Federation of International
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Non- Renewal of appointment for unsatisfactory service

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In brief

Recent case law of the ILO Administrative Tribunal seems to depict a tendency towards an increasing scope of judicial review by the Tribunal regarding decisions of non-renewal of fixed-term appointments for unsatisfactory service. While stating that such decisions can only be subject to limited review by the Tribunal, which will interfere only if the decision was based on a mistake of fact or of law, or if an essential fact was overlooked, the Tribunal extends the scope of its review to the process of performance assessment and to the working environment of the agent subject of the assessment. Although compensation in case of an irregular decision not to renew an appointment remains imperfect, it offers the agent the opportunity to assert their rights, especially when they took care to take preventive measures.

Introduction

International organisations are increasingly using fixed-term appointments regarding their agents. It is their way of keeping a certain flexibility without being tied to an agent for a long period of time, since international organisations have wide discretion regarding decisions not to renew a fixed-term appointment according to the needs of the department involved.

Agents do not have a right to the renewal of their contract upon expiry. However, the decision not to renew their contract must be motivated. This is likely a way for the ILO Administrative Tribunal to take into consideration reasonable expectation of stable employment, which is becoming an increasing concern particularly with regards to the recurrent recourse to fixed-term appointments.

When the non-renewal of a fixed-term appointment is not based on the decision to abolish the post, it is usually based on performance issues regarding the agent. According to well-established case law, international organisations have wide

discretion in taking decisions concerning staff performance appraisal, which explains why the Tribunal is reluctant to interfere with such decisions. Therefore, judicial review is limited, and the Tribunal will interfere only if:

- the decision was taken in breach of applicable rules on competence, form, or procedure;
- the decision was based on a mistake of fact or of law;
- an essential fact was overlooked;
- if there was abuse of authority;
- or if a clearly mistaken conclusion was drawn from the facts.

However, in recent cases, the Tribunal expanded *de facto* the scope of its review to reviewing the process of performance appraisal followed by the organisation and the working environment of the agent. This was the case in judgement no. 4289, rendered during its 130th session, which was in line with previous decisions such as judgements no. 4062 and 4170.

Facts & Decisions

In the case regarding judgment no. 4289, the complainant joined the International Centre for Genetic Engineering and Biotechnology (ICGEB) in 2003, employed under a fixed-term appointment which had been renewed several times until the expiry of her last contract on June 30th, 2017. In 2016, she received a negative performance appraisal from her supervisor and was offered to follow a performance improvement plan. During the third of the four planned follow-up meetings, she was informed that her contract would not be renewed. The complainant sought a review of this decision and also submitted a complaint of harassment against her supervisor. However, the Director-General accepted the recommendation of the Joint Appeals Board and dismissed her internal appeal. The Tribunal annulled this decision.

First, it recalled the principle that *"the decision not to renew a fixed-term contract is a discretionary decision"*, and that international organisations have wide discretion in taking such a decision.

However, when reviewing if the decision was attended by legal error, the Tribunal specified that *"if the decision is based on poor performance, the assessment of that performance has to be made in accordance with the rules established for that purpose"* (consideration 7).

The Tribunal stressed that *"allied to this is an obligation to afford an opportunity to improve"*. This implies that the performance improvement plan must be pursued to completion and cannot be peremptorily cut short. Regarding the organisation's defence arguing that the complainant did not accept the plan in good faith, the Tribunal replied that such claim needs to be made out on the evidence and that, in any event, the organisation should have acted accordingly instead of waiting for a further stage of the plan.

In addition, the Tribunal considered that the Advisory Panel erroneously concluded that the allegations of harassment were not sufficiently established on the documentation to warrant further investigation. The Tribunal clarified that at the complaint stage, the agent does not need to prove that the harassment is established beyond reasonable doubt– since it is the subject of the disciplinary proceedings that must follow– but rather according to a less demanding standard of proof.

The Tribunal implied that accordingly, the case could have been remitted to the organisation for further investigation regarding the allegations of harassment. However, in the absence of such request, the Tribunal only used this fact to establish the quantification of the damages to which the complainant is entitled.

Therefore, the complainant was awarded compensation in the amount of 40 000 euros under all heads. The Tribunal explained having taken into account several considerations: first, the fact the negative assessment of her performance appraisal has not been challenged; second, that although the likelihood of a renewal was not great, it was not excluded that the improvement performance plan could have improved the complainant's performance and the organisation failed to adequately address her complaint of harassment.

This decision supplements Judgement 4170 rendered for a case in which the complainant had contested a performance report and the decision not to renew her fixed-term appointment for unsatisfactory service. The complainant had lodged a complaint of moral harassment against two of her supervisors which had culminated in opinions revealing a mutual lack of respect that had led to tensions and a hostile environment. An improvement performance plan had also been enforced, however, the Appeals Board noted that it had not been *"implemented in an efficient and proper manner"*. In this respect, the Tribunal confirmed that placing the complainant under different supervisors from the same department *"could not suffice in the already hostile work climate"*. The complainant's redeployment in a different service had been recommended. However, the solution of transferring her to another service had not been seriously considered by the organisation, which preferred not to renew her contract. The Tribunal pointed out that the decision of maintaining the negative assessment and not renewing her appointment was unlawful. The Appeals Board should have recommended to review the assessment instead of paying the complainant a termination indemnity.

In addition to stressing the inadequacy of the solution offered, the Tribunal went back to the circumstances that culminated in the impugned decisions. It considered that internally, the Organisation should have verified if the negative performance appraisal and the non-renewal of the complainant's appointment were not affected by prejudice or other extraneous factors.

The Tribunal recalled that, as a general principle, the professional context in which the staff member works must be taken into account and considered that in the present

case, the behaviour of the complainant's supervisors contributed to creating a tense and hostile working environment.

The Tribunal expanded *de facto* the scope of its review, this time on the grounds of reviewing a conclusion drawn from the facts, since it reviewed the facts such as the professional context in which the staff member works and assessed the possible consequences of those circumstances on performance assessment. In this regard, it recalled as a general principle that performance assessment requires fairness, impartiality, and honesty. If the internal bodies do not examine the professional context in which the staff member works, they are not able to ensure that performance assessment complies with these requirements and, consequently, they fail to take into account an essential fact, which the Tribunal has the power to sanction.

In this case, the complainant asked for her reinstatement. However, the Tribunal did not deem this appropriate. It believed that such measure can only be possible in case of termination of contract, which the Tribunal has always distinguished from non-renewal. Suffice to say, there was no misconduct. However, in our opinion, it could be argued that it was a dismissal in disguise.

The Tribunal did not consider that a contract was terminated but that a fixed-term appointment was simply not renewed beyond its expiry, which implicitly recalls another great principle established by its case law regarding the fact that agent employed under a fixed-term contract are not entitled to the renewal of their contract. As an alternative, the Tribunal simply awarded the complainant the equivalent of salaries and allowances she would have received if her contract had been renewed, as compensation for material damages.

To conclude, these cases can be considered a step forward, as they allow the Tribunal, to a certain extent, to review the circumstances of a decision not to renew a fixed-term contract, which implies there must be a "valid reason"[1] for such decision, in accordance with a general principle of the international civil service. But they remain a modest step forward regarding adequate compensation.

It is all the more significant in a similar case, judgement n° 4062[2]. The case regarded a UNESCO agent, who had joined the organisation as a supernumerary and was then employed under a fixed-term contract renewed several times. She had always received good reviews until she was transferred to a new service. When the complainant received a negative assessment, despite a performance improvement plan, the organisation decided not to renew her contract for unsatisfactory performance, despite the opinion of the internal appeals body, which is competent to review performance assessment and recommended her transfer in a different service, particularly given serious communication issues in her current section .

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[1] See in particular Judgement no. 1911, consideration 6, Judgement no. 2124, consideration 3, Judgement no. 2414, consideration 23, or more recently Judgement no. 4289, consideration 7 regarding decisions not to renew a contract.

[2] The author represented the complainant to obtain the annulment by the Tribunal of the decision not to renew her contract.

Under the guise of reviewing whether an essential fact had been overlooked by the organisation, the Tribunal established the following:

> *"Such a working environment is clearly detrimental to the quality of staff performance and makes it particularly difficult, a fortiori, for employees who are not providing satisfactory services to improve the quality of their performance."*

The Tribunal also considered that despite the improvement performance plan enforced, *"the complainant did not receive the regular feedback from her supervisors that she would have needed in this case in order to substantially improve the quality of her performance".*

Consequently, the negative assessment as well as the decision not to renew her contract was considered unlawful.

The Tribunal deemed, as fair compensation for material damages suffered, that the complainant should be paid the equivalent of all salary and allowances that she would have received had her contract been renewed.

On our end, we regret that the Tribunal rejected her claim for the payment of all the emoluments which she would have received until she reached retirement age. Indeed, although the renewal of her fixed-term contract was not guaranteed, it was more than likely for this specific complainant who had been working for the organisation for eleven uninterrupted years before being transferred to this dysfunctional service.

The award of 10 000 euros is surely not enough to compensate the damage suffered. It was more balanced in cases 4062 and 4170 since the Tribunal qualified the moral injury suffered as "substantial", given the professional reputation harm and the lack of care from the Organisation, and awarded a more appropriate compensation.

Conclusion and Tips

Despite the absence of a right to have a fixed-term contract renewed, an agent can only be subject to a decision not to renew their appointment if the organisation can *in fine* motivate its decision and prove the applicable procedures have been followed. Regarding the non-renewal of an appointment for unsatisfactory service, this translates into considering the professional context in which the staff member works and the need to follow a improvement performance plan which must necessarily be implemented since the organisation has an obligation *"to afford an opportunity to improve".*

Inappropriate behaviour from a manager or a hostile working environment can have a negative influence on the performance of an agent, without prejudice to his or her abilities. Fortunately, the Tribunal, despite a limited review, verifies these conditions.

In practice, if an agent employed under a fixed-term contract receives a negative performance assessment, it is recommended that they challenge the assessment and scrupulously follow the specifications of the improvement performance plan, even if

they challenge it later on. They should also report extraneous factors that could impact their performance.

If conditions are met, reporting an extraneous factor can take the form of a complaint of harassment, regarding which the Tribunal recalled receivability is subject to a less demanding standard of proof and compel organisations to:

- investigate the matter both promptly and thoroughly, as facts must be determined objectively and in their overall context;
- ensure due process;
- guarantee the protection of the person accused;
- guarantee that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account [3].

In this regard, it can be pointed out that the Tribunal insisted that an organisation must carry out a full and proper inquiry and cannot simply let the Tribunal rule without adducing evidence that might have proved material, provided a proper inquiry has been carried out. Failure to do so would constitute a breach for which the applicant would not only be entitled to claim compensation[4] (but would also be a ground for vitiating the evaluation decision and, consequently, the decision not to renew the contract.

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[3] See in particular Judgement no. 2642, consideration 8, which is consistently referred to by the Tribunal since then.
[4] See Judgement no. 1619, consideration 6.