

NINETY-SECOND SESSION

In re Guastavi (No. 2)

Judgment No. 2100

The Administrative Tribunal,

Considering the second complaint filed by Mrs Adelina Guastavi against the International Training Centre of the International Labour Organization (ILO) on 16 February 2001, the Centre's reply of 27 April, the complainant's rejoinder of 6 June and the Centre's surrejoinder of 18 July 2001;

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 party has applied for;

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

A. The complainant, an Italian born in 1946, joined the staff of the ILO's International Training Centre at Turin in 1975. In December 1994 she was put in charge of the Research and Training Material Development Section and promoted to grade P.4. The Centre decided to set up a Distance Education and Learning Technologies Applications (DELTA) Programme, which was to include the Section, managed by the complainant, and in August 1998 it advertised the post of Chief of the Programme at grade P.5, specifying the duties involved and the qualifications required. The complainant applied on 22 October 1998. She was called up for an interview on 16 September 1999 with a group of officials appointed by the Director of the Centre. The Director's decision to fill the post by the transfer of a P.5 official - who had not applied for the post - was notified to the complainant on 28 January 2000 and published on 31 January.

The complainant had written on 10 December 1999 to her two supervisors - the Chief of the Training Support Service and the Director of the Training Department - objecting to the way staff were managed in general and the way she had been treated in particular. She had a meeting with her supervisors on 14 December, and in a minute of 21 December she put to them some questions about the organisation of her Section and the future DELTA Programme. Among other things she asked what was preventing the "selection panel" from disclosing the results of the interviews for the post of Chief of the Programme. Furthermore, she observed that their negative comments about her performance, made during the meeting of 14 December, had never been made in performance reports, including one they had signed in May 1999. They were, she said, part of the harassment she had been subjected to constantly since her election to the Chair of the Staff Union Committee of the Centre in 1997. She concluded that she had been treated unfairly and noted that unless matters were set right she would go to the Tribunal. In his reply of 31 January 2000 the Director of the Training Department said that his action had been guided solely by considerations that had to do with her professional performance and competence.

In February 2000 the complainant was transferred to the post of Senior Programme Officer, at grade P.4, in the DELTA Programme. In a minute of 14 February 2000 she asked the Director of the Centre to state the reasons for the rejection of her application for the post of Chief of the Programme and to let her have "the evaluation criteria and results of the panel's report". In his reply of 13 March the Director explained the criteria and procedure that had been applied, specifying that his decision had been taken in the "usual way", prescribed in Article 1.2(b) of the Centre's Staff Regulations for filling posts of grade P.5 and above. In a minute of 12 April the complainant again asked for information and expressed surprise that, having opted at first for the competition procedure, the Director would in the end appoint directly an official who had not applied for the post. In a minute of 17 April the Director

invited her to refer to his minute of 13 March.

In June and July 2000 the complainant wrote several times to the Administration of the Centre, objecting to remarks made by her colleagues, particularly in the Staff Union. In her submission they amounted to psychological harassment. She asked for an inquiry. By a minute of 14 September the Chief Personnel Officer replied that the Administration could not interfere in Staff Union affairs and that the other incidents had already been looked into carefully. Deeming an inquiry unnecessary, he rejected her request.

On 12 October 2000 the complainant filed an internal complaint under Article 12.2 of the Staff Regulations. She objected to the Director's minute of 17 April 2000 replying to her request for information about the competition, and to the Chief Personnel Officer's minute of 14 September 2000 refusing to hold an inquiry. In support of her allegations of harassment she cited examples of what she considered to be the more significant incidents.

By a minute of 8 December 2000, the impugned decision, the Deputy Director of the Centre rejected the internal complaint on the Director's behalf on the grounds that the minute of 17 April merely referred to the one of 13 March, which she had not challenged within the prescribed time limit. He observed that no intention of harassment could be inferred from the incidents she cited. Indeed, two of them involved "normal Union activities", in which the Administration could not interfere. He suggested keeping a confidential file over a period of six months in which would be noted any incidents the complainant thought might be "part of a plan to harm [her]", as well as the outcome of any inquiries by the Administration. The complainant took no action on the proposal.

B. The complainant alleges that the Centre is in breach of Article 1.2 and Annex H of the Staff Regulations. Under those provisions the Director of the Centre may fill a vacancy either by competition or by direct appointment. He may not organise a competition and then directly appoint someone who has not applied for the post. But he did, so the Centre has committed an abuse of authority. It has also impaired her right, recognised by the case law, to have her application considered in good faith and in keeping with the fundamental principles of fair and open competition. Furthermore, the refusal of her request for information about the competition was in breach of the Selection Committee's rules of procedure and the Centre's duty to keep her informed.

She asserts that the personal and libellous attacks against her since 1997 seriously harmed her good name and played a part in the rejection of her application. The Administration's lack of response and its refusal to carry out an inquiry amount to indirect support for the culprits. She is surprised that libellous statements should be described as "normal Union activities". She sees the impugned decision - and the significant reduction in her responsibilities as a result of the transfer to her present post - as a hidden disciplinary sanction or even as reprisals for her union activities.

As a preliminary claim, she asks the Tribunal to order the Centre to disclose to her the selection criteria, the "panel's" report and the various documents pertaining to the assessment of the competition tests. Her main claims are to recognition that the decision of 31 January 2000 appointing the Chief of the DELTA Programme is unlawful, though she does not seek the quashing of the appointment; the opening of an inquiry to establish the facts about the psychological harassment; and compensation for professional and moral injury. She also seeks costs.

C. The Centre asserts that her pleas challenging the appointment are irreceivable because she failed to exhaust the internal means of redress. In subsidiary argument it contends that the Director never implemented the competition procedure: he opted right from the start for direct appointment, the "normal way" of filling vacancies of grade P.5 and above. The call for candidates was merely to broaden the choice. The minute of 13 March 2000 explained clearly the criteria followed and gave ample reasons.

The complainant's claim for compensation, for professional and moral injury on the ground that her good name was harmed, is irreceivable because she did not put it forward in her internal complaint. On the merits it submits that what the Tribunal has to determine is whether, in the light of the complainant's allegations and arguments, the measures taken were adequate. It points out that of the incidents she cited in the internal complaint as examples of harassment, only two could have cast any doubt on her professional competence and those had occurred two years before she filed that complaint. They "do not even begin to prove the existence of a plan to harm her", so the Centre was right to reject her request for an inquiry. It is true that libellous statements cannot be regarded as normal activities of the Staff Union. But, in the interests of freedom of association they are as a rule outside the Administration's jurisdiction, as stated in Judgment 274 (*in re Connolly-Battisti* No. 2) under 22.

D. In her rejoinder the complainant maintains that the decision of 17 April 2000 was "a new one rejecting" her claim for information submitted on 12 April which was amply substantiated, unlike the one of 14 February. So her internal complaint was not out of time.

On the merits she points out that the selection process should have been run by the Selection Committee, not the "panel" chosen by the Director. She asserts that she was the first candidate on the short list, but that because of her union activities, the management would never have allowed her appointment as Chief of the DELTA Programme. In her submission the decision to make a direct appointment "shows substantive, formal and procedural flaws, as well as abuse of authority" and should be set aside because it offends against the principle of equality of opportunity. She was unable to challenge the Director's minute of 13 March 2000 for want of adequate substantiation.

She again observes that until her election to the Chair of the Staff Union Committee, she had always got on with her colleagues and supervisors. She accuses the Centre of prejudging the outcome of the case by stating that the incidents did not even begin to prove the existence of harassment. That could have been shown only by an inquiry. She accuses the management of the Centre of having a hand in the results of the Staff Union Committee elections for the period 1999-2000: it threatened not to renew the appointments of some staff members on precarious contracts if they voted for her.

E. In its surrejoinder the Centre reiterates its objection to the receivability of the complaint insofar as it concerns the impugned appointment, and accuses the complainant of calling into question some fundamental concepts of administrative law. The burden of proof is on her to show that she was better qualified than the person who was appointed. Her plea of procedural flaws would be receivable only if the procedure had been a competition, which was not the case as is plain from the fact that no Selection Committee was convened.

According to the Centre, the complainant appears to interpret any criticism or disappointments met with in the course of her union or professional activities as vexatious acts. Her last accusation is libellous and quite untrue.

CONSIDERATIONS

1. The complainant joined the staff of the ILO's International Training Centre at Turin in 1975. She is currently Senior Training Officer at grade P.4 in the Distance Education and Learning Technologies Applications (DELTA) Programme.

In August 1998 the Centre advertised the post of Chief of the DELTA Programme. The complainant applied on 22 October. On 16 September 1999 the candidates on the short list, which included the complainant, were interviewed. But she was informed on 28 January 2000 that the post had gone to a colleague who had not applied for it. That appointment was published on 31 January 2000.

2. By a minute of 14 February 2000 the complainant asked the Director of the Centre to give her the reasons for the rejection of her application and "the evaluation criteria and results of the panel's report".

The Director sent her a minute on 13 March explaining the process and criteria that had been applied. In his view "the staff member selected was the best suited to the duties of the post".

Unsatisfied with this reply the complainant sent another request for information on 12 April.

In a minute of 17 April 2000 the Director referred her to his minute of 13 March.

3. The complainant wrote to the Administration several times in June and July 2000 alleging that personal and libellous attacks levelled against her since 1997 by officials at the Centre had caused "serious and repeated injury to her professional and personal reputation". She asked for an inquiry into the psychological harassment she alleged, accused the Centre of inertia and asked it to take disciplinary measures. She said that she was still awaiting a final answer from the Centre to her request for an inquiry. The Chief Personnel Officer rejected her requests in a minute of 14 September 2000.

4. On 12 October 2000 she lodged an internal complaint under Article 12.2 of the Staff Regulations. She challenged

the "Director's decision of 17.04.2000 whereby the Centre [had] denied [her] information on the selection criteria and the documents pertaining to the evaluation of the competition tests for the selection for the [Chief] of the DELTA Programme". She also challenged the Chief Personnel Officer's minute of 14 September 2000. Her claims included a request for a "'super-partes inquiry' to establish that the conduct of the officials [concerned] was unlawful" since, she says, it offended against Article 4.2 of the Staff Regulations; and "disciplinary measures under Chapter XI of the Staff Regulations to be applied in the most appropriate manner and on the basis of justice and equity".

5. By a minute of 8 December 2000, the impugned decision, the Deputy Director of the Centre informed her on the Director's behalf that insofar as her internal complaint was an objection to the "decision" of 17 April 2000, it was irreceivable. As to the decision of 14 September 2000, the "incidents" she cited were spread over three years and so "hardly amounted to an indication of a plan to harm [her]". Only two of them had occurred during the six-month period set by Article 12.2 of the Staff Regulations, and both had been in the context of "normal Union activities" on which "the Administration could not act without interfering".

As a preliminary claim the complainant asks the Tribunal to order disclosure of the selection criteria, the "panel" report and the documents pertaining to the evaluation of the competition tests. Her main claims are to recognition of the unlawfulness of the appointment of 31 January 2000, an inquiry into the facts of the psychological harassment, compensation for professional and moral injury and costs.

The competition

6. As regards her application for the post of Chief of the DELTA Programme, the complainant takes the view that the Centre acted in breach of Article 1.2 and Annex H of the Staff Regulations, the Selection Committee's rules of procedure, and of the Centre's duty to keep staff informed.

In support of her allegation that her professional and personal reputation were harmed, she submits that the Centre denied her the right to an impartial inquiry into the conduct of the officials concerned. In her submission it was her activities as Chair of the Staff Union Committee that prompted the vexatious treatment of her.

7. The Centre asks the Tribunal to dismiss her challenge to the appointment of the Chief of the DELTA Programme as irreceivable under Article VII, paragraph 1, of the Tribunal's Statute because, it says, the complainant failed to exhaust the available means of redress as concerns her claim to disclosure of documents pertaining to the appointment. Furthermore, in the internal complaint she did not object to the lawfulness of that decision or claim any redress in connection with it. Consequently, her claim to disclosure of documents or additional information shows no cause of action, since it pertains to a decision which she can no longer challenge.

In the Centre's submission, it is absurd to make out, as the complainant does, that the Director's minute of 17 April constituted a new decision rejecting by implication her claim for information. It merely referred her to his previous reply of 13 March 2000. What is more, it made no reference at all to her claim.

Consequently, says the Centre, the six-month time limit established in Article 12.2 for the filing of an internal complaint started to run when the complainant received the decision of 13 March 2000. Since she did not file until 12 October 2000 the Director was right to dismiss her internal complaint as time-barred.

8. Article VII, paragraph 1, of the Statute of the Tribunal 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."

Article 12.2 of the Staff Regulations says:

"Any complaint by an official ... shall ... be addressed to the Director ... within six months of the treatment complained of ..."

9. The evidence shows that in her internal complaint about her application for the post of Chief of the DELTA Programme, the decision the complainant impugned was the Director's minute of 17 April 2000.

10. The Tribunal notes that that minute makes no mention of the appointment decision published on 31 January

2000. The decision had indeed been notified to the complainant personally and she did not challenge it expressly. Only before the Tribunal has she asked for it to be quashed. Consequently, her claims concerning the unlawfulness of the decision of 31 January 2000 must be declared irreceivable because she failed to exhaust all internal means of redress.

The present complaint is also irreceivable insofar as it impugns the part of the decision of 8 December 2000 which dismisses the complainant's internal complaint of 12 October 2000 filed against the Director's minute of 17 April 2000.

The Centre was right in its assertion that, according to the case law, the minute of 17 April 2000 could not be regarded as setting off a new time limit for an internal appeal. It merely confirmed the Director's position as set out in his minute of 13 March 2000. It neither altered the previous decision nor provided further justification. It did not relate to different issues from the previous one, nor was it based on new grounds (see Judgment 2011, *in re* Dormond Vega and González Vega).

Since, according to a steady line of precedent, a mere confirmation cannot be regarded as a new decision setting off a new time limit, the decision she could have challenged was the one of 13 March 2000. The date on which she received it was the starting point of the six-month limit set in Article 12.2 of the Staff Regulations. But she filed her internal complaint only on 12 October 2000, so the Director was right to reject it as time-barred and irreceivable. The claims she made in connection with the internal complaint are also irreceivable as she failed to exhaust the internal means of redress.

The alleged psychological harassment

11. The second part of the complaint concerns the "conduct of certain officials towards [the complainant] which constitutes psychological harassment".

Her main claims are to an inquiry to "establish the unlawfulness" of that conduct, and to compensation for professional and moral injury which she alleges was caused by psychological harassment, humiliation and the "virtual downgrading" she suffered because of her union activities.

In ruling on the second part of the complaint the Tribunal will consider, as the Centre requested, only the allegations made in the internal complaint of 12 October 2000. It will not entertain the others since they have not been addressed in an internal appeal as Article VII, paragraph 1, of the Tribunal's Statute requires.

12. In her internal complaint of 12 October 2000 the complainant alleged unwarranted and intolerable personal attacks against her. She objected that, although they had gone on since 1997, they had not been sanctioned by "any disciplinary measure or formal reprimand by the Centre". Her allegations included the following:

- at a meeting in July 1997 a supervisor said that her opinion was not needed, another member of staff being more competent;
- in September 1997 she was excluded from meetings of the management of the Training Department;
- in February 1998 the new Director of Studies said that she was incapable of managing and planning Research and Training Material Development Section activities;
- in April 2000 the official in charge of a technical programme told the Chief of the DELTA Programme that he could not work with her for "political" reasons;
- in June 2000 the then Chair of the Staff Union Committee said in the course of a meeting that she was difficult to work with;
- in July 2000 a colleague sent a note to all the members of the Staff Union accusing her of "double standards, violence and aggressivity".

13. The Tribunal points out that an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it, and that an accumulation of events over time may be cited to support an allegation of harassment (see for example Judgment 2067, *in re* Annabi No. 2, under 5 and 16).

14. In this case the complainant largely bases her plea of psychological harassment on remarks she attributes to members of staff, on the fact that she was excluded from meetings of the management of the Training Department and on the note of July 2000. But her pleas are bald statements: she offers no evidence that, added together, the separate incidents amount to conduct that betrays malice aforethought.

The evidence shows that the incidents she recounts and which were spread out over time do not, when taken together, reflect such conduct but rather individual positions adopted by a number of officials, including her supervisors.

15. As to the remarks she attributes to the Chair of the Staff Union Committee and the quarrel she says arose between herself and a member of the Staff Union about union matters, the Tribunal endorses the Director's response to her that "the Administration could not act without interfering in union matters".

The second part of the complaint is therefore unfounded.

16. The conclusion is that all her claims must be dismissed as irreceivable or unfounded.

DECISION

For the above reasons,

The complaint is dismissed.

DISSENTING OPINION BY JUDGE RONDÓN DE SANSÓ

1. In this judgment the Tribunal has dismissed the complaint filed by Mrs Adelina Guastavi on 16 February 2001 on the grounds that it was in part irreceivable and in part unfounded.

2. The Tribunal has found irreceivable her challenge to the decision appointing the Chief of the DELTA Programme, on the grounds that she did not exhaust the internal means of redress. It notes that in the internal complaint she neither impugned that decision, notified to her on 28 January 2001 and published on 31 January, nor claimed compensation in connection with it. The Tribunal further notes that there is no mention of that decision in her internal complaint concerning her application for the post and that on this point too the complaint is irreceivable because she failed to exhaust the internal means of redress.

3. I disagree. As I see it, the complainant did ask the Director of the Centre to state why her application had been turned down, and to inform her of the evaluation criteria and the results of the "panel's" report so that she could find out the reasons for the decision. She first sent a minute of 14 February 2000. Then, on 12 April 2000 she repeated her request for information because the Director's minute of 13 March 2000 had not given her an answer. Her second request was rejected by the Director on 17 April 2000. In these circumstances, having failed to obtain the explanation she wanted, the complainant was not in a position to challenge the lawfulness of the appointment published on 31 January 2000, though it was obvious that she disagreed with it.

4. The Tribunal has also declared irreceivable the part of the complaint that challenges the decision of 8 December 2000 rejecting her internal complaint of 12 October 2000 against the decision of 17 April 2000. It finds that the decision of 17 April did not set off a new time limit for an internal appeal because it was a mere confirmation and so, according to the case law, may not be regarded as a new decision against which an internal appeal may lie. According to the Tribunal, the only such decision is the one of 13 March.

5. Again, I disagree. The minute of 17 April 2000, though it reproduces some elements of the minute of 13 March, is in fact a new decision rejecting the detailed pleadings in the complainant's minute of 12 April 2000, and was not the decision contained in the previous minute.

6. The Tribunal's ruling in Judgment 2011 that mere referral to an earlier decision does not constitute a new one, does not apply in this case because what the minute of 17 April 2000 contains is a new decision, not a confirmation

of an earlier one.

7. There are also a number of substantive issues that should have been settled such as whether, once a competition has been opened and candidates have applied, the Administration may switch to selection by direct appointment without giving any explanation to the people involved. In seeking to answer that question the Tribunal would have been bound to discuss what the real reasons were for that change in addressing the substantive pleas: denial of access to information and documents; breach of the Staff Regulations and particularly the rules on filling vacancies; conduct harmful to the complainant's personal and professional reputation; and psychological harassment.

8. In view of the foregoing, I cannot but conclude that in this case the Tribunal should have declared the complaint receivable and entertained the complainant's pleas.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet