

Registry's translation, the French text alone being authoritative.

## FORTY-EIGHTH ORDINARY SESSION

In re TARRAB (No. 9)

Judgment No. 499

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Labour Organisation (ILO) by Mr. Nazmi Tarrab on 2 September 1981 and brought into conformity with the Rules of Court on 14 September, the ILO's reply of 15 October, the complainant's rejoinder of 8 November and the ILO's surrejoinder of 14 December 1981;

Considering Articles II, paragraph 1, and VII, paragraph 3, of the Statute of the Tribunal and Articles 1.9(a), 13.1 and 13.2 of the Staff Regulations and Circular No. 180 (Series 6) of the International Labour Office;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Paragraph A of Judgment No. 466 summarises the career of the complainant, an official of the International Labour Office. His transfer to the Cairo office was a failure because of the objections of the Director of that office. After much discussion he returned to headquarters in Geneva and was assigned to the International Labour Standards Department. On 27 April 1981 he was told that after consulting the Administrative Committee the Director-General had decided to transfer him on 1 May, without any change in the terms of his appointment, to a new Arabic unit in the Editorial and Translation Branch. On 4 May he submitted to the Personnel Department an application for review under Article 13.1 of the Staff Regulations. On 20 May he had a talk with the head of the Personnel Policy Branch, who told him that the Director-General had not found his case convincing but had noted his intention of lodging a "complaint" under Article 13.2 of the Staff Regulations. In his "complaint" of 15 June the complainant observed that he was not a qualified translator and that the transfer was humiliating. On 14 August he was informed that the Director-General, who was absent on mission, had received a recommendation to submit the complaint to the Joint Committee and that he, the complainant, would be informed of the Director-General's decision after his return, on 24 August. On 2 September 1981 the complainant filed the present complaint with the Tribunal challenging the implied decision to dismiss his internal "complaint".

B. The complainant reproduces in its entirety the case he submitted in his internal appeal. He cites in particular Article 1.9(a) of the Staff Regulations, which stipulates that the Director-General shall assign an official to his duties and his duty station subject to the terms of his appointment, account being taken of his qualifications. The complainant points out that he is a lawyer by training and that every post he has held in the ILO and in the civil service of the Syrian Arab Republic has matched his qualifications. He is by no means qualified, however, for editorial and translation work, and his transfer would make difficulty both for himself and for the Arabic unit. Besides, a translator is graded P.3, a lower grade than his own, and he has therefore been downgraded. Moreover, according to Circular No. 180 (Series 6), which related to staff transfers between headquarters and the field, unless other satisfactory arrangements can be made an official should be reinstated in the headquarters department to which he belonged before his transfer. This rule was respected when he was transferred to the International Labour Standards Department, where he used to work before his ten years in the Middle East. He invites the Tribunal to quash the decision with effect from 1 May 1981.

C. In its reply the ILO adds to the complainant's version of the facts. It explains that his transfer to the International Labour Standards Department was only provisional and that the setting up of the Arabic unit seemed to offer a more lasting solution. His "complaint" under Article 13.2 of the Staff Regulations contained objections relating to the qualifications for the post, which warranted closer study by the Joint Committee. No recommendation could be made to the Director-General until the last few days of the time limit set in the Staff Regulations, and it was impossible to obtain his decision before he came back from an official mission on 24 August. The complainant was

so informed on 14 August, but on 2 September he filed his complaint with the Tribunal. On 4 September the Chief of the Personnel Department expressed astonishment to the complainant since the Director-General had agreed to refer the case to the Joint Committee and the impugned decision was therefore not final. In a letter of 8 September the complainant replied pointing out, among other things, that the sixty-day time limit set in Article VII(3) of the Statute of the Tribunal had expired. On 22 September the head of the Personnel Policy Branch wrote to him confirming that the Joint Committee proceedings would go ahead. On the question of receivability the ILO points out that it expressed its views on the case before the complaint was filed when it decided to refer the complainant's internal appeal to the Joint Committee and that there was therefore not yet a final decision. The complainant argues that the mere lapse of the sixty days mentioned in Article VII(3) of the Statute of the Tribunal is tantamount to rejection of his internal appeal, even though the Chief of Personnel's letter of 14 August 1981 made it quite clear that that was not what the ILO intended. By a letter of 4 September the complainant was informed of the referral of his case to the Joint Committee, and it was not until 14 September that his complaint was brought into conformity with the Rules of Court. Although a staff member may file a complaint after the expiry of the time limit when the organisation has failed to reply, he may not do so after the organisation has taken some express decision on the internal appeal. The reason why the Director-General decided to refer the appeal to the Joint Committee was that he thought it necessary to check certain points of fact such as the complainant's qualifications and the availability of other posts which might suit him. The ILO invites the Tribunal to declare the complaint irreceivable and in any case to take no decision pending the publication of the Joint Committee's report and the Director-General's final decision.

D. In his rejoinder the complainant observes that it is not the Joint Committee but the Administrative Committee which is competent in the matter of assignments. He challenges the arguments put forward by the ILO to explain the delay in deciding on his internal appeal. No decision was taken in the sixty days prescribed by Article VII(3) of the Statute of the Tribunal. Indeed he waited for over a fortnight after that time limit expired before filing his complaint. He believes that the Administrative Committee, which was consulted on the transfer, was dishonest in failing to give him a hearing, and he expresses distrust of the Joint Committee, of which the membership is similar and, in his view, not independent.

E. In its surrejoinder the ILO submits that the delay in answering the internal appeal was due to circumstances which the complainant could not in good faith hold against the Organisation. The Administration warned him of the delay and told him that it by no means suggested that the question of his transfer would not be reviewed. It is true he was entitled to file a complaint so as to preserve his rights, but he could not in good faith argue that the filing of his complaint prevented the Organisation from reviewing its position, particularly since the complaint was not brought into conformity with the Rules of Court until the Director-General had taken an express decision. Moreover, the criticisms of the membership of the Administrative Committee and the Joint Committee are unfounded. The members of the Joint Committee are appointed ad hoc for each case. The ILO vehemently rejects the insinuations about the integrity of the members of the committees. It therefore abides by its original arguments and invites the Tribunal to hold the complaint irreceivable.

#### CONSIDERATIONS:

Under Article VII(1) of the Statute of the Tribunal a complaint shall not be receivable unless the complainant has exhausted such other means of resisting the decision as are open to him under the Staff Regulations. Article VII(3) provides, however, that where the Administration fails to take a decision upon a claim within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. In both instances the time limit for filing a complaint is ninety days, either from the notification of the express decision or from the expiry of the sixty-day time limit allowed for the taking of the decision by the organisation.

On 27 April 1981 the Director-General of the International Labour Office decided to transfer the complainant, without any change in the terms of his appointment, to the Arabic Language Unit. On 4 May 1981 the complainant objected to the transfer but to no avail. The only answer he received, on 20 May, was that the Director-General had noted his intention of pursuing his case in accordance with the procedure in Article 13.2 of Staff Regulations. On 15 June the complainant submitted a "complaint" to the Personnel Department. On 14 August the Chief of the Personnel Department wrote to him saying that a recommendation had been made to the Director-General, who was absent on mission, for referring the case to the Joint Committee and that he, the complainant, would be informed of the Director-General's decision on his return.

The ILO argues that the complaint filed with the Tribunal on 2 September is irreceivable because the complainant has failed, as required by Article VII(1) of the Statute of the Tribunal, to exhaust the internal means of redress.

Article VII(1) does not lay down an absolute rule. A complainant may abandon the internal proceedings even before a decision is taken and may appeal directly to the Tribunal when the appeals body fails to report and there is no reason to suppose from the evidence that it is likely to do so within a reasonable period. But it must be quite clear from the evidence that there is no decision, and only in quite exceptional cases will the Tribunal find that the condition is met.

To turn to the present case, the complainant informed the ILO on 4 May 1981 of his intention of appealing against the transfer. The ILO replied at first that the Director-General agreed to refer the matter to the Joint Committee; then, in August, it said that the Director-General, who was absent on mission, had received a recommendation to that effect; lastly, in conversations in September the complainant was told that the matter would be referred to the Committee. These shifting attitudes, which in the end came to nothing and spanned four months, constitute exceptional circumstances and warranted a direct complaint to the Tribunal. The complaint is therefore receivable.

The ILO's whole case is that the complaint is irreceivable, and the Tribunal may not therefore yet consider the complainant's arguments on the merits. It invites the ILO to file a memorandum on the merits, and to do so as soon as possible since it is the ILO which has prevented the Tribunal from giving a final decision.

Any party to a dispute may argue his case as he sees fit provided it is not to the detriment of due process. The party who is the defendant may choose either to reply or not to reply. If he chooses to reply he is under a duty to enable the court to render a complete decision on the dispute. If he files a preliminary memorandum arguing only procedural issues, that may amount to a dilatory tactic, even if it is not his intention, and delay the decision. Only where it appears to the defendant that the complaint should be dismissed on specific grounds, for example where it appears clearly vexatious, may the defendant apply to the Tribunal, before filing his memorandum in reply, for permission to confine his arguments to those grounds. Otherwise he will incur the danger that, instead of adjourning, as in the present case, the Tribunal declare the allegations of fact in the complaint to be established.

#### DECISION:

For the above reasons,

1. The complaint is receivable.
2. The ILO shall submit its arguments on the merits of the complaint.
3. The Tribunal will make no decision on the complaint until the written evidence is complete.

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

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner