that her employment in ITCOM would not have been further extended, she filed a grievance with HRD on 4 November 2010. In effect, she sought a decision that her periods of short-term employment under Rule 3.5 be converted into a fixed-term contract with retroactive effect. She also sought financial compensation. HRD dismissed her

grievance and the JAAB unanimously recommended that her grievance be dismissed as devoid of merit. The Director-General accepted that recommendation and the complainant was so informed by the letter of 9 August 2011. This is the impugned decision.

3. The ILO requests that this matter be joined with two previous complaints filed by the complainant which raised similar issues. However, the request is moot as the Tribunal determined those two complaints in Judgment 3110.

4. The ILO raises receivability as a threshold issue in the present complaint.

5. The Tribunal finds that the complainant's claim concerning her non-selection for the temporary position of IT Service Desk Assistant is plainly irreceivable inasmuch as it was not a subject of her challenge in the ILO's internal appeals process as Article VII, paragraph 1, of the Statute of the Tribunal requires.

6. The Tribunal however rejects the ILO's contention that the complainant's claim for the conversion of her short-term contract is receivable only to the extent that it relates to her last contract extension for the period from 1 January to 31 May 2010, but is otherwise time-barred. The ILO relies on Judgments 2708 and 2838 as authority for its submission that, in view of the six-month time limit for filing a grievance under Article 13.2 of the Staff Regulations, the grievance filed on 4 November 2010 is irreceivable as to extensions prior to that of 1 January to 31 May 2010. A similar argument was rejected by the Tribunal in Judgment 3110, under 5. It is sufficient to note that, as earlier indicated, at the material time the complainant was employed under a single contract which was extended several times, and neither the extension of 1 January 2010 nor the decision to apply Rule 3.5 to her gave rise to a new, separate contract. The objection therefore fails.

7. The Tribunal also rejects the ILO's related contention that the complaint is irreceivable to the extent that the complainant seeks a conversion of her short-term contract from 1 October 2009 to 31 May 2010 into a fixed-term appointment. In support of this contention, the ILO argues that the complainant does not now have a cause of action or personal interest in obtaining a conversion because she already had the benefit of conditions of fixed-term appointment under Rule 3.5.

8. On the merits, the ILO's arguments essentially endorse the two reasons that the JAAB gave for dismissing the grievance on the issue of the conversion of her contract to a fixed-term contract. In the first place, the JAAB found that the complainant's employment during the relevant period did not fall within the scope of paragraph 3 of Circular No. 630, Series 6, pertaining to the inappropriate use of employment contracts in the ILO. This, according to the JAAB, was because the complainant was providing temporary assistance in the area of information technology, which is exempt from the 364-day limit on the use of short-term contracts. With respect, however, paragraph 3 of Circular No. 630 expressly exempts from its scope "persons employed principally as information technology consultants". It does not provide a blanket exemption for all persons employed in information technology. This does not exempt the complainant's employment as a temporary Helpdesk Assistant. A careful reading of paragraph 3 of Circular No. 630 indicates that this and the other exemptions which it provides are intended to cover persons whose work is of a technical and specialized nature or whose work is specially funded.

9. In the second place, the JAAB noted, and the ILO contends, in effect, that the complaint is unfounded because the complainant's last two contract extensions stated that they were approved on an exceptional basis to ensure the continuity of the service in the absence of the substantive holder of the post who was on special leave and it did not carry any expectation of further extension beyond the expiry date or a career in the ILO. The Tribunal rejects this argument as it sees nothing in Circular No. 630 that would justify such an exception

from the application of this Circular. Furthermore, as stated above, the complainant's tasks did not come within the scope of the exceptions set forth in Circular No. 630. Accordingly, the complainant's employment on a short-term contract over the period from 1 October 2009 to 31 May 2010 was contrary to the provisions of the Circular and the violation of the principle *tu patere legem quam ipse fecisti* entitles her to an award of moral damages.

10. The complainant also claims moral damages on the ground that the ILO breached its duty of care towards her by not giving her reasonable notice of the non-renewal of her contract.

11. The Tribunal has often stated that an international organisation has a duty to inform a staff member in advance about the non-renewal of her or his fixed-term contract to enable the staff member to exercise her or his rights and take whatever steps she or he sees fit. On this basis, the Tribunal requires an organisation to give reasonable notice, even where a provision contained in the contract of the staff member or in the applicable rules states that notice need not be given (see, for example, Judgment 2104, under 6). In the present case, albeit formally short-term, the complainant's contract was subject to Rule 3.5, and she therefore benefited from the terms and conditions of a fixed-term appointment. Consequently, the verbal notice of non-renewal which the complainant received on 6 May 2010 was insufficient to fulfil the ILO's duty to provide a notice applicable by the ILO to fixed-term contracts. The complainant is therefore entitled to an award of material damages on this account.

12. However, as the complainant benefited from the terms and conditions of a fixed-term appointment under the Staff Regulations as of 1 October 2009, she did not suffer any other material loss.

13. The ILO's breach of Circular No. 630 and its failure to provide reasonable notice of non-renewal justify an award of compensation for material and moral injury, which is set *ex aequo et bono* at 15,000 Swiss francs.

14. As she succeeds in part, the complainant is also entitled to 1,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The ILO shall pay the complainant 15,000 Swiss francs in compensation for material and moral injury.
2. The ILO shall also pay the complainant 1,000 Swiss francs in costs.
3. All other claims are 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