

SEVENTY-SIXTH SESSION

In re LOCHNER

Judgment 1301

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Stella Lochner against the International Labour Organisation (ILO) on 22 July 1992 and corrected on 16 November, the ILO's reply of 25 February 1993, the complainant's rejoinder of 6 April and the Organisation's surrejoinder of 26 May 1993;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal and Articles 4.12, 6.7, 13.1 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Article 6.7 of the Staff Regulations of the International Labour Office reads:

- "1. The performance of each official shall be appraised on a form prescribed by the Director-General after consulting the Administrative Committee. The appraisal shall be carried out by the official's responsible chief who may obtain the views of a subordinate supervisor or where appropriate any other official under whose supervision the official has worked during the period under review ...
2. The appraisal shall be communicated to the official, who shall initial and return it within eight days of its receipt attaching to it any observations he may wish to make. These observations shall be filed with the appraisal unless the Director-General decides otherwise. The appraisal, together with any observations which may have been made by the official, shall then be transmitted to the official to whom the responsible chief reports, who may add his observations to it, in which case it shall be returned to the responsible chief and to the official for initialling. It shall then be transmitted to the Secretary of the Reports Board for appropriate action.
3. A performance appraisal shall be established on the completion of an official's first nine months of service, after eighteen months, after thirty-three months, after forty-five months, and at the end of every two-year period thereafter ..."

The complainant, an Austrian citizen, began working for the ILO in 1974 at grade G.2. She was assigned to the Personnel Development Branch in 1983 and had risen to grade G.4 by 1990, when her post was regraded G.5. In the same year she won a competition for a G.6 post in the Personnel Policy Branch, to which she was transferred on 1 October 1990.

On 1 December 1989 the former chief of the Personnel Development Branch sent her a draft appraisal of her performance from 1 December 1986 to 31 August 1989, when he had left the Branch. There followed correspondence and discussions with the complainant in which the Administration urged her to initial the report and add any comments she wanted. She objected to the length of the report period. On 6 December 1990 she made a "request for review" under Article 13.1 of the Staff Regulations alleging breach of the rules on performance appraisal.

In a minute dated 21 December 1990 the chief of the Personnel Development Branch asked his predecessor to revise his original draft appraisal for 1986-89 so that it covered only the period from 1 December 1986 to 30 November 1987; a second report would be prepared for the period from 1 December 1987 to 30 November 1989, and he invited his predecessor to make a contribution to it covering the period up to 31 August 1989. The former chief of the Branch agreed in his minute of 14 January 1991, acknowledging that the report for 1986-87 had been late. In a minute dated 15 January the new chief of the Branch asked the complainant to initial and return the revised appraisal for 1986-87 within eight days. Also on 15 January her first-level supervisor sent her a draft appraisal for 1987-89. In a minute of 21 January to the chief she pressed her 13.1 request.

Having failed to get her to sign the appraisal for 1986-87 or explain the basis of her request for review, the chief told her in a minute of 8 February 1991 that he would put the revised appraisal for 1986-87 to the Reports Board along with the correspondence and would draw the Board's attention to the draft appraisal for 1987-89 unless she discussed it with her supervisor within the week.

On 15 February 1991 she lodged a "complaint" under Article 13.2 of the Staff Regulations against the validity of the appraisal of 1 December 1989 of three years' performance. In a minute of 18 April the Director of the Personnel Department explained to her on the Director-General's behalf that the "appropriate method" of challenging an appraisal on procedural or substantive grounds was the procedure established under the Staff Regulations that involved consideration of it by the Reports Board and a final decision by the Director-General on the Board's report. The Director accordingly recommended that she fill up the relevant sections of the forms so as to let the Board have "completed performance appraisals" rather than drafts. The Director also invited her to send the Board "clarifications" of her "complaint". On 15 May she returned the draft appraisals to the Director, but without initials or comments.

In its comments of 7 June 1991 the Board regretted the "errors of procedure" that flawed the report for the period from 1 December 1986 to 30 November 1987. It asked her to initial the report and append any comments she cared to make; otherwise it would have the draft put in her file with the material correspondence. As to the appraisal for the period from 1 December 1987 to 30 November 1989 the Board said that any failure to comply with the established procedure was the complainant's own fault, but again it recommended that she get a "last chance" to put things right by completing the appraisal procedure before the draft and correspondence went on file. By a letter of 23 April 1992, which she is impugning, the Director of the Personnel Department informed her that the Director-General had decided to put the draft appraisals and material correspondence in her file.

B. The complainant submits that the ILO failed to comply with the rules as to the two draft reports on her performance from 1 December 1986 to 30 November 1989. Although she maintains that they are wrong in substance about the quality of her work, her objections bear mainly on procedure.

Under Article 6.7.3 of the Staff Regulations she should have had a report every two years. The draft report submitted to her on 1 December 1989 covered nearly three. The two draft reports the ILO supplied in January 1991 - one for the period from 1 December 1986 to 30 November 1987, the other for the period from 1 December 1987 to 30 November 1989 - were just a "cover-up" for its breach of procedure. In any event it acted too late: a report was due by the end of February 1988 on her performance from 1 December 1986 to 30 November 1987. The delay ruled out "timely feed-back", prevented her from making good her shortcomings and allowed her former chief's soured relations with her to taint his recollections of her performance.

She further alleges that the ILO failed to discharge its duty to consult her beforehand. The Reports Board's guidelines say that the "preparation of the performance appraisal should be the occasion for discussion between the supervisor and the official" and that the written assessment "should not come as a surprise to the official at the end of a review period". But the criticisms of her in the first report came out of the blue.

She submits that the reports are not "appraisals" within the meaning of Article 6.7. So it was not open to her to initial them or comment on the substance without seeming to treat them as valid in law. She seeks the quashing of the impugned decision, the removal from her personal file of "defamatory comments" in the appraisals and an award of token damages for distress and for injury to her career prospects and personal and professional reputation.

C. In its reply the ILO submits that her complaint is irreceivable because she has failed to exhaust the internal remedies. To correct possible errors of judgment ILO staff may comment on appraisals of their performance. But the complainant chose not to do so. The Organisation also has a review procedure whereby its Reports Board examines alleged errors of judgment or of procedure. Again she refused to comply with the established procedure. So the decision she is challenging is not "final" within the meaning of Article VII(1) of the Tribunal's Statute.

On the merits the ILO contends that her withholding comments on the draft appraisals and her unwillingness to supply the required information or discuss the matters at issue caused the whole exercise to break down. She was wrong to reserve for the Tribunal her observations on the substance of her appraisals: in any event it will not replace the ILO's views of her performance with its own. While acknowledging errors of procedure in preparing the first report, the Organisation blames the dispute on her own "intransigence", not on administrative delay. Her refusal to comment on the substance made the second report incomplete as well.

Under the circumstances what could the Organisation do but put copies of the draft reports along with the relevant documents in her personal file? Though they may not amount to complete 6.7 "performance appraisals", they are "documents relating to measures officially taken or considered in connection with the official" within the meaning of Article 4.12 and should therefore go on file.

It is up to her to show what injury, if any, she suffered that she did not bring upon herself. If her fears of damage to her career prospects were genuine she had only to comment on the issues raised in the reports.

D. In her rejoinder the complainant enlarges on her earlier pleas. She denies that she was in any way to blame. It was not she who drafted the appraisal for 1986-87 inadmissibly late and in breach of the rules of procedure. Since, as the Organisation concedes, the material documents do not constitute 6.7 performance appraisals she was under no duty to initial and return them. What requirement is there in the Staff Regulations to sign reports that are not in line with the rules?

As for the moral injury, she maintains that the accusations levelled against her by her present and former chiefs were akin to a "witch-hunt".

E. In its surrejoinder the ILO maintains that the procedural errors it committed were not so great as to preclude correcting them or treating the reports as performance appraisals. It was her refusal to act that made them incomplete appraisals. A staff member's refusal to complete the form does not strip an appraisal of legal effect. As to the injury she alleges the ILO points out that in the months following the periods covered by the two reports she rose by two grades in the General Service category.

CONSIDERATIONS:

1. The complainant joined the ILO in 1974 in the General Service category at grade G.2. In 1983 she was assigned to the Personnel Development Branch as a personnel clerk under the supervision of the secretary to the Selection Board. By 1990 she had reached grade G.5. On 1 October 1990 she was transferred to the Personnel Policy Branch after winning a competition for a G.6 post in that Branch. She is seeking the removal from her personal file of what she sees as libellous comments in two draft reports appraising her performance from 1 December 1986 to 30 November 1989, when she was still in the Personnel Development Branch.

2. In the draft report covering the period from 1 December 1986 to 30 November 1987, which she was given on 14 January 1991, the former chief of the Branch said that she had performed her duties "with competence and skill" and notwithstanding pressure had maintained "a high level of accuracy and attention to detail". But he added that her relations with her first-level supervisor "were less than desirable" and spoke of her "uncooperativeness", and it is to those remarks that she takes strong exception.

3. In a further draft report appraising her performance from 1 December 1987 to 30 November 1989 her first-level supervisor, the secretary to the Selection Board, described her as "a conscientious and hard worker" and as "competent" and "efficient" but said that she "had difficulties in working in a team". To that comment too she takes exception.

4. After making a request for review under Article 13.1 of the Staff Regulations and after further correspondence, both of which failed to give her satisfaction, she lodged a "complaint" on 15 February 1991 under Article 13.2 alleging unfair treatment and procedural "irregularities", in particular delay in drafting the report for 1986-87 and lack of proper consultation between her and her supervisor.

5. In an interim reply of 18 April 1991 to her 13.2 "complaint" the Director of the Personnel Department said:

"... the appropriate method of contesting the procedure leading to, or the merits of, a performance appraisal, is the specific procedure established under the Staff Regulations, which involves consideration of appraisals by the Reports Board and a subsequent decision, on the basis of the Board's report, by the Director-General."

The Director therefore asked her to complete the reports "as soon as possible" so that they could go to the Reports Board. In answer, however, she merely sent them back without comment on 15 May and in a minute of that date maintained that she did not accept them as valid.

6. In "comments" dated 7 June 1991 which were forwarded to her the Reports Board observed that she had not

commented on the appraisals; it asked her to sign them, make any comments she wished and return them to it. She did not sign and she did not comment.

7. In a letter of 23 April 1992 in final answer to her Article 13.2 complaint the Director of the Personnel Department said that the Director-General had noted her failure to take the action set out in the Director's minute of 18 April 1991 and in the Board's comments of 7 June 1991. Since she had failed to "make use of the opportunity given to state [her] grievances", the Director-General saw no grounds for holding that she had been treated inconsistently with the Staff Regulations or with the terms of her contract of employment and the draft appraisals would be "placed on [her] file along with all the relevant correspondence".

8. Article VII, paragraph 1, of the Tribunal's Statute reads:

"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 requirement that a complainant go through any internal procedure is not just a formality. The complainant therefore had an obligation to make due efforts under the rules to challenge the appraisals of her performance. The appraisals fell within the purview of the Reports Board, whose members are familiar with ILO procedures and standards for reporting and competent to make recommendations both on procedure and on substance. The Board may in particular recommend withdrawing or altering appraisals. By refusing to put to it her comments on the draft reports she is challenging the complainant failed to avail herself of the means at her disposal to have the reports withdrawn or altered. Her complaint is therefore irreceivable under Article VII(1) of the Statute.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda
William Douglas
Mark Fernando
A.B. Gardner