Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M.

v.

ILO

139th Session **Judgment No. 4973**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. M. against the International Labour Organization (ILO) on 17 July 2022 and corrected on 18 August 2022, the ILO's reply of 21 October 2022, the complainant's rejoinder of 28 November 2022 and the ILO's surrejoinder of 20 December 2022;

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 may be summed up as follows:

The complainant challenges the step assigned to him at the time of his recruitment.

The complainant entered the service of the International Labour Office, the secretariat of the ILO, on 10 January 2018 at grade G.3, step 1, under a short-term contract. He held the post of security guard in the Security Unit. This contract was subsequently renewed on several occasions, until 4 January 2019. The complainant was then awarded an "ST3.5" short-term contract, under which he enjoyed, with some exceptions, the terms and conditions of a fixed-term appointment in accordance with Rule 3.5 of the Rules governing conditions of service of short-term officials. This contract was also extended on several

occasions until 30 April 2020. Meanwhile, the complainant was assigned step 2 of grade G.3 on 1 January 2019 and step 3 of the same grade on 1 January 2020.

In August 2019, the Office published a vacancy announcement for a fixed-term guard post, at grade G.3, in the Security Unit. The complainant applied and was chosen for this post. On 26 March 2020, he received, by email, an offer of appointment dated 24 March for a period of two years from 1 May 2020. This offer specified that he would be appointed at grade G.3, step 3. The complainant accepted the offer on the same day.

On 1 January 2021, the complainant's salary was increased to step 4 of grade G.3.

In January 2021, in the context of a gradual return to the workplace and resumption of normal administrative procedures on account of positive developments in the COVID-19 pandemic, the complainant received, for administrative purposes, a printed copy of the offer of appointment of 24 March 2020 for signature and return. On 4 February 2021, he contacted the Human Resources Department and expressed astonishment at receiving the document when he had signed an identical offer on 26 March 2020. He also asked why he had been assigned the step assigned to him upon appointment in comparison with that assigned to some of his colleagues who were recruited before him. He explained in this regard that, during a discussion with them, he had learned that at least three of them had been offered a step that took into account their experience in the area of security prior to their appointment by the Office and underscored that he himself had worked for 21 years in this area before joining the Office.

The Human Resources Department replied on 5 February 2021 that the printed copy of the contract was the same as that sent to him by email in March 2020, during the COVID-19 pandemic, and indicated that step 3 which he had retained when recruited on 1 May 2020 took into account his previous professional experience within the Office.

Considering that this reply did not provide an explanation of the differential treatment noted in comparison with some of his colleagues, the complainant reiterated his request for an explanation by email of 9 February 2021.

Having received no reply, the complainant filed, on 28 July 2021, that is 16 months after his appointment for a fixed term, an internal complaint with the Director of the Human Resources Development Department to challenge the determination of his step at the time of his appointment for a fixed term, alleging unequal treatment in relation to his colleagues at the same grade in the same post, who had been granted higher steps at the time of their recruitment.

His internal complaint having been dismissed on 30 September 2021 by the Director of the Human Resources Development Department, the complainant filed an appeal with the Joint Advisory Appeals Board on 29 October 2021.

The Board submitted its report to the Director-General on 8 April 2022. It recommended that the appeal be dismissed as irreceivable *ratione temporis*. In particular, it considered that the fact that the complainant learned in early 2021 that some of his colleagues had benefited from a more advantageous determination of their step at the time of their recruitment did not constitute, in the light of the Tribunal's case law, a circumstance that permitted an exception to the strict observance of the time limits for appeals prescribed in the Staff Regulations. In this respect, it found that the Administration had not misled him and had not concealed information that would have prevented him from exercising his right of appeal in good time. Nevertheless, the Board made some additional general recommendations to the Organization. It noted, in particular, that when the complainant, in early February 2021, requested an explanation for the differential treatment that he allegedly suffered in relation to his colleagues, the Administration merely stated that his step had been awarded in accordance with the applicable rules on recruitment. In the Board's view, the Administration should have explained the applicable rules in greater detail, citing the relevant extracts as appropriate, and should

have demonstrated greater care towards the complainant in view of its duty to inform.

By a letter of 20 April 2022 from the Deputy Director-General for Management and Reform, the complainant was notified of the Director-General's decision of the same date to endorse the recommendation made by the Board and, consequently, to dismiss his internal complaint as irreceivable *ratione temporis*. This is the impugned decision.

In the meantime, the complainant's salary was increased to step 5 of grade G.3 on 1 January 2022, and to step 4 of grade G.4 on 1 May 2022.

The complainant asks the Tribunal to set aside the impugned decision of 20 April 2022, to set aside the decision to appoint him at step 3 in March 2020, and to order the Organization to issue a new, retroactive offer of appointment taking proper account of his qualifications and professional experience. He also claims retroactive reimbursement of all sums due as salary, allowances and other applicable benefits and emoluments, as well as payment of 5,000 Swiss francs in moral damages in view of the Organization's breach of its duty to inform and its duty of care. Lastly, he asks the Tribunal to award him 1,000 Swiss francs in costs and to take any action it deems appropriate and necessary to remedy the situation completely.

The ILO asks the Tribunal to dismiss the complaint as irreceivable *ratione temporis*, because the internal complaint was not filed within the time limits prescribed in the Staff Regulations. It also asks the Tribunal, subsidiarily, to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant asks the Tribunal to set aside the Director-General's decision of 20 April 2022 to dismiss his internal complaint and the decision to appoint him at step 3 of grade G.3 from 1 May 2020, of which he was notified on 26 March 2020, and to order the Organization to issue a new, retroactive offer of appointment taking due account of his qualifications and professional experience.

2. The complainant considers that, contrary to the Director-General's decision taken on the basis of the unanimous opinion issued by the Joint Advisory Appeals Board, his internal complaint of 28 July 2021, which concerned an allegation of unequal treatment, was indeed receivable *ratione temporis* as he had only become aware that this inequality existed in late January/early February 2021. He submits that the Board and the Director-General made a mistake of law by not accepting that the start of the time limit for appeal was the moment when, following his conversation with his colleagues in late January/early February 2021, he became aware of the unequal treatment that he had suffered, as well as of a practice of the Organization of which he was wholly unaware and which would not have been contrary to the applicable statutory rules. The complainant considers, in any event, that even if it were to be accepted that the start of the time limit for appeal was in March 2020, the fact remains that the Board and the Director-General again made a mistake of law as to how the Tribunal's case law on exceptions for the calculation of time limits for internal appeals was to be interpreted. In this case, the complainant was, indeed, relying on a material fact of which he was unaware and could not have been aware in March 2020 and of which he became aware only in late January/early February 2021. The complainant argues that to rule otherwise would, on the one hand, have the consequence of depriving any official of an effective remedy when he acquires knowledge of facts that would allow the legality of a decision to be challenged only after the events and, on the other hand, of breaking the official's bond of trust with his organization for the rest of his career.

The Organization contends that, since the actual substance of the case is the decision to appoint the complainant at step 3 of his grade when he was awarded his fixed-term contract, the time limit for challenging this decision by internal means of redress ran from 26 March 2020 and expired on 26 September 2020. Accordingly, the internal complaint filed on 28 July 2021, that is more than 16 months after he was notified of the impugned decision, is clearly irreceivable *ratione temporis*. Furthermore, the complainant's situation is not one in which the Tribunal would accept that the time limit normally set to file an internal complaint was not applicable. This is particularly relevant

since the fact on which the complainant relies already existed at the time when the decision was taken to appoint him at step 3 of grade G.3. Consequently, the present complaint should be declared irreceivable in accordance with Article VII, paragraph 1, of the Statute of the Tribunal.

3. In this case, the relevant provisions for ascertaining the receivability of the complaint are:

– on the one hand, Article 13.2.1 of the Staff Regulations, pursuant to which:

> "An official who wishes to file a grievance on the grounds that s/he has been treated in a manner incompatible with her/his terms and conditions of employment shall, except as may be otherwise provided in these Regulations or other relevant rules, request the Human Resources Development Department to review the matter within six months of the treatment complained of. The procedure for the examination of general grievances related to the terms and conditions of employment is governed by article 13.3.";

– and, on the other hand, Article VII, paragraph 1, of the Statute of the Tribunal, according to which a complaint shall not be receivable "unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". The Tribunal considers that, in keeping with consistent precedent, this provision implies that in order for a complaint to be receivable, the complainant must not only have exhausted the internal means of redress but must also have done so in accordance with the conditions and time limits prescribed in the applicable rules of the organization concerned (see, in particular, Judgments 4103, considerations 1 and 2, and 3947, consideration 4).

The Tribunal recalls that, still according to consistent precedent, strict adherence to time limits is essential, on the one hand, to have finality and certainty in relation to the legal effect of a decision (see, in this respect, Judgment 4103, consideration 1) and, on the other hand, to ensure the efficacy of the whole system of administrative and judicial review of decisions while avoiding adversely affecting, even on grounds of equity, the necessary stability of the parties' legal situations

(see, in this respect, Judgments 4374, consideration 8, 4184, consideration 4, 4160, consideration 9, 4101, consideration 3, 3923, consideration 4, 3829, consideration 7, 3795, consideration 4, 3704, considerations 2 and 3, 3406, consideration 12, 2821, consideration 8, and 2722, consideration 3). Time limits are an objective matter of fact and run, as a general rule, from the moment at which a decision is conveyed (see, in this respect, Judgments 4160, consideration 9, 1466, consideration 5, and 602, consideration 3). The fact that a complainant may not have discovered the irregularity on which he purports to rely until after the expiry of the time limit is not in principle a reason to deem his complaint receivable (see, in this respect, Judgments 4103, consideration 1, 3829, consideration 7, 3687, consideration 11, 3406, consideration 12, 3002, consideration 13, 2821, consideration 8, and 602, consideration 3). Similarly, a reply to a request to clarify a decision does not trigger a new deadline within which to challenge the initial decision, since the recognition of such a principle would render ineffective the purpose for which the time limit was established (see, in this respect, Judgment 4103, consideration 3).

4. As the Tribunal recalled in Judgment 3687, consideration 10, an exception may be made to the rule of strict adherence to the relevant time limit only in very limited circumstances. These include circumstances "where the complainant has been prevented by *vis major* from learning of the impugned decision in good time [...], or where the organisation, by misleading the complainant or concealing some paper from him or her so as to do him or her harm, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith" (see Judgment 3405, consideration 17), "where some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or where [the official concerned by the decision] is relying on facts or evidence of decisive importance of which he or she was not and could not have been aware before the decision was taken" (see Judgment 3140, consideration 4).

5. In the material case, the Tribunal notes that step 3, which the complainant contests, was the step assigned to him at the time of his appointment under a fixed-term contract, of which he was notified on 26 March 2020, and that the six-month time limit prescribed under Article 13.2.1 of the Staff Regulations therefore began to run on that date. It follows that this time limit expired in September 2020 and that the Joint Appeals Advisory Board, the Director of the Human Resources Development Department and the Director-General were, therefore, correct in considering that the complainant's internal complaint, filed on 28 July 2021, was irreceivable *ratione temporis*.

6. The fact that the complainant only learned of a difference in treatment in comparison with certain colleagues previously recruited under fixed-term contracts during discussions with them in late January/early February 2021 cannot be considered as falling within the scope of exceptions which, according to the Tribunal's case law cited above, allow the rule of strict adherence to time limits for appeals to be waived.

The complainant indicates that it was the receipt, in January 2021, of the printed copy of the offer of appointment of 24 March 2020 that prompted him to discuss the matter with other security guards. However, given that the conditions of his appointment were specified in the offer of appointment of 24 March 2020, it was incumbent upon the complainant, if he had doubts as to whether the step assigned was correct, to consult with the Human Resources Development Department at that time.

7. It follows that the justification offered by the complainant does not constitute, in the light of the case law cited above, a new and unforeseeable fact of decisive importance occurring since the impugned decision was taken and of which he was not or could not have been aware at the time he was notified of the decision (see, for example, Judgments 3687, consideration 10, 3614, consideration 16, 3541, consideration 22, 3140, consideration 4, and 676, consideration 1).

8. On the contrary, it appears that the complainant was employed by the Office since January 2018 and that he had already been awarded two step increases, in January 2019 and in January 2020, which was the reason why the Organization informed him on 26 March 2020 that he was appointed at step 3 of grade G.3. He could not, therefore, be considered to be entirely unfamiliar with the functioning of the advancement within grade system provided for in the Staff Regulations. In this respect, the complainant's assertion that he was not supposed to be familiar with this system because at that time he was under a short-term contract, with the consequence that the Staff Regulations were not applicable to him, is not relevant. This conclusion is all the more warranted given that Rule 3.5(a) of the Rules governing conditions of service of short-term officials provides that "the terms and conditions of a fixed-term appointment under the Staff Regulations of the ILO shall apply [...] as from the effective date of the contract which creates one year or more of continuous service". The complainant was in this situation since January 2020.

9. The complainant further submits that the Organization failed in its duty to inform and its duty of care by not clearly indicating, in response to his request for clarification of 4 February 2021, the reason why he was appointed in March 2020 only at step 3 of grade G.3.

Even assuming that the complainant seeks thereby to maintain that the Organization has deprived him of the possibility of exercising his right of appeal by misleading him with the information it provided him in February 2021, he does not, in any event, fall within the scope of exceptions to the normal application of the time limit for appeals envisaged in such an eventuality by the case law cited above. The exchange of emails to which the complainant refers in this respect is in any event subsequent to the expiry of the time limit for appeals against the decision of 24 March 2020. The case law in question supposes a situation in which an official has been misled with regard to his rights at the time of the notification of the decision he intends to challenge (see Judgments 3829, consideration 7, 3687, consideration 10, 3406, considerations 12 and 13, 3002, considerations 13 and 16, 2821,

consideration 9, 2722, consideration 3, 1466, consideration 5, 1106, consideration 3, and 602, consideration 3).

Furthermore, and again in accordance with the Tribunal's case law cited above, the request for an explanation sent to the Organization on 4 February 2021 could not in itself have the effect of giving rise to a new time limit for the internal complaint against the decision of 24 March 2020.

10. Accordingly, the complainant's internal complaint of 28 July 2021 having been properly considered irreceivable *ratione temporis*, the present complaint is itself not receivable under Article VII, paragraph 1, of the Statute of the Tribunal, since the complainant has not properly exhausted the internal means of redress open to him.

11. In his internal complaint before the Joint Appeals Advisory Board, the complainant also submitted that the unequal treatment he alleged to have suffered constituted, in any event, a continuing breach of his terms of employment, reflected monthly in his payslips. Consequently, he could still challenge the step assigned to him on appointment by contesting his payslips, without any risk of being told that his request was irreceivable, "except possibly to limit compensation to the last six months before his internal complaint"[*]. He maintains this position before the Tribunal.

The Organization opposes this interpretation as inconsistent with the Tribunal's case law, according to which challenging a payslip does not entitle an official to belatedly challenge a decision after the expiry of the time limit for appeals if the payslip merely confirms the decision. To rule otherwise would, according to the Organization, seriously undermine the necessary stability of the parties' legal situations.

12. The Tribunal considers that the differential treatment alleged by the complainant existed ever since he was notified of the offer of appointment on 26 March 2020 and that he could, therefore, have

[*] Registry's translation.

challenged it from that point in time. It has only been confirmed, subsequently, in every payslip. It follows that the present complaint is irreceivable, even when examined from this perspective (compare with Judgments 4103, consideration 4, 3614, considerations 11 to 13 and 15, and 2823, consideration 10).

13. It follows from the foregoing that the complaint must be dismissed in its entirety as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2024, 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 6 February 2025 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER