

In re Mogensen

Judgment 1726

The Administrative Tribunal,

Considering the complaint filed by Mr. Ejvind Mogensen against the International Labour Organization (ILO) on 15 November 1996 and corrected on 10 January 1997, the ILO's reply of 21 April, the complainant's rejoinder of 28 May and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

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

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

A. The complainant, a Dane who was born in 1938, has been employed by the ILO since 1970, save from March 1975 to November 1976. He served as a technical cooperation expert in Papua New Guinea, Guyana, Trinidad and Tobago, Antigua, the Gambia and Thailand. Then, in June 1990, he took up a career appointment as regional adviser on cooperatives for Asia and the Pacific and was sent to Bangkok. In March 1993 he became a senior specialist in cooperative development and training on the ILO's East Asia Multidisciplinary Advisory Team (EASMAT), still in Bangkok.

On 31 March 1994 the Assistant Director-General responsible for ILO activities in Asia and the Pacific wrote a minute to the Director of the Personnel Department and the Director of the Bureau of Programming and Management (PROGRAM) at headquarters in Geneva. It said that the Regional Office and the "technical departments concerned" had agreed to a switch of posts between Bangkok and New Delhi. The switch meant that the complainant's post would go to New Delhi and one for a specialist in labour administration from New Delhi to Bangkok. On 3 May 1994 the chief of Regional Administrative Services told the complainant that he would therefore be transferred to New Delhi. In a fax letter of 4 May to the Director of Personnel the complainant explained why his transfer was technically unwise and unwelcome to himself and to his family; he also pressed an earlier request for transfer to headquarters instead. He developed his case in correspondence with the Assistant Director-General, the Deputy Regional Director and the Director of Personnel, offering to stay on in Bangkok pending transfer to Geneva or, failing that, his retirement in 1998. But the Administration said they had no suitable post to offer him at headquarters and by a letter of 24 October 1995 the Director of Personnel told him to go to New Delhi "as soon as possible".

By a memorandum of 3 November 1995 to the Director of Personnel he sought review under Article 13.1 of the Staff Regulations stating that he would not, whatever the outcome, be able to move before June 1996, the end of the school year. By a letter of 7 December 1995 the Director said that after reviewing his case the Director-General was willing to postpone the transfer of his post until then, but no later.

On 9 April 1996 he lodged a "complaint" under Article 13.2 of the Staff Regulations alleging unfair and unwarranted treatment. The Director of Personnel replied on 30 July 1996 that the Director-General was confirming his transfer to New Delhi. That is the decision he is challenging.

B. The complainant submits that his transfer was unlawful. He pleads procedural and substantive flaws. The Administration infringed circular 479, series 6, of 15 April 1992 on "Mobility of staff between field and headquarters", which requires the Administration to consult the official before transfer and take account of his family's interests. In keeping with the ILO's "mobility policy" it should have brought him back to headquarters and sent out a specialist in cooperatives. Though the transfer of his post to New Delhi was "technically wrong", the Administration made vague references to the "wishes" of "constituents" instead of offering justification on technical grounds. The move has taken its toll on his family, having harmed the health of his children, cost his wife her job and reduced his post adjustment allowance.

He asks the Tribunal to quash his assignment to New Delhi and order his immediate transfer to Geneva or any other duty station acceptable to him. He claims moral damages in proportion to the time he was "forced" to stay at New Delhi and an award of costs.

C. In its reply the ILO argues that his complaint is time-barred: to be receivable he should have filed it within ninety days of getting notice of the Director-General's final decision, which the postal receipt gives as 6 August 1996.

On the merits it observes that transfer is a matter of policy and unrelated to such subjective issues as the official's preferences. The Director-General having taken the decision in the Organization's interest, there are no grounds for interfering with what was a proper exercise of his discretion. Nor were there any flaws in the decision to assign the complainant to New Delhi. The complainant alleges no mistake of law, but merely failure to apply the guidelines in circulars, which are not binding. The Organization had no duty to consult the complainant about his assignment, although the correspondence it did have with him lasted almost two years. It denies treating him unfairly and is sorry that, despite its search for a suitable post at headquarters at a time when money was short, "distress and disappointment" proved unavoidable. He is not immune to transfer because of any financial loss due to his wife's giving up a job or to the payment at a lower rate of the post adjustment allowance, the purpose of which is to ensure equal purchasing power of pay at all duty stations. In any event the Organization took account of his own interests by postponing the transfer for over two years. As the Tribunal has held, staff may be expected to cope sometimes with uncomfortable working conditions. The Organization observes that the Tribunal may not order his assignment to any particular duty station and asks it to dismiss his claims as unfounded.

D. In his rejoinder the complainant contends that his complaint is receivable. He did not get the impugned decision until 19 August 1996, having reported for work in New Delhi on the 16th. He enlarges on his pleas on the merits and rebuts the arguments in the reply. Had the Organization consulted at the outset as few as three specialists on its staff it might have spared him the distress and disappointment it admits to causing. He wants the Tribunal to set aside the decision to transfer "the post and myself" to New Delhi.

E. In its surrejoinder the ILO withdraws its objection to receivability. On the merits it points out that the complainant's arguments are mere expressions of "personal sensitivity", not valid objections to the lawfulness of his assignment. In any event the Tribunal is competent neither to establish whether a discretionary decision is ill-advised or technically wrong nor to review the transfer of a particular post.

CONSIDERATIONS

Background

1. The complainant has been employed by the ILO since 1970. On 1 March 1993 he was appointed "senior cooperative development and training specialist" in the East Asia Multidisciplinary Advisory Team (EASMAT) at the ILO's Regional Office in Bangkok.

2. On 31 March 1994 the Assistant Director-General responsible for ILO activities in Asia and the Pacific sent a minute to the Director of the Personnel Department and to the Director of the Bureau of Programming and Management (PROGRAM). The minute stated as follows:

"Subject: Interchanging COOP/BANGKOK and ADMIN/NEW DELHI posts

This is to inform you that it has been agreed with the technical departments concerned and the Bangkok Regional Office regarding the above posts to be interchanged."

3. In fact nothing had been agreed with the technical departments or with the Regional Office.

4. After a series of correspondence, the Assistant Director-General explained what had happened in a memorandum of 21 April 1994 to the Director of the Enterprise and Cooperative Development Department (ENTREPRISE) at headquarters in Geneva. He states:

"1. I refer to [the Director of Personnel's] minute of 13 April, which is in turn a reaction to your minute of 5 April. It would seem that the process of consultation has not been appropriate, which I sincerely regret.

2. I asked [the Deputy Regional Director] to undertake preliminary consultations during his briefing in Geneva in early January. He reported to me that he spoke to you on the issue and that you agreed that cooperative development would be difficult in the former planned economies covered by EASMAT whereas there was more potential in countries covered by [the South Asia Multidisciplinary Advisory Team]. At the same time, you saw the need for urgent labour administration assistance in Cambodia, Laos, Viet Nam, Mongolia and China. [The Deputy Regional Director] reported to me that you could support the idea of a switch. However, in the absence of a written proposal, perhaps you left the issue aside.

3. Subsequently, we consulted PROGRAM but did not undertake further consultation of the technical units concerned. [The Deputy Regional Director] and I crossed wires on this: he thought that I would have further consultations during the Governing Body session, in particular on the implications for Mr. Mogensen, whereas I thought that all necessary consultations had been carried out. This was the origin of my minute of 31 March, which was an attempt to push matters forward at the end of my mission to Geneva.

4. [The Deputy Regional Director] asks me to convey his regret that his conversation with you has led to a misunderstanding.

5. Returning to the merits of the proposed switch, I hope that it will not be necessary to reopen the question. I have consulted the Area Office and [Multidisciplinary Team] Directors concerned, and it is very clear that the proposal reflects the priorities of our constituents. I hope that you can therefore agree, which would permit an early competition for a labour administration specialist in EASMAT.

6. If you agree, I will consult Mr. Mogensen on the date of transfer."

5. In a memorandum also of 21 April 1994 to the Assistant Director-General, the Director of ENTREPRISE stated that he did exchange views on the subject with the Deputy Regional Director; he "did not, however, realize that this would have personnel consequences of the type now proposed". Nonetheless he supported the proposal and invited the Assistant Director-General to "go ahead with the arrangements".

6. When the complainant was informed on 3 May 1994 that his post would be transferred to New Delhi he immediately objected on technical and personal grounds.

7. The same day he telephoned the Director of ENTREPRISE, who told him that "his agreement to the switch was based on the assumption that I [the complainant] had been consulted or actually had proposed it". Apparently in June 1995, the Director sent a fax to the Assistant Director-General in which he stated that the complainant's post should remain in Bangkok. These assertions by the complainant have not been denied by the Organization.

8. The Deputy Regional Director also hedged on the decision. In his memorandum of 6 September 1994 to the Director of Personnel, he argued on behalf of the complainant. He concluded that "we would be pleased here at [the Regional Office] to explore any proposal that would result in Mr. Mogensen's continued presence in Bangkok, or his transfer to Geneva".

9. From May 1994 to September 1995, the complainant continually appealed to the Administration to find an alternative to transferring him to New Delhi. He proposed a number of solutions, and he and the Administration explored a number of job possibilities in other cities. None of these possibilities worked out, and the Administration did not accept his other proposals.

10. On 17 September 1995, the Director of Personnel informed the complainant by e-mail message that he would have to move to New Delhi.

11. However, on 5 October 1995, the Assistant Director-General wrote to tell the Director of Personnel that for "humanitarian reasons" he supported "the temporary attachment of the Senior Cooperatives Specialist position to the East Asia Multidisciplinary Team".

12. Nevertheless, and despite further protests, the Director of Personnel wrote to the complainant on 24 October to say that he should "prepare to transfer to New Delhi as soon as possible".

13. On 3 November he formally requested review of the decision under Article 13.1 of the Staff Regulations. In her letter of 7 December 1995, the Director of Personnel informed him that, with the Assistant Director-General and the Director-General, she had "reviewed the whole matter". The Director-General's conclusion was that the transfer could be delayed until June 1996, after which the complainant would have to move to New Delhi or he would run "the risk of non-extension" of his contract.

14. On 9 April 1996 the complainant submitted a "complaint" under Article 13.2 of the Staff Regulations. On behalf of the Director-General, the Director of Personnel wrote to him on 30 July 1996 to say that it had been rejected.

15. The reasons given for rejection were that:

(i) there were sound technical reasons to transfer the post;

(ii) his personal considerations had been taken into account, as evidenced by the two-year delay between the decision and the actual transfer;

(iii) the financial consequences of the transfer had been taken into account because of the much lower cost of living in New Delhi.

16. The complainant appeals that decision to the Tribunal.

Receivability

17. The ILO has abandoned its argument that the complaint is time-barred. The complainant has abandoned his claim that "action be taken to effect my immediate transfer to Geneva". These were the only two issues regarding receivability, and therefore this complaint is receivable.

Was there a flaw in the process?

18. It is not for the Tribunal to review the substance of decisions on structural reform within an organisation. As it has stated many times, it will review such a discretionary decision only if it was taken in breach of a rule of procedure, or if there was a mistake of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if some clearly mistaken conclusion was drawn from the evidence.

19. In the matter at hand the evidence points to a breach of procedure in the broad sense of that word.

20. The Assistant Director-General's original decision, relayed in his minute of 31 March 1994, was clearly based on the mistaken belief that everyone concerned had been consulted and had agreed.

21. The subsequent review by the Assistant Director-General and the Director of ENTREPRISE in their memoranda of 21 April 1994 demonstrates that the decision originated in a conversation between that Director and the Deputy Regional Director.

22. It appears from the evidence that during this review neither the Assistant Director-General nor the Director realised that the complainant had still not been consulted, even though that was clearly the normal practice.

23. The ILO does not deny the complainant's assertion that the Director told him on 3 May 1994 that the Director's "agreement to the switch was based on the assumption that I had been consulted or actually had proposed it".

24. In addition, ILO circular 479, series 6, of 15 April 1992 states at paragraph 4:

"Under Article 1.9 of the Staff Regulations, the Director-General has the authority to assign staff to jobs at headquarters or in the field in the interests of the Office. Without prejudice to this underlying authority, the officials concerned will be consulted on transfers between duty stations "

Judgment 1496 (*in re* Güsten) similarly states under 9 that "one requirement of the case law is that the staff member be given a hearing beforehand when the transfer may harm his dignity or private interests and is not a matter of urgency".

25. It is significant that all three people involved in the original decision later expressed reservations. In his memorandum of 6 September 1994, the Deputy Regional Director argued on the complainant's behalf. The Director of ENTREPRISE sent the Assistant Director-General a fax stating that the complainant's post

should remain in Bangkok. And the Assistant Director-General himself wrote to tell the Director of Personnel that he supported the "temporary attachment" of the complainant's position to the Bangkok unit.

26. Finally, the complainant's seniority, length of service (virtually all of it on difficult posts in developing countries), the fact that he had only recently been moved to Bangkok, and the wholly unnecessary and unjustifiable failure to consult him constitute in the Tribunal's view a serious affront to his dignity and a breach of the Organization's obligation of respect towards him as a member of its staff.

27. These facts are clearly a source of injury to his dignity and feelings of rejection.

28. However, his reactions to the various events were also based in some measure on his expectation that some time in his career he would be transferred to Geneva. Although he had sound reasons for this expectation based on ILO policy -- see for example circular 479 under 14 -- he did not have a legal right to demand such transfer and cannot recover any compensation for the failure to transfer him.

29. The evidence supports the conclusion that, had the complainant been consulted before the decision was made, and not merely afterwards, it is likely that the Assistant Director-General would not have made the same decision. This conclusion is reinforced by the fact that all three officials connected with the decision thought that the complainant had been consulted beforehand.

30. In this regard the Tribunal notes the natural inertia which attaches to any decision once it has been made. Even in the absence of bad faith -- and there is indeed none here -- the decision to move the complainant's post became irrevocable on 21 April 1994 and thereupon ceased to be an open question to be objectively assessed. Once it realised that the decision was based on the wrong premise that there had been prior consultation with the complainant and consideration of his position, the Organization should have abandoned it and started again properly. Its failure to do so in the particular circumstances of this case tainted the process beyond redemption.

Remedy

31. While it is clear that at this stage the remedy of overturning the decision to transfer the post is not appropriate and would not in fact be in the best interests of either party, the complainant has suffered moral injury due to the actions of the Administration. It is difficult but not impossible to separate the portion of such injury caused by the frustration of the complainant's expectation of a transfer to Geneva from the portion caused by the failure in the process of transferring his post from Bangkok to New Delhi. The Tribunal considers that such injury should be properly compensated by an award of damages of 10,000 United States dollars.

32. The complainant, having represented himself, has no entitlement to legal fees, but he should be compensated for his costs in an amount which the Tribunal estimates at 1,000 dollars.

DECISION

For the above reasons,

1. The Tribunal orders the ILO to pay to the complainant the sum of 10,000 United States dollars in damages.
2. It awards him 1,000 dollars in costs.
3. It dismisses all his other claims.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Michel Gentot
Egli

James K. Hugessen

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.