

THIRTY-THIRD ORDINARY SESSION

In re ELLOUZE

Judgment No. 244

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Labour Organisation (ILO) drawn up by Mr. Ridha Ellouze on 11 March 1974 and brought into conformity with the Rules of Court on 15 March 1974, the Organisation's reply of 8 April 1974, the complainant's rejoinder of 23 May 1974 and the Organisation's surrejoinder of 26 August 1974;

Considering Article II, paragraph 1, of the Statute of the Tribunal, and International Labour Office Staff Regulations 4.3, 4.4, 13.2, 14.3, 14.3 bis and 14.4;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. On 22 August 1967 the complainant, who is of Tunisian nationality, applied for and was offered an appointment in the International Labour Office as a book-keeping clerk and machine operator at grade G.4. The appointment was local and short-term and covered the period from 1 September to 31 October 1967. He received an extension on the same terms from 2 to 30 November 1967, and later to 31 December 1967 and to 31 January 1968. On 27 February 1968 he was offered a 13-month appointment (including one month's briefing in Geneva) at the ILO office in Algiers as an administrative assistant. According to the terms of the appointment, from the date of starting work in Algiers the complainant was to have non-local status in that duty station. The complainant started work in Algiers on 1 April 1968 and his home was stated to be Sfax, in Tunisia. His appointment was later extended to 30 June 1969 and 30 June 1970. In July 1969 he asked to have his home changed from Sfax to Geneva mainly on the grounds that for reasons of health his wife, who was of Swiss nationality had had to go back to Geneva. The Administration dismissed his request on the grounds that the reasons he had given could not be regarded as "compelling" and did not warrant any change in his home. On 6 January 1970 the complainant resigned with effect from 31 January, and his resignation was accepted. He nevertheless remained in Algiers until 28 February 1970, and was then given a G.4 local appointment in Geneva for seven months from 3 March 1970. That appointment was partly replaced by another local appointment, of 11 May 1970, which was successively extended on the same terms to 31 March 1973. In the meantime, on 5 December 1972, the complainant had received a contract of appointment of indeterminate duration from 1 January 1973, which also stated that he was a locally recruited staff member. On 16 May 1973 he asked that Sfax should be regarded as his home. His request was dismissed on 24 May 1973 on the grounds that by unreservedly accepting the offer of 5 December 1972 he had consented to be a locally recruited staff member and had been aware of the consequences of his acceptance since he had held that status since 1970. The complainant made a further request to the same effect on 31 May 1973, which was also dismissed, on 24 July. On 3 October 1973 he submitted to the Director-General a claim which was dismissed on 10 December 1973. It is the decision of 10 December 1973 which he is now impugning before the Tribunal.

B. In his complaint the complainant observes that in support of its decision the Administration seeks to defend itself on the grounds that at the time he was offered an appointment of indeterminate duration he fulfilled the requirements of Staff Regulation 4.3(c) regarding the appointment of locally recruited staff members: in other words, he had resided "without interruption for one year within a radius of 25 kilometres from Geneva". He points out in reply that his residence in Geneva was the direct consequence of his having been given fixed-term appointments. According to the provisions of the Staff Regulations those appointments had been tainted with illegality in that, even though the period of his residence in Geneva had been shorter than the stipulated period, they had been local appointments.

C. The complainant points out that in the Algiers office he held a non-local appointment and his home was Sfax,

his birthplace. By dismissing as unfounded his request to have his home changed from Sfax to Geneva the Administration had admitted that his home was not Geneva and that he could not be regarded as locally recruited in Geneva. The Administration could not both refuse to recognise Geneva as his home while he was in Algiers and regard him as "locally recruited" when he returned to Geneva.

D. The complainant asks the Tribunal (a) to quash the Director-General's decision of 10 December 1973 refusing, contrary to the express provisions of Staff Regulation 4.3, to recognise his status as a "non-locally recruited" staff member; and (b) to order the Administration to restore to him, with effect from the starting date of his appointment of indeterminate duration, all the rights of non-locally recruited General Service staff.

E. In its reply the Organisation observes that the sole purpose of the complaint is to determine whether the International Labour Office should recognise the complainant's home as being in Tunisia or may properly regard him as having been locally recruited in Geneva.

F. According to the Organisation, the facts of the case show that the complainant was a locally recruited staff member with a fixed-term appointment from 3 March 1970 to 31 December 1972 and that he had therefore resided without interruption "for one year within a radius of 25 kilometres from Geneva". That period - from 3 March 1970 to 31 December 1972 - cannot be disregarded in calculating the period of his residence in Geneva since he was not a "non-locally recruited official" under the terms of his appointments. Accordingly, in December 1972, when he was given an appointment of indeterminate duration, the International Labour Office could not but regard him as a locally recruited staff member and his duty station, namely Geneva, as his home. It did not therefore in any way infringe Staff Regulations 4.3 and 4.4 in treating the complainant as locally recruited for the purposes of his appointment of indeterminate duration.

G. The Organisation notes the complainant's contention that the agreement between him and the Office which operated from March 1970 to December 1972 to regard him as locally recruited and hence the application of Staff Regulations 4.3 and 4.4 to his appointment of indeterminate duration were unlawful. The Organisation replies that under the appointment of 1970 and the further appointments in 1971 and 1972 it was agreed that the complainant should have local status. He knew the significance of that status. Several months after receiving a permanent contract which also stated that he was to have local status he nevertheless made a claim to be regarded as "non-local". "It is as if the complainant, who knew that he could be employed by the Office only if he were locally recruited, waited to be given a permanent appointment before calling into question the terms he had accepted." The Organisation therefore contends that the complainant cannot now question the lawfulness of the fixed-term appointments granted in 1970, 1971 and 1972. His argument that the unlawfulness of those appointments means that he should be regarded as non-locally recruited and his home as being in Tunisia and not Geneva cannot therefore be accepted.

H. The Organisation then argues that even supposing the complainant can rely on any alleged flaw in the fixed-term appointments, it can be easily proved that they are not in fact tainted with any such flaw. According to Staff Regulation 14.4, "No exception may be made to these Regulations unless the official concerned consents and only if such exception does not prejudice the interests of any other official or group of officials". Thus, provided that the interests of other officials are not prejudiced, the parties may agree to an exception to the Staff Regulations. That is what happened in the case of the complainant, who was aware of the meaning of the exception to which he consented. Thus that exception was in accordance with the Staff Regulations and the appointments were not unlawful.

I. The Organisation observes that the complainant alleges a contradiction between the Administration's refusal to change his home from Sfax to Geneva while he was in Algiers and its refusal to regard him as non-locally recruited when he was in Geneva. Insofar as that argument relates to the appointment of indeterminate duration, the Organisation considers it irrelevant: between the complainant's departure from Algiers and the start of that appointment nearly three years elapsed during which he held local status in Geneva, so that under Staff Regulations 4.3 and 4.4 he cannot but be regarded as locally recruited in Geneva. In so far as the argument relates to the fixed-term appointments of 1970, 1971 and 1972, the Organisation maintains that it is not in good faith to refrain from submitting such an argument until now and that in any case the parties expressly agreed from 1970 to regard the complainant as locally recruited, as authorised under Staff Regulation 14.4.

J. In summing up the Organisation contends that Staff Regulations 4.3 and 4.4 required the Office, for the purposes of the appointment of indeterminate duration which came into force on 1 January 1973, to regard the complainant

as locally recruited and to treat Geneva as his home because he had lived in Geneva without interruption for more than one year on fixed-term appointments as a locally recruited staff member. It was not contrary to Staff Regulation 14.4 for the parties to agree, when the complainant was given fixed-term appointments in 1970, 1971 and 1972, that, as an exception to Staff Regulations 4.3(e)(iii) and 4.4, but in the spirit of Staff Regulation 4.3(a), he should be regarded as locally recruited and having his home in Geneva. Moreover, he cannot rely on what he now alleges to be a flaw when he accepted it in full awareness of the facts and without reservations for nearly three years. The Organisation therefore asks the Tribunal to dismiss the complaint.

K. In his rejoinder the complainant argues that, contrary to what the Organisation says (see paragraph E above), the purpose of his complaint is to secure not solely a declaration that his home is in Tunisia, but recognition of the impropriety of the provision in his appointment describing him as "locally recruited", with all the legal consequences which that entails.

L. The complainant then maintains that, over and above the safeguards and rights for which it provides, for the purpose of determining "local" status Staff Regulation 4.3 lays down criteria based on the staff member's nationality and place of residence at the time of recruitment. Since in this case nationality is irrelevant, the only relevant criterion is that of residence. It is clear that residence should be real since the criterion applies only if residence is "continuous" and merely "legal" residence does not suffice. At the time of recruitment the complainant did not meet those conditions. In reply to the Organisation's contention that he "surrendered his right to rely on his expatriation", he alleges evidence of an increasing tendency in the Office to impose such "surrender" of rights. If he did "surrender" his rights he did so only under duress to obtain an appointment or extension of appointment; he had to wait until he was no longer under duress before claiming correction of an irregularity. Lastly, he maintains that exceptions permitted under Staff Regulation 14.4 cannot have the effect of reducing the standard of protection afforded by the Staff Regulations.

M. In the claims for relief in his rejoinder, over and above the claims set out in his complaint and mentioned in paragraph D above, the complainant asks the Tribunal (a) to hold that the short-term appointments granted to him from 1970 to 1972 were tainted with illegality under Staff Regulation 4.3; (b) to declare that the Administration of the Office cannot therefore properly rely on the terms of those appointments to justify those of the permanent appointment granted to him in December 1972; (c) to declare that Staff Regulation 14.4 cannot authorise surrender by a staff member of his rights under the Staff Regulations; (d) to declare that in any case the Administration had put him under duress and his consent was tainted; and (e) to award costs against the ILO.

N. In its surrejoinder the Organisation states that under Staff Regulation 4.3 on being appointed to Algiers the complainant was naturally deemed to be non-locally recruited, since he had been sent from Geneva and was of Tunisian nationality, and his home was therefore deemed to be in Tunisia under Staff Regulation 4.4. His appointment of indeterminate duration was quite distinct from his earlier appointments, particularly in that it altered the whole relationship between the Office and the complainant by making that relationship no longer limited in time but almost permanent. Staff Regulation 4.3(d) states that periods of employment as a non-locally recruited official in an intergovernmental organisation in Geneva shall not be taken into account in calculating the year of residence referred to in Staff Regulation 4.3(c). That rule implies that periods of employment as a locally recruited official shall be taken into account. Since the complainant had been employed in the Office for some 34 months as a locally recruited official, that period should be taken into account. In accordance with Staff Regulation 4.3, therefore, the complainant was correctly deemed to be locally recruited and in accordance with Staff Regulation 4.4(b) his home was correctly deemed to be Geneva.

O. The Organisation notes the complainant's contention, however, that that argument is tainted by the impropriety committed by the Office in deeming him to be locally recruited during his fixed-term appointments, to which he had agreed only because pressure from the Office had induced him to surrender his status as a non-locally recruited official. The Organisation points out that the complainant himself asked to be reassigned to headquarters while he was still in Algiers. On receiving that request the Office found itself in a quandary: on the one hand it had a moral obligation towards a staff member whom it wished to help by offering him an appointment in Geneva; and on the other hand it owed a legal obligation to the Governing Body, under Staff Regulation 4.3(a), to fill General Service category posts as far as possible by locally recruited officials, and therefore not to appoint non-local officials when satisfactory applicants were available locally. In reconciling those two obligations the Office unhesitatingly decided that in law the latter was the more compelling and that since book-keeping clerks qualified for local recruitment were available in Geneva the Office could not recruit an official with non-local status without violating its obligation towards the Governing Body. The Office also wished to fulfil its moral obligation, however, especially

since the complainant had given satisfactory service. In doing so it could not infringe its legal obligation towards the Governing Body by recruiting an official with non-local status. Consequently only recruitment of an official with local status was considered. To recruit someone in the position of the complainant, who did not fulfil the conditions at the time of his recruitment as a fixed-term official, an exception had to be made to Staff Regulation 4.3(c) even though that meant causing unlawful prejudice to the complainant since he would have been entitled to non-local status by reason of his nationality and his appointment in Algiers. In the present case such an exception seemed unlikely to cause difficulty since the complainant himself had suggested it in full awareness of the facts and Staff Regulation 14.4 authorised the Director-General to consent to it. It is therefore paradoxical that despite the Office's efforts to meet the complainant's own wishes and to comply strictly with the regulations, and its adoption of a solution which the complainant himself had suggested, he should now complain of unlawful prejudice. The Organisation accordingly again asks the Tribunal to dismiss the complaint.

CONSIDERATIONS:

1. The complainant held several fixed-term appointments from 22 August 1967 in Geneva (locally recruited), from 1 March 1968 in Algiers (non-locally recruited) and finally from 3 March 1970 once again in Geneva (locally recruited). On 5 December 1972 he was appointed as a General Service category official from 1 January 1973 under a contract of indeterminate duration. The appointment expressly provided in clause 6: "You will be classified as locally recruited within the meaning of Staff Regulation 4.3(b)". In other words, his home was Geneva.

On 14 and 31 May and on 3 December 1973 the complainant asked the Director-General to regard Sfax, his birthplace, as his home. His requests were dismissed by decisions of the Personnel Department dated 24 May and 24 July 1973 and by a decision taken in the name of the Director-General on 10 December 1973, which is the decision impugned.

2. According to Staff Regulation 4.4(a), "Unless there are compelling reasons to make an exception an official's home shall be deemed to be in the country of which he is a national at the time of his appointment".

To an official of the General Service category like the complainant, however, a different rule applies, and his home "shall be deemed to be at the duty station", that is, Geneva, if the official has been locally recruited.

According to Staff Regulation 4.3(c), moreover, "In Geneva an official shall be classified as locally recruited if at the time of appointment he fulfils any of the following conditions ... (iii) irrespective of nationality, he has been continually living for one year within a radius of 25 km. from Geneva".

3. It appears from the documents in the dossier that the complainant held successive short-term appointments in Geneva as a locally recruited official from 3 March 1970 and that accordingly by 5 December 1972, the date of his appointment of indeterminate duration, he had been resident in Geneva for over one year. Consequently, and in accordance with the above provisions, he was to be deemed to be a locally recruited official and his home was therefore his duty station, namely Geneva, as the Director-General held in the impugned decision.

4. True, the complainant contends that several of the appointments which he held between 3 March 1970 and 5 December 1972 were tainted with illegality in that they treated him as a locally recruited official, whereas at 3 March 1970 he had been living in Geneva for less than one year.

But the complainant did not object to the terms of those appointments at any time before or during their period of validity. It was only after the appointments had expired that he maintained that Geneva could not lawfully be stated to be his home. It was therefore no longer open to him to contest the terms of appointment, which had become final. Moreover, it was on his own express and unsolicited request that on 3 March 1970 he was acknowledged to be a locally recruited official.

5. The other allegations of the complainant, who has in any case changed his mind, have no bearing on the present dispute, or are based on an error of law, or have not a shred of proof to support them, or relate to staff members who have filed no complaint.

It appears from the foregoing that none of the grounds of complaint may be regarded as founded and that the complaint should therefore be dismissed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 21 October 1974.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet