Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session **Judgment No. 3376**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J.-M. R. against the International Labour Organization (ILO) on 22 November 2011 and corrected on 24 January and 24 February 2012, the ILO's reply of 28 May, the complainant's rejoinder of 26 October 2012 and the ILO's surrejoinder of 25 January 2013;

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 and the pleadings may be summed up as follows:

A. The complainant has worked for the ILO for many years. From 1988 to 2005 he was employed as a systems analyst responsible for maintaining the mainframe system in the Information Technology and Communications Bureau (ITCOM).

In 2000 the International Labour Conference decided to modernise the information technology used by the ILO in the areas of finance and human resources. In 2002 a system was selected as an integrated software platform and the new system was called IRIS (Integrated Resource Information System). Several external

invitations to tender were issued with a view to outsourcing, through service contracts, the expertise required to implement the project. In late 2002 an initial contract was signed with a company specialising in integrated software for 5,700 days of service delivery. In 2003, as certain needs such as staff training and improvements to the system were identified, a contract to provide qualified on-site consultants to perform certain tasks under ILO staff management was signed with a private company. Two further contracts were signed in 2006 and 2010.

The modernisation of the information technology systems also required the restructuring in 2005 of ITCOM and the Strategic Programme and Management Department (PROGRAM), entailing the abolition of the complainant's post. The complainant agreed to be transferred to a post of IRIS system programmer in the new Applications Technical Support section (IT/ATS) that had been created in ITCOM.

As his performance appraisal reports for 2006-2007 and 2008-2009 were unsatisfactory, the complainant challenged them in August 2010 by lodging a grievance in which he also questioned the lawfulness of the "recruitment" of staff from the private company and requested that this matter be investigated. When his grievance was dismissed, he appealed to the Joint Advisory Appeals Board (JAAB), which recommended on 21 June 2011 that the second performance appraisal report should be set aside. With regard to the signing of service contracts with the private company, which stemmed, according to the JAAB, from a decision taken by the Director-General with the approval of the Governing Body, it considered that "it [was] not in a position to assess the validity of that decision, which was made at the Director-General's discretion subject to the authority of the Governing Body". By a decision of 22 August 2011, which is the impugned decision, the Director-General endorsed the recommendation concerning the setting aside of the second performance appraisal report, but dismissed the complainant's claim concerning the private company, citing additional grounds to those invoked by the JAAB.

The complaint concerns only the latter element of the impugned decision.

B. The complainant contends that his complaint is receivable because the fact that the private company supplies staff who are not subject to ILO employment conditions to perform regular duties on ILO premises, which he himself could have performed had he been given the opportunity to apply for them through a normal recruitment procedure, breaches his own employment conditions and has deprived him of opportunities for advancement in his career.

He submits that the activities of a company providing an outsourced service must comply with certain conditions and principles. The service cannot be provided on the premises of the contracting organisation, nor can it be provided on a permanent basis. Instead of training or recruiting staff, the ILO has become dependent on the expertise of the private company, whose staff have been working on site since 2003. The decision to outsource, without limit of time, the supply of a service connected with the establishment and operation of the new system was therefore unsound. He further maintains that the ILO should have conducted an independent investigation to assess the impact on his working conditions of the supply of staff by the private company.

He requests the Tribunal to set aside the impugned decision, to order the ILO to undertake an investigation of the supply of staff by the private company, and to cease assigning to them, on a permanent basis, tasks that could be performed by ILO officials. He further requests an award of damages for the injury suffered and 2,000 Swiss francs in costs.

C. In its reply the ILO argues that the Tribunal lacks competence *ratione materiae* to hear the complaint: the contracting of a company to supply a service cannot constitute non-observance of the terms of appointment of ILO officials, within the meaning of Article II, paragraph 1, of the Tribunal's Statute.

Subsidiarily, the ILO contends that the complaint is irreceivable because it is time-barred, since the first contract with the private company was signed in 2003 and the complainant filed his grievance challenging the presence of the outsourced staff in August 2010, i.e. long after the deadline established under Article 13.2 of the Staff Regulations, namely six months from the treatment complained of. In addition, the ILO argues that the complainant has no cause of action inasmuch as the use of the private company's staff did not injure him in any way. The presence of the staff in question had no bearing on the type of post offered to him after the restructuring process. Moreover, he has produced no evidence to support his assertion that ILO officials could perform the tasks assigned to the aforementioned staff. As to the allegation regarding the blockage of his career advancement prospects, the ILO points out that, according to the Tribunal's consistent case law, officials have no right to promotion.

On the merits, the ILO contends that the complaint is entirely unfounded, since it invokes none of the grounds which might lead the Tribunal, in the exercise of its limited power to review discretionary decisions such as those related to restructuring, to set aside the disputed measures or to order an investigation into them.

The ILO points out that the complainant cannot claim costs as he was defended by the Staff Union Legal Adviser.

D. In his rejoinder the complainant maintains that the Tribunal is competent to hear his complaint, which is furthermore receivable, since it is not directed against the service contracts but against the presence of staff of the private company who prevent him from being assigned duties corresponding to his grade and qualifications. On the merits, he submits that the outsourcing principles laid down in circular No. ST/IC/2005/30 published in 2005 by the United Nations Secretariat have been violated. He also refers to the existence of a form of rivalry between the private company's staff and ILO officials. With regard to his claim to costs, he emphasises that, while he benefited from suggestions made by the Staff Union Legal Adviser, he prepared his complaint independently in his free time.

E. In its surrejoinder the ILO maintains its position and points out that the circular mentioned by the complainant is not applicable to it.

CONSIDERATIONS

1. In the context of the modernisation of its information technology services, the ILO adopted an integrated software management platform in 2002 known as project IRIS. External contractors were required to bring the IRIS system into operation. One of the consequences of this development was the abolition in 2005 of the maintenance post occupied by the complainant, who accepted a new assignment.

On 6 August 2010 the complainant challenged his performance appraisal reports for the periods 2006-2007 and 2008-2009. He also requested the opening of an investigation into the lawfulness of the outsourcing of certain services to a private company linked to the ILO by successive contracts for additional services aimed at ensuring the smooth functioning of the IRIS system.

This grievance was dismissed by a decision of 5 November 2010, which the complainant referred to the JAAB. The latter issued its report on 21 June 2011. By a decision of 22 August 2011, the Director-General endorsed the recommendations contained in the report. He noted that the challenge to the performance appraisal report for 2006-2007 was time-barred but set aside the report for 2008-2009.

The Director-General declared the request for an investigation into the lawfulness of the disputed outsourcing irreceivable. The complaint relates exclusively to this aspect of his decision.

2. The outsourcing of certain services, that is to say the use by an organisation of external contractors to perform tasks that it feels unable to assign to officials hired under its staff regulations, forms part of the general employment policy that an organisation is free to pursue in accordance with its general interests. The Tribunal is not competent to review the advisability or merits of the adoption of such

a measure in a specific field of activity (see Judgments 3225, under 6, 3275, under 8, 3041, under 6, 2972, under 7, 2907, under 13, 2510, under 10, 2156, under 8, and 1131, under 5).

An organisation that resorts to subcontractors, be they companies or individuals, must ensure that the contract it signs with them will not have an adverse impact on the situation of officials who are subject to the staff regulations and will not unjustifiably infringe the rights they enjoy under those regulations. The risk of such an infringement is particularly great in the case of long-term contractual outsourcing and in cases where the tasks involved are still partly performed concurrently by regular staff (see Judgment 2919 *passim*). In such cases the duty of care requires the organisation to provide the staff concerned with adequate information concerning the outsourcing procedures and their possible impact on their professional situation and to prevent any possible adverse impact thereon (see Judgments 2519, under 10, 1756, under 10(b), and 1780, under 6(a)).

3. It follows from the foregoing and from Article II, paragraph 1, of the Statute of the Tribunal that an official may challenge before the Tribunal the outsourcing of certain tasks only to the extent that such outsourcing has a direct adverse impact on the rights conferred by the official's terms of appointment. This condition is clearly not satisfied in the present case. It is true that the entry into operation of the IRIS system entailed a change of assignment for the complainant, but he accepted the new assignment.

Accordingly, the complaint must be dismissed as devoid of merit, without there being any need to rule on the objections to receivability raised by the ILO.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 May 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN

DRAŽEN PETROVIĆ