

NINETY-FIRST SESSION

In re Bartolomei de la Cruz (No. 2)

Judgment No. 2058

The Administrative Tribunal,

Considering the second complaint filed by Mr Héctor Guído Bartolomei de la Cruz against the International Labour Organization (ILO) on 25 July 2000, the ILO's reply of 27 October 2000, the complainant's rejoinder of 12 February 2001 and the Organization's surrejoinder of 6 April 2001;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. Facts relevant to this case are to be found in Judgment 1972 of 12 July 2000 in which the Tribunal ruled on Mr Bartolomei's first complaint. Following an incident that occurred on 5 November 1998 the complainant, who was Director of the International Labour Standards Department, was temporarily assigned to duties as Special Adviser on International Labour Standards from 14 December 1998.

On 18 October 1999 the newly appointed Director of the Personnel Department sent the complainant four letters. The first informed him that the Director-General invited him to apologise in writing to officials he had wronged by communications he sent in November and December 1998. Moreover, the Director-General said, the complainant was "no longer able to shoulder responsibilities involving the management of a whole team of officials" and so would not be reinstated in his former post as Director of the Standards Department. The other three letters proposed disciplinary sanctions for various lapses in his observance of the standards of conduct required of international civil servants. The complainant sought postponement of disciplinary proceedings on health grounds, which was granted until 31 March 2000. On 17 April he lodged an internal complaint against the decision to relieve him permanently of his duties. Having received no reply he lodged this complaint on 25 July 2000 under Article VII(3), of the Tribunal's Statute.

B. The complainant cites a number of "new facts" and submits testimonies received too late, he says, to be produced in his first complaint. He hopes they will induce the Tribunal to modify its assessment of certain facts and some of its findings in Judgment 1972. In particular, he reverts to problems he had in 1996 and rumours about him prevalent at the time.

He asserts that since December 1998 he has been implicated in two incidents. First, on 23 June 1999 an e-mail message in his name was sent to numerous members of staff. It contained "extremely libellous" comments, in particular about certain senior officials. The then Director of Personnel let doubt linger as to the identity of its author.

Secondly, the September 1999 issue of *Union*, the Staff Union's bulletin, had a brief article about a new remote access software allowing the information technology department at the ILO to connect to a computer and intervene from a remote location. It went on to say that "riffraff" such as "suspended Departmental Directors" would not have access to the software. The complainant recalls that a Staff Union Committee "Flash" of 13 November 1998 had accused him of having "entered" a colleague's computer and not just having "read two e-mail messages". So he protested, but there was no public response from the Administration.

On the strength of a report he commissioned from an expert, the complainant contends that he fell victim to mobbing: he was given no "job specifications for his new functions", he has no responsible chief, the Administration failed to respond publicly to the "abuse" in the September 1999 issue of *Union* and no serious inquiry was held with a view to punishing the real authors of the e-mail of 23 June 1999.

He alleges several procedural flaws in the administrative investigation of his case, the findings of which were sent to him in May 1999. In particular, the Staff Union Committee filed several letters of grievance against him, one dated 12 November 1998, but he was told neither of their existence nor of their content, and so was unable to adduce cogent arguments in the inquiry. He objects to the inquiry having been entrusted to the then Director of Personnel, whose impartiality he doubts. The Administration should have brought in an impartial outsider. The insulting manner in which the inquiry was conducted as well as its conclusion affirming that the "Flash" was not libellous because it did not mention him by name, show bias against him. The Administration's failure to react to the "Flash" amounts to a refusal to protect his dignity. Even though the inquiry concluded that he had never entered his colleague's computer, the Administration has still not set the record straight in public, so his good name and honour remain seriously impaired.

He further submits that the decision to relieve him permanently of his duties is out of proportion to the charges against him. It overlooked "his past record" in the Organization and was unfounded, since in November and December 1998 his performance was "professional and beyond reproach". Lastly, to ask him to write letters of apology is "more than a humiliation". It amounts to a sanction, and one which is inadmissible because the Staff Regulations make no provision for it.

The complainant asks the Tribunal to order the production of the Staff Union Committee's letter of grievance against him filed on 12 November 1998 and to quash the Director-General's decision of 18 October 1999 in so far as it relieves him permanently of his duties as Director of the Standards Department and invites him to write letters of apology. He also seeks reinstatement in those duties, a published rebuttal of the accusations against him in the "Flash" of 13 November 1998 and compensation for moral injury. He claims costs.

C. In its reply the ILO objects to the receivability of the complainant's claim to the quashing of the invitation to him to write letters of apology, on the grounds that it is not a decision within the meaning of Article VII(1) of the Tribunal's Statute. Moreover, the *res judicata* rule precludes any challenge to the Tribunal's findings and rulings on issues dealt with in Judgment 1972. Accordingly, it says, several of the complaint's paragraphs and annexes must be disregarded. Even if his complaint could in some respects be treated as an application for review, it would be dismissed as irreceivable. Furthermore, being discretionary, the impugned decision is subject to only limited review by the Tribunal. Lastly, it submits that the testimonies and expert report the complainant relies on are of no value as evidence, being based on a partial version of the facts.

As to the e-mail incident of 23 June 1999, the Organization observes that it held a "thorough inquiry" and informed the complainant in a letter of 15 July that it had started investigating the matter. However, since the inquiry failed to reveal the identity of the real author of the e-mail, the Organization was unable to take any action. Regarding the article published in the September 1999 issue of *Union*, the ILO explains that it wrote to the Editor in Chief pointing out that it was reprehensible and calling for compliance with the duty of discretion.

The ILO observes that, having turned to the Director of Personnel several times since November 1998, the complainant is not in a position to object to her having headed the inquiry. He raised no objection when she informed him that the inquiry was to be conducted by the Personnel Department. The Organization denies any bias on the part of the Director of Personnel or the Administration. As to the Staff Union Committee's letter of grievance of 12 November 1998 - which it attaches to its reply - it did send the complainant a copy in October 1999, though the contents were immaterial to the inquiry.

At no time did the ILO cast doubts on the complainant's professional competence. His conduct, however, was another matter: when his lapses came to light the Administration was bound in the Organization's interests to take appropriate action regarding his position in the Organization. The disciplinary sanctions taken show no breach of the principle of proportionality. The latter is in any event immaterial to the decision under challenge, which concerns the assignment of an official and is therefore within the bounds of the Director-General's discretionary authority. The decision as to where the complainant was to be finally assigned would undoubtedly have been different if, after the "Flash" was published, he had not tried to take the law into his own hands without any thought for his fundamental obligations as an international civil servant and the basic rights of other officials in his

department. The Organization therefore considers his claims to the quashing of the impugned decision and to reinstatement in his former post to be devoid of merit.

In alleging that the inquiry lacked objectivity, the complainant is raising issues on which the Tribunal has already ruled in Judgment 1972. The ILO observes that it acknowledged the "Flash" to be offensive and that the complainant had the right to defend himself. On the basis of the inquiry report the Staff Union was asked to publish its own corrigendum to the "Flash" and an apology. Otherwise, the Administration was to publish a corrigendum. The Staff Union Committee, however, considered that it was not able to comply with that request. The Director-General takes the view that, since the "Flash" was published nearly two years ago, to revert to the issue now would be counterproductive for the running of the Office. Besides, the Tribunal has in the meantime delivered Judgment 1972 acknowledging that, although the attacks on him were unjustified, the complainant was partly to blame for the deterioration in the working environment that followed. That being so, if the Administration is to publish a rebuttal of the false accusations against him, it must do likewise for the officials he himself accused wrongly. Since he has failed to offer a proper apology, the ILO considers that, in the interests of impartiality, any such publication ought to consist of a referral to the Tribunal's findings in Judgment 1972 and it has proposed to the complainant a draft text to that effect.

In the ILO's view, the only possible affront to the complainant's honour arose from the publication of the "Flash", which the Organization has totally repudiated. It submits that his claims to publication of a corrigendum and to compensation for the injury allegedly caused by the "Flash" are unfounded. Indeed, the two claims cannot be awarded together: although the publication of idle insinuations may warrant compensation, public denial of them constitutes proper redress for any injury caused. The reason why there was no public denial in this case is that the complainant rejected the Administration's proposals. So the absence of a repudiation does not entitle him to any financial relief.

Nor may he claim any compensation on the grounds that the various administrative decisions affecting him caused him moral injury, since there is no conclusive evidence that the ILO caused him unnecessary hardship. When it took the decision to reassign him temporarily, it maintained his grade and showed the utmost discretion in order to protect his good name. If his reputation suffered, he alone is to blame because he has persisted in publicising his own version of the facts. In view of all the foregoing, the ILO considers his allegation of mobbing to be unfounded.

Lastly, the Organization submits that its sole purpose in inviting the complainant to write letters of apology was to enable him to re-establish normal working relations with the officials concerned. It points out that he was not the only recipient of such a request: all the officials concerned by the incidents have been asked to apologise to those they offended.

D. The complainant rejoins that his complaint is not an application for review. He observes that the decision to relieve him permanently of his duties was taken while he was totally unfit for work; consequently, the Administration has had no opportunity to ascertain whether he would again be capable of directing his department. In his submission, that decision constitutes a hidden disciplinary sanction and is unlawful because any lapses he may have had in reaction to the mobbing are largely due to errors on the part of the ILO. Lastly, even an order from the Tribunal to publish a corrigendum to the "Flash" could not undo the two years "of illness and suffering" that he has endured. In this connection, he asks the Tribunal to recognise that his illness is a result of his problems at work.

E. In its surrejoinder the Organization maintains that the inquiry confirmed that there was nothing temporary about the incompatibility of the complainant's "position" with a management post, since he was unable to refrain from "further disrupting the service".

The complainant may not use mental illness as a pretext for blaming the Administration for his mistakes. Besides, for an illness to be service-incurred, it must not only be related to work, but must also be the direct consequence of a specific risk to which the official has been exposed in carrying out duties entrusted to him. Psychological reactions to adverse administrative decisions cannot be attributable to work.

CONSIDERATIONS

1. The complainant is a former Director of the International Labour Standards Department. Following a number of incidents, which are recounted in Judgment 1972 (*in re* Bartolomei de la Cruz), the Director-General relieved him of his duties by a decision, described as provisional, and assigned him to new duties as Special Adviser on International Labour Standards. Construing the reassignment as a hidden disciplinary sanction the complainant came to the Tribunal, which dismissed his complaint in the above-mentioned judgment. The Tribunal found that, in view of the circumstances of the case, the Director-General had lawfully used his discretionary authority in deciding to reassign, at least temporarily, a director whose department was no longer functioning properly, and that the official's dignity had not been impaired.

2. By a letter of 18 October 1999, the new Director of the Personnel Department notified to the complainant the decisions taken to close the case. First, the Director-General had decided to remove him permanently from his duties as Director of the Standards Department on the grounds that all the evidence showed him to be "no longer able to shoulder responsibilities involving the management of a whole team of officials" of a "key department in the area of workers' rights". Secondly, the complainant was invited to apologise in writing to the officials against whom he had made allegations. Lastly "proposals for a reprimand" would be addressed to him under separate cover.

The letter went on to emphasise that the publication of the "Flash" by the Staff Union Committee, which could be construed as accusing a director of improperly entering the e-mail system or computer of another official, could elicit only disapproval from the Administration; that the inquiry which ensued had cleared him of blame on that score; and that the Staff Union would be invited to publish the necessary corrective statements and offer its apologies "if, due to some action or other of its members, a director was associated by name with the accusation in the Flash".

3. On 17 April 2000 the complainant filed an internal complaint under Article 13.2 of the Staff Regulations, recounting the circumstances of the case at length and challenging his "punitive transfer", which, he said, was not a sanction provided for in the rules, was unwarranted and adopted following an inquiry which showed numerous procedural flaws and bias. He also alleged that the Administration failed to protect him from "mobbing", and sought reinstatement in his duties, the publication of a formal denial of the accusations against him in the "Flash" of 13 November 1998, and redress.

4. Since the Director-General failed to reply within sixty days, the complainant has come to the Tribunal challenging the implied confirmation of the decision of 18 October 1999 in so far as it relieves him permanently of his former duties as Director of the Standards Department and invites him to write letters of apology. The complainant adds that he wishes "to obtain changes in some of the assessments ... made by the Administrative Tribunal in Judgment 1972 in the light of new facts and testimonies received too late to be submitted with his first complaint".

5. It should be noted in this connection that the complainant does not challenge the Tribunal's ruling in Judgment 1972, which means that his claims do not amount to an application for review. The ILO contends that assessments already given by the Tribunal are not open to challenge and considers that several paragraphs of the complaint should be discounted under the *res judicata* rule. The plea fails: the decision challenged in the present dispute is not the one addressed in Judgment 1972, so the complainant may rely on all such evidence and testimony as he deems appropriate to support his pleas.

6. That having been said, the ILO is right to object to the receivability of his claim to the quashing of the invitation to him to write letters of apology. Although one of a set of measures devised by the Organization in an attempt to put an end to this regrettable affair, the "invitation" does not constitute, contrary to what the complainant asserts, a decision that can be set aside. If, however, the measure was proved to be excessive, as the complainant contends it is, his claim to compensation for moral injury arising from the affront to his dignity could be justified. This matter will be discussed below under 14.

7. The complainant attributes the decision notified in the letter of 18 October 1999 to remove him permanently from office as Director of the Standards Department to several factors: mobbing, a phenomenon he analyses at length on the basis of a report he commissioned from an expert; hostility on the part of some members of staff; and bias on the part of the then Director of Personnel. In support of his claim to the quashing of that decision, he produces numerous statements from witnesses attesting to his professional competence, which the ILO has in fact never denied.

8. Contrary to the complainant's allegation, the present case adds nothing new to the issues already considered by the Tribunal in Judgment 1972. It is true that he places more emphasis on the fact that the ILO's bias arose from events prior to the incidents that prompted the measures affecting him. He submits for instance that his intention to stand for office as Director-General aroused "false and libellous rumours" in 1996 and that the Administration deliberately prolonged an administrative inquiry into the conditions under which he employed his maid. According to a witness, in the course of that inquiry the former Director of Personnel displayed "inordinate aggressivity" towards him though the accusations against him were false. The Tribunal can clearly not regard allegations about events that occurred in 1996 as proof of the Organization's bias, and will take account only of the objective items of the evidence on file.

9. As well as recounting in detail events with which the Tribunal is already familiar and facts which he qualifies as new - set out under A and B above - the complainant develops the following legal pleas. He alleges that he fell victim to mobbing and that the ensuing inquiry - the findings of which were sent to him on 24 May 1999 - shows procedural flaws and a lack of objectivity. He further submits that the adverse decision is in breach of the principle of proportionality and without merit.

10. He contends that he was mobbed as a result of the Administration's failure to apply appropriate measures to the Staff Union Committee for publishing a "Flash" that made libellous charges and an accusation of computer piracy which has now been proved false. What is more, he has still not received a "job specification" corresponding to his new duties and does not even have a supervisor. Lastly, the Organization has several times demonstrated its unwillingness to afford him protection: for instance, in June 1999, a libellous e-mail message, of which he was obviously not the author, was sent out in his name.

It appears that the ILO was anxious - though it did not succeed - to keep matters confidential as far as possible and to avoid adding fuel to the accusations, libel and rumours. In the Tribunal's view it would probably have been better advised to state publicly that the e-mails that prompted the dispute were not pirated but simply found in a photocopying machine, as was stated in Judgment 1972. In any event, none of the facts the complainant relies on in this connection bears out his objections to the lawfulness of the decision to remove him from his duties and, more generally, it is plain from the evidence on file that his accusation of harassment on the part of the Organization is unfounded.

11. As to the inquiry itself, it is plain from the abundant correspondence between the complainant and the then Director of Personnel that none of the evidence was kept from him and that he was able to comment on all the Administration's letters and challenge its findings. Even supposing that he did not receive the Staff Union Committee's letter of grievance, the inquiry report notes expressly that no certain conclusions could be drawn because he had been unable to comment on the allegations in it. Moreover, neither the correspondence nor the excerpts of the inquiry report cited in the defendant's reply in any way bear out the serious accusations of partiality and bias levelled against the former Director of Personnel. Nor is there proof of any procedural flaws, of any impairment of the right of defence, or of any abuse of authority.

12. As to the merits, the Tribunal takes the view that, however regrettable the complainant's position may be for someone able to count on testimonies so laudatory of his competence and the esteem in which he was held, and whose health was probably affected by the dispute, the Director-General exercised his discretionary authority quite lawfully in deciding not to reassign him as head of a department which, as said in Judgment 1972, was no longer able to function properly. That he performed his duties most satisfactorily before being relieved of them is not disputed and is indeed demonstrated by numerous testimonies. However, that affords no grounds for doubting the Director-General's assessment that the complainant was "no longer able to shoulder responsibilities involving the management of a whole team of officials". As noted in Judgment 1972, on several occasions he broke the most elementary rules of confidentiality by making public accusations against a number of colleagues and staff members whom he identified by name, and sending documents concerning the incidents to many people in and outside the Organization - even after the decision to remove him temporarily from his duties had been taken. Consequently, the decision to change what was only a provisional measure into a definitive one cannot be regarded as tainted by any error of law.

13. The complainant asks that the defendant be ordered to publish a denial of the accusations made in the "Flash" of 13 November 1998. It is not, however, for the Tribunal to issue such an injunction.

14. His claim to the quashing of the decision having failed, so too must his claim to redress. It should nonetheless

be noted that the ILO did not fail in its duty to protect his dignity and that its invitation to him to write letters of apology, issued in the interests of even-handedness in view of like invitations addressed to the Staff Union, caused him no injury warranting redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet