Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

K.

v.

ILO

137th Session **Judgment No. 4809**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. K. against the International Labour Organization (ILO) on 2 December 2008, corrected on 16 January 2009, and the ILO's reply of 27 March 2009;

Considering the numerous decisions for a stay of proceedings issued at the request of the parties and the email of 8 June 2022 by which the Registrar informed the parties of the decision of the Vice-President of the Tribunal, acting by delegation of power from the President, to end the written proceedings unless the complainant filed a rejoinder within a last time limit of six months;

Considering the complainant's email of 8 December 2022 informing the Tribunal that he was unable to file a rejoinder within this time limit and requesting a new stay of proceedings;

Considering the Vice-President's decision, notified to the parties on 16 December 2022, refusing this new stay of proceedings;

Considering the additional documents submitted by the parties on 28 August 2023 in response to a request for further submissions from the President of the Tribunal;

Considering Articles II, paragraphs 1 and 4, 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 may be summed up as follows:

The complainant seeks a contractual redefinition of his employment relationship and the setting aside of the decision not to renew his last contract.

On 11 December 2000 the complainant joined the International Labour Office ("the Office"), the ILO's secretariat, under a ten-day external collaboration contract principally for installing and troubleshooting computers in the Social Dialogue Sector (DIALOGUE). This contract expressly stated that the complainant was engaged as an independent contractor, that he was not an official of the Organization and, as such, was not subject to the Staff Regulations or the Rules governing conditions of service of short-term officials. He was also asked to certify that he had taken out insurance ensuring adequate coverage against the risks of death, injury or illness.

From 6 May to 25 October 2002 the complainant held a special short-term contract (SST) with the Bureau of Library and Information Services (INFORM) to help set up a new IT system for the library. From 7 November to 6 December 2002 he held a short-term contract (ST) for the same purpose. From January 2003 he was awarded a series of external collaboration contracts in DIALOGUE, mostly for the provision of support and assistance, and a short-term contract in INFORM running from 1 to 29 August 2003 and conferring him the title of network administrator and technical assistant.

On 14 December 2006, while the complainant was employed under an external collaboration contract from 6 November to 15 December 2006, he was notified of the decision to grant him a new contract of this type that would expire on 8 January 2007 and not be renewed. His contractual relationship with the Organization did in fact end on that date. On 14 February 2007 he lodged a grievance against this decision with the Human Resources Development Department, pursuant to Article 13.2 of the Staff Regulations, requesting that his previous contractual status be redefined. The proceedings were stayed until 15 February 2008, while the parties attempted to resolve the dispute amicably. As they were unsuccessful, on 21 February 2008 the complainant referred the matter to the Joint Advisory Appeals Board,

to which he repeated his request for a contractual redefinition and claimed damages in compensation for the material and moral injury he considered he had suffered.

In its report of 3 July 2008, the Joint Advisory Appeals Board unanimously found that the grievance was receivable. It considered that there had been an "inappropriate use" of external collaboration contracts and recommended that the Director-General redefine the various contracts at issue as short-term contracts and award the complainant material and moral damages.

By a letter of 3 September 2008, which is the impugned decision, the complainant was informed by the Executive Director of the Management and Administration Sector of the Director-General's decision to reject his grievance as irreceivable on the grounds that his external collaboration contracts did not confer on him the status of an official and that he was therefore barred from initiating internal appeal proceedings. With regard to the nature of his contracts, it was explained to him that, in view of the purely advisory nature of the tasks he had performed and pursuant to the provisions of Circulars No. 630, series 6, and No. 11, series 6 – which in essence define what is meant by an external collaboration contract and deal with cases where the use of this legal form of contractual relationship is prohibited – the external collaboration contracts granted to him were appropriate and there was therefore no question of redefining them. His attention was drawn to the fact that he had never raised any objections when the various disputed contracts were signed. He was also informed that, given the six-month time limit prescribed in Article 13.2(1) of the Staff Regulations, at the time when he lodged his grievance of 14 February 2007 he was time-barred from challenging anything that had happened prior to 14 August 2006. Lastly, the Joint Advisory Appeals Board's recommendations concerning material and moral damages were dismissed as "overly vague" and, in any event, unjustified.

The complainant asks the Tribunal to set aside the impugned decision and the decision not to renew his last contract, to order that his entire employment relationship with the Office be redefined, and to award him material and moral damages and costs.

The ILO considers that the Tribunal does not have jurisdiction to hear the present complaint because the complainant was not an official of the Office. Should the Tribunal nevertheless accept jurisdiction, the ILO argues that the complainant failed to comply with the time limits for appeal and that any challenge relating to external collaboration contracts in effect before 14 August 2006 is, in any event, time-barred. It therefore asks the Tribunal to dismiss the complaint as irreceivable or, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant, who provided IT services to the Office between December 2000 and January 2007, mostly under a series of external collaboration contracts, as well as two short-term contracts and one special short-term contract, impugns before the Tribunal the decision of 3 September 2008 to dismiss his grievance seeking a contractual redefinition of his employment relationship.

In this grievance, lodged on 14 February 2007, he essentially requested that all his contracts be redefined as one fixed-term contract, on the grounds that he had in fact worked on the same terms as an official. The grievance followed the notification of a decision dated 14 December 2006 – which he also contested – that granted him a new external collaboration contract until 8 January 2007 but stated that this contract would not be renewed upon expiry.

2. The Organization submits that the Tribunal does not have jurisdiction to hear the complaint because the complainant, who held external collaboration contracts for most of the period in question, was not an official of the Office.

This challenge to the Tribunal's jurisdiction – which, in the form in which it is presented, relates to the substance of the dispute – is irrelevant in this case.

It is true that, under the Tribunal's case law, where an external collaboration contract confers jurisdiction for settling disputes concerning its performance on another judicial authority or – as is more

often the case – on an arbitral body, the Tribunal cannot hear such a dispute, even where it concerns precisely the redefinition of the contract in question as a contract appointing an official (see, in particular, Judgments 4652, considerations 16 to 20 and 22, and 2888, considerations 5 and 6).

However, plainly this case law does not apply when that contract grants jurisdiction to the Tribunal to hear disputes relating to its performance, as permitted under Article II, paragraph 4, of the Tribunal's Statute (see Judgments 4652, consideration 21, and 2888, consideration 7). In this case, the external collaboration contracts concluded by the ILO and the complainant all included a provision in paragraph 12 specifically conferring jurisdiction on the Tribunal to hear "[a]ny dispute arising out of [their] application or interpretation". The Tribunal therefore has jurisdiction to rule on any dispute relating to their possible redefinition.

3. Nevertheless, the Organization is correct in submitting that the complaint is largely irreceivable because the complainant's challenge of most of the contracts for which he seeks redefinition is time-barred.

It is true that the contracts in question did not themselves set any time limit for submitting an appeal in their connection. However, under the Tribunal's case law, since the complainant intended to obtain recognition as an official, he ought to have lodged his grievance within the time limit applicable to any ILO official under Article 13.2(1) of the Staff Regulations, that is within six months of the treatment complained of (see Judgments 2888, consideration 8, 2838, considerations 4 to 6, and 2708, considerations 6 to 8). Admittedly, it would in practice have been awkward for the complainant to dispute the lawfulness of the initial contracts in question because he might have jeopardised further employment by the Organization and it would have been difficult for him to prove at the outset that, as he submits, he was engaged in ongoing duties. But these considerations do not hold good for subsequent contracts, and they ought to have been challenged at the latest within six months of their respective expiry dates. As has been said, the

complainant – who had never requested that his employment relationship be redefined before it was ended – did not submit his grievance until 14 February 2007. The evidence shows that, at that date, the only contracts that could still be challenged within the prescribed time limit were an external collaboration contract for DIALOGUE between 6 November and 15 December 2006 and the last contract of this type, granted to the complainant at the end of the preceding contract for employment in the same department and which ended on 8 January 2007.

Pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, the fact that the complainant's grievance was out of time insofar as it sought the redefinition of all the other contracts renders his complaint irreceivable to the same extent for failure to exhaust the applicable internal means of redress, since they cannot 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 4655, consideration 20, 4159, consideration 11, and 2888, consideration 9).

Accordingly, the Tribunal may grant the complainant's claim for the redefinition of his employment relationship following its examination of the case on the merits only in so far as it concerns these last two contracts.

4. In support of the complaint, the complainant firstly submits that the impugned decision was taken without authority, in that it was signed by the Executive Director of the Management and Administration Sector, without her proving that she held a delegation of power of signature from the Director-General for that purpose.

However, in the letter of 3 September 2008 notifying this decision, the Executive Director stated that "after examining the report [of the Joint Advisory Appeals Board], the Director-General [had] asked [her] to [...] inform [the complainant] of his decision" and concluded her explanation of the reasons of the decision as follows: "In the light of the above, the Director-General cannot agree with the [Board's] conclusions and recommendations. He therefore dismisses your grievance [...]". The

wording of this letter makes it plain that it was not intended to convey a decision taken by the Executive Director but by the Director-General himself, in a procedure commonly used in such cases at the ILO and, *mutatis mutandis*, in many other international organisations. The matter of whether the power to sign this letter had been granted is therefore irrelevant and the plea must be dismissed in accordance with the Tribunal's well-established case law in this matter (see, for example, Judgments 4291, considerations 17 and 18, 3352, consideration 7, and 2836, consideration 7).

5. As regards the question of the redefinition of the employment relationship, which is central to the present dispute, the merits of the complainant's claims must mainly be assessed – within the limits stated in consideration 3 above – in the light of the provisions of Circular No. 11 (Rev. 4), series 6, of 15 July 1988, governing external collaboration contracts, and of Circular No. 630, series 6, of 5 August 2002, concerning the "[i]nappropriate use of employment contracts in the Office", which was specifically intended to prevent external collaboration and short-term contracts being misused at the Office.

Paragraph 1 of Circular No. 11 provides as follows:

> "An external collaboration contract may only be used where there is a specific well-defined task to be performed and the output can be considered as a specific end-product (e.g. a study or a typed document) and/or where the task assigned is of an advisory nature. [...]
>
> (a) The external collaboration contract may be used under the following conditions:
>
> - the work required can be defined as a specific end-product (e.g. a report), and/or advisory services;
> - it is a one-time, finite piece of work, not an ongoing activity[;]
> - the work is usually performed in the contractor's own time and at any place of his choice [...];
>
> [...]
>
> (b) The external collaboration contract should NOT be used where:
>
> - the work is the same as or similar to that being done by other staff and requires the contractor's presence at the Office [...] during a prescribed period and during established working hours, on a continuous basis throughout the contract's duration;

- the work involves ongoing duties and responsibilities, a group of tasks (such as normally found in a job description) which continue throughout a period of employment;
- office space and other facilities and services are required or routinely provided during the period of employment;
- the work is supervised within an established hierarchical structure;

[...]"

Circular No. 630, which partly reproduces and clarifies these provisions, stipulates in paragraph 12 that:

> "An External Collaboration Contract [...] is task-based. Such a contract may be used only where there is a specific well-defined task to be performed and the output can be considered as a specific end-product (e.g. a research study, report, translation, or typed document) or where the task assigned is one that is advisory in nature (e.g. engaging an academic or other specialist to present a paper and be a discussant at a workshop). [...] The conditions under which the [external collaboration] contract may be used are that the work to be carried out is not an ongoing activity; the work performed is to meet a specified deadline at working times determined by the contractor within the overall work plan set by the relevant Office unit and at any place of his/her choice; office space, facilities, or services normally should not be provided [...]"

6. In the present case, the external collaboration contract concluded for the period from 6 November to 15 December 2006 entrusted the complainant with the task of, as the contract put it, "provid[ing] information technology and [network] administration support in the [DIALOGUE] Sector". It is clear from the documents in the file that this task, which was similar to that assigned to the complainant under his previous contracts of the same type, consisted specifically in assisting the network administrator, Mr H., or even occasionally replacing him during absences, and in assisting staff in this sector to use IT, particularly by troubleshooting when technical incidents occurred.

On this point, the Tribunal agrees with the Joint Advisory Appeals Board's assessment in its report, adopted unanimously, that the ILO could not lawfully use an external collaboration contract for such tasks in view of the requirements set out in the aforementioned provisions of Circulars Nos. 11 and 630.

It is clear that the responsibilities in question did not correspond to "a specific well-defined task", as categorically required under these provisions for a contract of this type to be concluded, but to a set of ongoing, routine tasks such as might usually be entrusted to an official.

It is moreover plain that the complainant's work under his contract was not intended to result in an "end-product" as referred to by those provisions and, contrary to what the ILO maintains, that work could not, in the Tribunal's view, be regarded as a task of an "advisory nature" as envisaged therein. On this last point, the Organization considers that it can rely on a provision of paragraph 3 of Circular No. 630 which excludes particular service providers, including "information technology consultants", from the scope of the definition of inappropriate use of employment contracts. However, the concept of "information technology consultant" refers to consultancy, audit or IT system design tasks which – even though they may sometimes include the maintenance of specific software – are fundamentally different from the role of assisting with the routine administration of a network and day-to-day support for users which was entrusted to the complainant in the present case. The complainant could not therefore be regarded as such a consultant.

It follows from the foregoing that none of the fundamental conditions to which the use of an external collaboration contract is subject under the aforementioned provisions has been met in this case.

Furthermore, the Organization does not dispute the statements in the Joint Advisory Appeals Board's report that the complainant had to work at the Office where the Administration provided him with facilities and that his position was part of an established hierarchical structure. In addition, it is clear that the complainant was required to work particular hours given the nature of his tasks. These are all characteristics which, under the aforementioned provisions, ordinarily rule out an external collaboration contract being used for the activity in question.

7. The Tribunal is bound to observe that, although only the period from 6 November 2006 to 8 January 2007 is eligible for a contractual redefinition in view of the partial irreceivability of the

complaint discussed above, the complainant's previous external collaboration contracts were, on the evidence, also unlawful for similar reasons. This unlawfulness is particularly flagrant in respect of some of the contracts in question which were partly, or even solely, intended to provide a temporary replacement for Mr H. in the role of network administrator – including, it would appear, during his secondment to the Staff Union – although this role clearly should be performed by a staff member of the Office.

8. It follows from the foregoing considerations that the impugned decision must be set aside in so far as it refused to redefine the external collaboration contract for the period from 6 November to 15 December 2006, bearing in mind that, although the Organization attempts to oppose that setting aside by referring to the inviolability of the terms of a contract, that objection cannot stand in the case of misuse of the rules governing the contractual relationship between an organisation and its staff members (see, for example, Judgments 3225, consideration 7, 3090, consideration 7, 2838, consideration 8, and 2708, consideration 10).

9. However, the Tribunal considers that the complainant's last external collaboration contract expiring on 8 January 2007 does not require redefinition.

Apart from the fact that this contract was not submitted as evidence by the complainant, which in itself is sufficient to make such a redefinition unlikely, the wording of the aforementioned decision of 14 December 2006 makes it apparent that its specific purpose was to "finalize a report on IT services for [DIALOGUE] during 2005-2006", to be submitted to the Office on the date of expiry of the contract. On this occasion, the complainant's assignment was a "specific well-defined task" leading to an "end-product" within the meaning of Circulars Nos. 11 and 630 and could thus lawfully be covered by an external collaboration contract thereunder.

Accordingly, the Director-General was correct in refusing to redefine the contract in question and therefore the decision of 3 September 2008 should not be censured on that point.

10. Nor is the impugned decision unlawful in that it confirmed the decision of 14 December 2006 not to renew this last contract.

The complainant's line of argument specifically concerning this non-renewal of contract rests solely on the fact that the decision in question was not based on a valid reason duly brought to his attention.

It is true that, under the Tribunal's case law, the decision not to renew an official's contract of employment must, even if it is a matter for the competent authority's discretion, be based on valid reasons that must be communicated to the staff member concerned (see, for example, Judgments 3914, considerations 14, 15 and 18, 2708, consideration 12, and 1273, consideration 8).

However, this case law does not apply to external collaboration contracts, which are not contracts appointing officials. It is plain from the preceding consideration that the contract to which the non-renewal decision applied – which was, by definition, the last contract previously concluded – should be regarded, unlike the earlier contracts, as an external collaboration contract. This plea is therefore legally irrelevant.

Moreover, the plea is unfounded in any case. The decision of 14 December 2006 included an explanation of the reasons for terminating the complainant's contractual relationship with the Office, which was expressed as follows: "[DIALOGUE] does not have enough resources to establish a second [local area network] administrator post. Since [Mr H.] is no longer detached to the Staff Union, [DIALOGUE] does not foresee a requirement for your services in the foreseeable future". Contrary to what the complainant asserts, he was therefore informed of the reasons for the decision in question. In addition, while the information provided to him clearly demonstrates the inappropriate use – pointed out above – of external collaboration contracts for most of his employment relationship, it nonetheless constituted a valid reason for not renewing his last contract.

11. It follows from the foregoing that the impugned decision of 3 September 2008 should be set aside solely insofar as it refuses to redefine the complainant's external collaboration contract for the period from 6 November to 15 December 2006.

12. In the particular circumstances of the case, the Tribunal will not order the Organization to formally redefine the contract in question, despite the impugned decision being partly set aside. On the one hand, given the brevity of the contract in question, it could not in any event be converted into a fixed-term contract – bearing in mind that, under Article 4.6 of the Staff Regulations, a contract of this type must last for a minimum of one year – and could therefore only be redefined as a short-term contract, which is not what the complainant seeks and would only have very limited practical consequences. On the other hand, it appears to the Tribunal that the considerable length of time for which the case has been pending – owing to the numerous stays of proceedings successively requested by the parties – could make it difficult, at this stage, to determine the exact financial impact of such a redefinition.

13. However, the complainant should be compensated for the injuries of all kinds that were caused by his unlawful employment under an external collaboration contract for the period from 6 November to 15 December 2006.

In this connection, the Tribunal notes that it is not apparent from the evidence that the complainant would necessarily have received higher pay had he held a short-term contract between these two dates and that, while he argues that he was deprived of the opportunity to be appointed to particular positions during his employment because he was not regarded as an internal candidate in the recruitment procedures initiated to fill them, he fails to establish, in any event, that such a situation occurred during that specific period. However, it is plain that the status of external collaborator caused the complainant material injury owing to the fact that he had to cover his social protection costs for himself and pay national tax on his income from the Office. In addition, the complainant's employment on inappropriate terms that

wrongly denied him the status of an official undoubtedly caused him moral injury.

As only the short period corresponding to the duration of this contract can be taken into consideration when assessing the quantum of the injury, the Tribunal considers that, in the circumstances of the case, the injuries caused to the complainant by the impugned decision that are legally liable for compensation will be fairly redressed by an award of damages in the amount of 5,000 Swiss francs under all heads.

14. As he succeeds in part, the complainant is entitled to costs, which – in view of the fact that he did not engage a lawyer – the Tribunal sets at 500 Swiss francs.

DECISION

For the above reasons,

1. The decision of the Director-General of the ILO of 3 September 2008 is set aside insofar as it refuses to redefine the complainant's external collaboration contract for the period from 6 November to 15 December 2006.
2. The ILO shall pay the complainant damages in the amount of 5,000 Swiss francs under all heads.
3. The Organization shall also pay him costs in the amount of 500 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER