

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

FIFTY-FIRST ORDINARY SESSION

In re TEVOEDJRE

Judgment No. 580

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Albert Tévoédjrè against the International Labour Organisation (ILO) and Mr. Francis Blanchard on 2 March 1983, the ILO's reply of 27 April, the complainant's rejoinder of 5 July, Mr. Blanchard's letter of 18 August to the President of the Tribunal and the ILO's surrejoinder of 7 September 1983;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal, Articles 8 and 9 of the ILO's Constitution, Article 17 of the Standing Orders of the Governing Body of the International Labour Office and Articles 0.2, 1.4(a), 2.1, 2.2, 4.6(a), 8.1, 9.1, 11.3 and 14.6 of the Staff Regulations of the Office;

Having heard at public hearings on 25 November 1983 pleadings by Mr. Dominique de Leusse and Mr. Pierre-Louis Manfrini, counsel for the complainant, and by Mr. Francis Wolf and Mr. Francis Maupain, the agents of the ILO;

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

A. The complainant, a citizen of Benin, was born on 10 November 1929. He joined the ILO in 1966, became an Assistant Director-General in 1969 and since 9 December 1974 has headed the ILO's International Institute for Labour Studies with the rank of Deputy Director-General. He has a fixed-term appointment which expires on 31 December 1983. In 1974 he stood for election as Director-General of the International Labour Office but lost to Mr. Francis Blanchard -- the second defendant in this case -- a French citizen who was born on 21 July 1916 and joined the ILO in 1951. Mr. Blanchard's term ran to 1979, but in 1978 the Governing Body of the ILO -- which Article 8 of the ILO Constitution empowers to appoint the Director-General -- granted him a five-year extension, to 25 February 1984. On 2 March 1982 the Government of Venezuela announced the candidacy of its ambassador in Geneva, Mr. Martini Urdaneta, to succeed Mr. Blanchard. Two days later Mr. Blanchard made it known that he would accept a further term. On 17 April the complainant told him that the Government of Benin would put forward his own candidacy if the Governing Body decided to elect a new Director-General. The complainant wrote on 16 November to the Officers of the Governing Body -- the Chairwoman and two Vice-Chairmen -- to ask that the Tribunal be invited to say whether Article 11.3 of the Staff Regulations applied. ⁽¹⁾ This was refused. On 18 November the Governing Body decided to make the appointment at its next session, on 1 March 1983, in private sitting and by election by secret ballot, and to set the deadline for candidacies -- to be submitted either by a Governing Body member or the Government of a member State -- at 1 February 1983. The Director-General's term was to be five years. These decisions were published in a press release on 19 November. On 22 December the Minister for Foreign Affairs of Benin wrote to the Chairwoman to say that if notwithstanding the age limit in the Staff Regulations the Governing Body admitted Mr. Blanchard's candidacy his Government would have to withdraw Mr. Tévoédjrè's. On 10 January 1983 the complainant invited the Chairwoman to put to the Governing Body the question of the admissibility of candidacies, and on 14 February his counsel sent her a brief advocating the disqualification of any candidate over the age of 65. On 15 February the Chairwoman informed the complainant that the Officers could not alter the content of an item of business the Governing Body had itself approved. On 16 February the complainant's counsel again wrote to the Chairwoman observing that the Governing Body had taken no decision on admissibility. The Foreign Minister of Benin wrote to the Chairwoman on 17 February warning against breach of the age limit. On 21 February Mr. Martini Urdaneta set out his objections to the procedure and, finding the Chairwoman's reply unsatisfactory, the Venezuelan Government withdrew his candidacy. On 1 March the Foreign Minister of Benin withdrew the complainant's. At its private meeting on the afternoon of that day the Governing Body held the secret ballot. The sole candidate, now the second defendant, was elected by 46 votes to none, there being eight abstentions and one blank ballot paper. The complainant filed his complaint on the morrow.

B. The complainant submits that the Tribunal is competent because he is alleging non-observance of the Staff

Regulations, the term used in Article II(1) of its Statute. His complaint is also receivable. Despite his iterated demands for a decision by the Governing Body on the admissibility of Mr. Blanchard's candidacy, the decision -- implied in the holding of the election -- was not taken until 1 March 1983. It was, moreover, the "final" one within the meaning of Article VII(1) of the Statute since the internal appeals procedures obviously do not apply. It ran counter to the principles of legality and equal treatment. The former requires an authority to comply with the rules in force even though it has adopted them itself. The Governing Body was not free to ignore the rule on the retirement age in Article 11.3 of the Staff Regulations, which applies, *mutatis mutandis*, to the Director-General as to any other staff member. That the Director-General is a staff member is clear from Articles 0.2, 2.1 and 2.2 of the Regulations; that the Regulations apply to him, from 4.6, 9.1 and others. The Governing Body has consistently taken that view over the years. Besides, Article 11.3 embodies a general rule of international civil service. Its application to the Director-General is required by the principle of equality and not precluded by any exception under Article 0.2 ("The Regulations, except as may otherwise be provided, shall apply to all officials..."). The age limit has been applied to every Director-General since 1919: none was appointed or had his term extended after the age of 65. There is like practice in other international organisations. The decision caused the complainant injury in that the Government of Benin withdrew his candidacy; by 1989 he will be too old to stand for election, and there is injury to his career. He invites the Tribunal to declare unlawful the admission of the second defendant's candidacy and therefore to quash the Governing Body's decision of 1 March 1983; subsidiarily, to award him token damages of one Swiss franc for moral injury; the Swiss-franc equivalent of 200,000 United States dollars (40,000 dollars a year for five years) for material injury; and 30,000 Swiss francs in costs.

C. In its reply the ILO invites the Tribunal to dismiss the complaint. It gives its own version of the facts. Its pleas are the following. (1) The Tribunal is not competent to hear the complaint. (a) The decision impugned was taken by the Governing Body, whereas Articles II(1), VII(3) and others of the Statute show that the only decision against which appeal will lie is one taken by the Administration. (b) The decision consisted in a collective choice of a candidate for an elective post and was therefore one of policy, whereas the decisions which the Tribunal may review are administrative. (c) Several provisions of the Constitution (Articles 8.1, 9.1 and 9.4) draw a distinction between the Director-General and the staff which suggests that he is not a staff member and so does not come within the purview of Article II of the Statute. (2) The complaint is irreceivable. (a) What it challenges is a decision to disregard the age of candidates; but the Governing Body so decided on 18 November 1982, as the complainant should have been aware from reading the minutes, and by 2 March 1983, the date of filing, the ninety-day time limit for an appeal had expired. (b) The complainant is estopped from bringing his complaint because he did not challenge the extension of Mr. Blanchard's term in 1978 to an age over 65, and because he wrote to the Director-General in March 1982 to say he would not compete if Mr. Blanchard sought a third term. (c) The complainant has no cause of action: the decision caused him no prejudice as a staff member; though it may have lessened his hopes as a candidate, it did not debar him from being one. (d) To allow the complaint would be to give a candidate who is a staff member and has access to the Tribunal an unfair and illogical advantage over a candidate who is not and has not. (3) Subsidiarily, the ILO argues the merits. The Governing Body, it submits, was in breach of neither of the principles relied on. (a) Equal opportunity applies solely to the right to stand, not to any right to be elected. The rule on retirement age does not apply to elected executive heads any more than to ministers in charge of government departments. The practice in other organisations bears this out. To apply Article 11.3 to the Director-General would impair the Governing Body's discretion under the Constitution. (b) Legality requires heed for the ranking of rules. Article 8 of the Constitution, the highest, puts no limit on the Governing Body's discretion, and the Staff Regulations may not do so. This is corroborated by practice: every Director-General since 1945 has had an extension or a first term taking him over 65, the Governing Body never having felt bound by 11.3. Besides, even if it were so bound, it could have appointed Mr. Blanchard by virtue of 14.6, which authorises derogation from the Regulations.

D. In his rejoinder the complainant points to what he sees as errors and distortions in the ILO's version of the facts. He submits (1) that the Tribunal is competent. (a) Article II(1) of the Statute empowers the Tribunal to hear complaints alleging non-observance of the Staff Regulations, and this complaint is such. (b) What is challenged is the lawfulness, not of an elective appointment, but of the admission of the second defendant's candidacy; that is an administrative and challengeable decision, whoever took it. (2) Nor do the ILO's objections to receivability hold water. (a) The time limit starts, not when a complainant might have been "aware" of a decision, but when it is notified to him in identifiable terms -- in this case, on 1 March 1983. (b) There is no estoppel. In 1978 the second defendant was below the age of 65 and the complainant was not a candidate. All that he said in March 1982 was that he did not object to Mr. Blanchard's extension for a year or two and so holding over the appointment of a new Director-General. (c) He does have a cause of action in that his Government could not back his candidacy in an election procedure it regarded as improper. (3) That 11.3 applies to the Director-General is clear from the wording

of the Regulations, which draw no distinction between the Director-General and the rest of the staff. Further evidence lies in the fact that all Directors-General but the present one have left office before the age of 65. This is in line with practice in other United Nations organisations: only the Director-General of the ILO has been appointed after the age of 65.

E. In its surrejoinder the ILO enlarges on its arguments on competence, receivability, cause of action and the merits. The complainant is not challenging an administrative decision by the Governing Body. Admission of the second defendant's candidacy was part of a policy decision which the Governing Body took in its discretion under Article 8 of the Constitution. Even if treated as a decision distinct from the act of election, such admission too was a policy decision. The doctrine of estoppel applies. Even if the complainant did consent to only a short extension for Mr. Blanchard, he was, by his own argument, concurring in a breach of the Regulations. Any prejudice he may have suffered comes, not from the decision, but from the Government of Benin's withdrawing his candidacy; he could, besides, still have got support from some other government. The Constitution and Staff Regulations make it plain that the Director-General is not a staff member. The Regulations apply to him only to the extent necessary to regulate his conditions of employment, and 11.3 does not expressly apply to him. The fact that all his predecessors left office before the age of 65 is immaterial, the ILO explains with references to each case that it had nothing to do with the Regulations. Practice in other organisations bears out that the age limit of 65 is not applied.

CONSIDERATIONS:

Competence

1. There are three grounds on which the ILO challenges the Tribunal's competence. (1) The impugned decision was taken by the Governing Body. (2) It was an appointment by a collective body to an elective post, and so a policy decision. (3) Its purport was to appoint the Director-General, who is not a member of the ILO staff.

For the reasons given below these pleas fail.

2. That it was the Governing Body that took the decision is immaterial. Who took the decision is not a question on which the Tribunal's competence, as defined in Article II(1) of its Statute, depends. The article merely says that the Tribunal may hear complaints alleging non-observance of the terms of appointment of officials and of provisions of the Staff Regulations. An appeal may therefore lie to the Tribunal against a decision by any authority which a complainant accuses of having infringed the terms of his appointment or the provisions of the Staff Regulations. The decision challenged in this case is just such a decision since the complainant is alleging that the Governing Body acted in breach of a rule he infers from Article 11.3 of the Staff Regulations.

There is therefore no need to consider whether the Tribunal is competent to review measures which the Governing Body takes in the exercise of its rule-making authority.

3. In ruling on the plea that appointing the Director-General was a policy decision the Tribunal bears in mind that the decision was a complex one involving several questions of form and one question of substance.

The formal questions related to the admissibility of candidacies, particularly the method of submitting them, the deadline for doing so and the setting of an upper age limit. The question of substance was the choice of a candidate.

The complainant has only one plea against admissibility, namely that the age limit was not observed. This plea is not a matter of policy and it is one which the Tribunal will entertain in exercise of its power of review. For that reason it need not determine whether, being a so-called "policy" decision, the actual choice of a candidate is a matter outside its competence.

4. Contrary to what the ILO contends, whether or not the Director-General is a member of the staff has no bearing on the question of competence.

As was stated in 2 above, what Article II(1) of its Statute says is that the Tribunal is competent to hear complaints alleging non-observance of provisions of the Staff Regulations. Since the complainant is alleging breach of a rule to be inferred from Article 11.3 of the Staff Regulations the Tribunal will consider the merits of the plea. If the Director-General is not subject to the rule which the complainant alleges was broken the Tribunal will of course dismiss the complaint. But its reason for doing so will be, not that it lacks competence, but that the complaint is

devoid of merit.

Receivability

5. The ILO contends that the complaint is irreceivable, and it has three arguments. (1) The complainant has not respected the time limit. (2) He waived any right to object to renewal of the second defendant's appointment as Director-General. (3) He has no cause of action.

These pleas fail for the following reasons.

6. As to the time limit, the Tribunal observes that the rule in Article VII(2) of its Statute is that, to be receivable, a complaint must have been filed within ninety days after the complainant was informed of the impugned decision, at least where, as here, the decision is an individual one. It is clear that in this instance the time limit was respected.

According to the minutes of its sittings of 18 November 1982 the Governing Body took three decisions on that date on the appointment of the Director-General. It decided to make the appointment on 1 March 1983 by election at a private sitting and by secret ballot. It set at 1 February 1983 the deadline for lodging candidacies. And it limited the future Director-General's term to five years, to start on the day he took up office.

Neither the minutes nor any other item of evidence suggests that on 18 November 1982 the Governing Body decided whether to set an upper age for candidates. In fact the point was resolved in terms accessible to third parties such as the complainant on the very day of the election, 1 March 1983. The complainant was accordingly free to challenge the decision within ninety days from 1 March 1983. Since he filed his complaint the next day his complaint is not time-barred.

7. The ILO observes that in 1978 the complainant made no objections to the first extension of the second defendant's term of office and it argues that he is thereby estopped from pleading the irregularity on which his case rests. It also cites a letter he wrote to the second defendant in 1982 saying that he would not stand against him.

Waiver of an action may not be presumed. The plea will succeed only if there was a statement its author clearly intended should carry legal force. Neither the complainant's posture in 1978 nor the wording of his letter in 1982 bears out such intent.

For one thing, there is no reason to suppose that the complainant intended that the attitude he took several years earlier should be binding on him for evermore. His reasons for not opposing the second defendant's first extension of his appointment might have ceased to exist by the time the question of a second extension came up. Besides, the facts had altered in the meantime: the second defendant had not reached the age of 65 in 1978; by 1983 he had.

Nor does the complainant's letter to the second defendant make his complaint irreceivable. It may have reflected what was in his mind at the time when he wrote it, but that does not mean his intention was that it be binding on him in law.

8. The ILO contends that the complainant has no cause of action. Its first plea is that the impugned decision does him no injury. It is clear, however, that in the circumstances the complainant has an interest, of a kind which the Tribunal will protect, in pleading any irregularity there may have been in the second defendant's candidacy. First, it was on account of that candidacy that the Government of Benin withdrew support from the complainant, thereby depriving him of one opportunity, if not all, of standing. Secondly, even if he had been able to stand, the odds against his election lengthened with the second defendant's candidacy.

The ILO's second plea is that if the complainant had a cause of action he would have an unfair advantage over candidates who, not being members of the ILO staff, do not have access to the Tribunal. But the alleged breach of equality is a corollary of the provision in the Statute which determines the conditions of access to the Tribunal, and the Tribunal may not review the lawfulness of that provision. The plea fails.

The merits

9. The complainant rests his case on Article 11.3 of the Staff Regulations, which states that an official may be retained in service until the last day of the month in which he reaches the age of 65 years. What the complainant contends is that the rule unreservedly precludes the extension of an official's appointment beyond that date and

since the second defendant was over the age of 65 by 1 March 1983 he was not eligible for an extension on that date.

He alleges that the Governing Body acted in breach of the principle of legality, which requires an authority to respect the rules in force, and that of equality, which means applying Article 11.3 to the Director-General as well as to other staff members.

10. Article 11.3 provides several things. It sets the normal age of retirement at 60. It vests power in the Director-General to extend an appointment up to the age of 65 in particular instances. It provides that where the Director-General intends to exercise the power the Administrative Committee shall, according to the official's grade, be consulted beforehand or informed afterwards. It does not apply to an official appointed for a fixed term to a post other than one approved by the General Conference or the Governing Body.

Only one question matters here: in so far as the provision sets an age limit of 65, does it apply to the Director-General or only to his subordinates?

11. The wording of the rule suggests the latter. In empowering the Director-General to keep some officials up to the age of 65 it implies that his subordinates may not stay on after reaching that age. But it does not make the Director-General himself subject to the rule. To be more precise, it does not vest in the Governing Body in regard to the Director-General the power which the Director-General has in regard to his subordinates. As to the Director-General the question of an age limit is left open.

Had the draftsman intended that 11.3 apply to the whole staff including the Director-General he would have framed it differently. Instead of just authorising the Director-General to extend the appointment of a subordinate he would have vested such power in the appointing authority, and the Governing Body might then have exercised it in regard to the Director-General.

12. In ruling on the admissibility of the second defendant's candidacy there was a matter which the Governing Body found was not provided for in the rules and which it had to settle. Being discretionary in character, the impugned decision is subject only to limited review. In keeping with precedent the Tribunal will quash such a decision only if it was taken without authority, or in breach of a rule of form or of procedure, or if it was based on a mistake of law or of fact, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

13. There are two flaws of that kind alleged by the complainant, breach of equality and breach of legality, and the Tribunal now takes up these pleas.

(a) As appears from the foregoing, 11.3 does not set any limit on the age up to which a Director-General may hold office. The rule was therefore not infringed by admitting the second defendant's candidacy, and there was no breach of the principle of legality.

(b) Is the Director-General, too, subject, by the principle of equality, to the age limit set for his subordinates?

The principle of equality does not mean that the same rules must be uniformly applied to everyone. What it means is that like facts require like treatment in law, but different facts allow of different treatment. The impugned decision is compatible with the principle as so stated.

The Director-General's place in the Organisation is beyond comparison. Whether he is a staff member within the meaning of the Staff Regulations is immaterial. His pre-eminence derives in particular from Articles 8 and 9 of the Constitution: he is appointed by the Governing Body and responsible to it for the business of the International Labour Office, of which he is the head and appoints the staff.

Because of the Director-General's unique status the Governing Body was at liberty to set no age limit and in so deciding it was not in breach of the principle of equality. The age of retirement is of course tending to fall in the civil service and in private industry and is below 65 for many workers. But although the common rule is for employment to end by the age of 65 it does not apply to everyone, and in particular not to the holders of the most senior positions, to which that of the head of an international organisation is analogous. For the second defendant to be treated otherwise than as prescribed in Article 11.3 was therefore no breach of equality.

14. The Tribunal holds that although it is competent and the complaint receivable the complaint must fail on the merits.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

ORDER

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

FIFTY-FIRST ORDINARY SESSION

In re TEVOEDJRE

THE ADMINISTRATIVE TRIBUNAL,

Considering the written evidence filed in the case of Tévoédjrè versus the International Labour Organisation and Blanchard,

Considering its decision to hold hearings on 25 November 1983 to allow the parties to submit oral pleadings further to their written submissions,

Considering the ILO's request that the hearings be in camera,

Considering the complainant's observations,

CONSIDERATIONS:

According to Article 14(4) of the Standing Orders of the ILO Governing Body the minutes of its private sittings shall be regarded as confidential and shall not be released for at least ten years.

On 18 November 1982 the Governing Body held two private sittings to debate the arrangements for the appointment of the Director-General, which is the subject of this case. With his submissions the complainant has filed the minutes of those sittings and the ILO refers to them in its reply.

In order to respect the confidential character of the Governing Body's private sittings, there is no need to grant the ILO's application. The Tribunal need only require the parties to refrain in their pleadings from referring to the

minutes of those sittings and from founding arguments thereon.

Although this may restrict the rights of the parties, it is not unacceptably detrimental to their interests. Any arguments which may be founded on the minutes will be of lesser importance, and the parties have had the opportunity to discuss them in their briefs.

ORDERS:

1. The parties are required to refrain in their oral pleadings from referring to and founding arguments on the minutes of the Governing Body's private sittings.
2. The application for holding the hearings in camera is dismissed.

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

Geneva, 24 November 1983

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

1. "An official shall retire at the end of the last day of the month in which he reaches the age of sixty. In special cases the Director-General may retain an official in service until the end of the last day of the month in which the official reaches the age of sixty-five."