

EIGHTY-THIRD SESSION

In re Mukungurutse

Judgment 1635

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Esau Mukungurutse against the International Labour Organization (ILO) on 14 August 1996 and corrected on 28 September 1996, the ILO's reply of 4 February 1997, the complainant's rejoinder of 6 March and the Organization's surrejoinder of 30 April 1997;

Considering Articles II, paragraph 5 and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, a citizen of Zimbabwe, joined the staff of the ILO on 1 November 1994 as a budget and finance officer at grade P.3 under a one-year fixed-term appointment. He was assigned to the Organization's Regional Office for Africa at Abidjan, in the Côte d'Ivoire.

Relations with his first-level supervisor soured. On 5 October 1995 he lodged a request for review under Article 13.1 of the Staff Regulations alleging improper treatment by that supervisor. Also on 5 October he and four colleagues sent a "petition", under Article 13.1, to the Assistant Director-General responsible for ILO activities in Africa, who is the Regional Director, levelling allegations against their supervisor. On the strength of a bad report dated 23 November 1995 on his performance the Administration extended his appointment by only three months. Having submitted comments on the report to the Reports Board, he filed a 13.2 complaint on 27 December 1995 against that decision.

In comments dated 12 March 1996 the Reports Board found no reason to keep him on. By a minute of 29 March 1996 the Regional Director gave him formal notice of the Director-General's decision not to extend his appointment beyond 31 May 1996.

In a letter of 24 May 1996 the complainant submitted a second 13.2 complaint to the Director-General against the appraisal of his performance and the decision not to extend his contract beyond 31 May. He asked for the suspension of those decisions and of the arrangements for his return home until his complaints had been settled.

In a reply of 31 May by electronic mail the Director promised him a decision from the Director-General on his internal "complaints" as soon as possible but said that his repatriation would go ahead. That is the decision he impugns.

B. The complainant says that the impugned decision shows mistakes of fact and of law. He alleges breach of the rules on performance appraisals, failure to take account of essential facts, the drawing of mistaken conclusions from the evidence, misuse of authority and personal prejudice.

He wants the Tribunal to set aside the impugned decision; reinstate him or, failing that, grant him material damages in an amount equivalent to what he would have earned since the date of "dismissal"; pay him 3,100 United States dollars to cover the cost of transporting his motor vehicle; award him the amount -- \$2,000 -- which the ILO deducted from his repatriation allowance; and grant him \$150,000 in moral damages and \$15,000 in costs. He seeks an apology from the Director-General and rectification in writing of his performance report and the records of the internal appeal proceedings.

C. In its reply the ILO contends that the complaint is irreceivable on the grounds that the challenged decision is not a final one and the complainant has not exhausted his internal remedies.

On the merits it rebuts most of the complainant's pleas but it acknowledges flaws in the procedure of appraisal. On 3 December 1996 it accordingly reversed the decision not to extend his appointment and says it has offered him ample compensation for any injury he had sustained.

D. In his rejoinder the complainant argues that his complaint is receivable and observes that the Organization has failed to show that the relief it has offered him is adequate. He presses his claims.

E. In its surrejoinder the ILO states that it has extended the complainant's contract until 31 August 1997 in order to "explore the possibility of reassignment". It maintains its objections to receivability and insists that its offer of compensation for moral injury is adequate in view of the complainant's length of service and the Tribunal's past rulings.

CONSIDERATIONS

1. The complainant started working for the ILO on 1 November 1994 under a fixed-term contract for one year. He was a budget and finance officer at grade P.3 in the ILO's Regional Office for Africa at Abidjan. Not until 6 April 1995 was he given the description of his post and not until May 1995 an official briefing about his duties.

2. On 5 October 1995 he filed a request for review under the Staff Regulations saying that almost ever since starting work at Abidjan he had been having "problems" at work with his first-level supervisor, the chief of Regional Administrative Services (C/RAS). On the same day he and four colleagues submitted to the Assistant Director-General responsible for ILO activities in Africa, who is the Regional Director, a petition that levelled serious allegations against the C/RAS. The Regional Director called a meeting on 13 October to discuss the petition. But the complainant never got a reply either to the petition or to his request for review.

3. A report was due on the appraisal of his performance in the first nine months of his service, up to 31 July 1995. It was completed on 23 November 1995 and submitted to the Reports Board. The appraisal was poor. The complainant put his observations to the Board when called upon to do so.

4. In a minute of 17 November 1995 to the chief of the Personnel Planning and Career Development Branch (P/PLAN) the Regional Director recommended extending the complainant's contract by only three months on the grounds of the poor rating of his performance. His contract was so extended. In a first internal "complaint", which he addressed to the Director of the Personnel Department in a memorandum dated 27 December 1995 he challenged that decision. In support of that appeal he made several serious allegations against the C/RAS of unfair treatment and treatment inconsistent with the terms of his contract and contended that the decision was in "retaliation".

5. In a memorandum of 28 January 1996 to the chief of P/PLAN the Regional Director observed that the complainant's "overall performance" and conduct had still not proved satisfactory and, as the first extension was to expire at the end of that month, recommended letting him have another extension for "winding up".

6. Having reviewed all the submissions made to it, the Reports Board issued comments on 12 March 1996: it noted that the complainant was still on probation and concluded that it had "no grounds to question" the Regional Director's recommendation. By a memorandum of 28 March 1996 the chief of P/PLAN sent him the Board's comments and informed him that the Director-General had decided not to extend his contract beyond 31 May 1996.

7. By an electronic mail message of 18 April 1996 to the complainant the Director of the Personnel Department acknowledged that taking a decision on his appeal of 27 December 1995 -- referred to in 4 above -- was desirable before his contract expired. In a letter of 23 May 1996, however, she told him that that would not prove possible and that the decision not to renew his contract was not suspended. By a letter of 24 May the complainant filed a second internal "complaint" against the appraisal of his performance and the decision not to extend his contract beyond 31 May 1996. He alleged many flaws in the process of appraisal, mistakes of fact and of law and serious personal prejudice on the part of the C/RAS. Observing that those decisions were "based on a Reports Board recommendation which is itself based on a flawed performance appraisal", he asked that the decisions, and the arrangements for his repatriation, be suspended.

8. By an electronic mail message of 31 May the Director told him that the "contents" of her letter of 23 May

1996 stood.

9. Another two months went by without any decision on either of his internal appeals, of 27 December 1995 and 24 May 1996. On 14 August 1996 he posted this complaint and thereby filed it with the Tribunal. On the complaint form he has identified as "the challenged decision" an express one of which he says he had notice on 31 May 1996. He claims:

(a) the quashing of the decision of 28 March 1996;

(b) reinstatement as from 1 June 1996 or damages;

(c) reimbursement of 3,100 United States dollars, the cost of transportation of a vehicle to Abidjan and then to Harare;

(d) the refund of \$2,000, a sum deducted from his repatriation grant;

(e) \$150,000 in moral damages;

(f) \$15,000 in costs; and

(g) a written statement by the Director-General rectifying the false allegations in the performance appraisal report and connected documents and a written apology by him for the harm caused to the complainant.

10. The Director-General having reviewed both his internal complaints, the Director of Personnel wrote him a letter on 3 December 1996 to convey the Director-General's view that he had "adequately substantiated most though not all" of the allegations of unfair and improper treatment that he had made in support of his first complaint; and that, as to his second one, "certain procedural errors" had been made in the process of appraisal and that the facts on which the appraisal had been based "were not sufficiently established"; the Director-General had therefore decided to "quash" the non-renewal, and so to deem his appointment to have been renewed for one year, and to remove all documents relating to the appraisal from his personal file. In the Director-General's view, however, it was possible neither to reinstate him in the Regional Office -- "due to the deterioration in the working relations experienced" by him -- nor to find him a suitable position elsewhere. The Director-General had therefore decided to terminate his appointment at 31 January 1997 under Article 11.4.1(d) of the Staff Regulations:

"The Director-General may terminate the appointment of a fixed-term official -

...

(d) if the necessities of the service render impracticable the use of the official in the duties or at the duty station assigned to him."

He would then be paid under Article 11.4.3 a termination indemnity equivalent to five weeks' salary. The Director-General further proposed to pay him the equivalent of one year's pay in moral damages in full settlement of his claims, repay the \$2,000 deducted from his repatriation allowance and grant him 500 Swiss francs in costs.

11. The complainant answered the Director's letter in one dated 22 December 1996 in which he objected to the termination of his appointment. The Director wrote to him again on 22 January 1997 to say that the Director-General deemed his contract to have been renewed for one year, up to 31 May 1997; would put him on special leave with pay "in the hope that an appropriate assignment is found"; would pay him the equivalent of three months' remuneration for moral injury; and would grant him a reasonable amount in costs up to 1,000 Swiss francs upon submission of evidence. The Director explained that if no "appropriate assignment" were found his contract would expire at 31 May 1997 and that, though his status thereafter remained uncertain, it would form "the subject of a decision in due course against which [he] would have a right to appeal".

12. Being dissatisfied with the terms of the Director's letter of 22 January 1997, the complainant asks the Tribunal in his rejoinder to rule on his complaint.

13. In its surrejoinder the defendant states that "in order to give the Office more time to explore the possibility of reassignment, the complainant's contract has been renewed for three more months, i.e. to 31 August 1997".

Receivability

14. In its reply the ILO pleads that the complaint is irreceivable on the grounds that the complainant is "unambiguously purporting to impugn an express decision" -- the electronic mail message of 31 May 1996 -- and not an implied one, because he says in the complaint form that Article VII(3) of the Tribunal's Statute is "not applicable". That message -- says the ILO -- merely confirmed that his internal complaint did not have the effect of suspending either the non-renewal of his contract or his repatriation; it did not purport to respond to his first internal complaint but "simply confirmed the decision of non-renewal" notified on 29 March 1996; it was "not even a preliminary decision ... let alone a final decision".

15. Yet the ILO recognises that the defect "could have been ... cured by proper drafting" of the complaint form, that the complainant did contest the decision of 29 March 1996 by his valid internal complaint of 24 May 1996 and that the present complaint could have been lodged in accordance with Article VII(3) of the Tribunal's Statute against the implied rejection of that internal one. It acknowledges, too, that "in Judgment 1546 [*in re* Randriamanantenasoa] under 1, the Tribunal took a flexible approach" in interpreting pleadings that were unclear.

16. The several decisions that have affected the complainant cannot be viewed in isolation from each other. The report dated 23 November 1995 declared his performance unsatisfactory, and the result was a short extension of contract. The Reports Board having endorsed the appraisal in its "comments" of 12 March 1996, there came the decision of 28 March not to renew his contract beyond 31 May 1996; and on that day there was the electronic mail message refusing to stay his repatriation. To challenge only that decision of 31 May would have been futile. Though that is the one he says he is challenging, he is necessarily impugning also the decisions in the chief of P/PLAN's memorandum of 28 March 1996 about performance appraisal and non-renewal on which the decision of 31 May was based. The conclusion is that the complaint is receivable.

The merits

17. As set out in the Director of Personnel's letter of 3 December 1996 about the complainant's two internal complaints, the Director-General's conclusions establish that there were flaws both in the process of appraising his performance and in the decision not to renew his contract. The inordinate delay in giving him a job description and a briefing, the unfair and improper treatment of him by the C/RAS and the failure to respond to his requests of 5 October 1995 for review, tend to bear out his charge of personal prejudice.

18. The Director-General having already extended the complainant's contract to 31 August 1997, the Tribunal need make no further order as to renewal beyond 31 May 1996 or as to the appraisal of his performance.

19. The complainant plainly did suffer moral injury. Under this head the Tribunal awards him *ex aequo et bono* an amount equivalent to a total of six months' salary and allowances, instead of the three offered to him.

20. The ILO having refunded and the complainant having accepted the sum of \$2,000 docked from his repatriation grant, that claim has been satisfied and need not be entertained.

21. As for his claim to reimbursement of the cost of transporting a vehicle, he omitted, as the ILO points out, to put forward that claim in any internal complaint. It is therefore irreceivable under Article VII(1) of the Tribunal's Statute on the grounds of his failure to exhaust his internal remedies.

22. His claims to a written statement and to an apology from the Director-General fail because the Tribunal is not competent to grant redress of that kind.

23. Since he has succeeded, at least in part, he is entitled to an award of costs, and the amount is set at 8,000 Swiss francs.

DECISION

For the above reasons,

1. The ILO shall pay the complainant an amount equivalent to six months' salary and allowances in moral damages.
2. It shall pay him 8,000 Swiss francs in costs.
3. His other claims are dismissed.

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

Delivered in public in Geneva on 10 July 1997.

William Douglas
Michel Gentot
Mark Fernando
A.B. Gardner