

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

## FIFTY-THIRD ORDINARY SESSION

In re ALI KHAN (No. 3)

Judgment No. 614

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Labour Organisation (ILO) by Mr. Bahauddin Ali Khan on 13 May 1983, the ILO's reply of 12 July, the complainant's rejoinder of 30 October and the ILO's surrejoinder of 14 December 1983;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal and Article 13 of the ILO Staff Regulations;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. Information on the complainant's career in the ILO appears in Judgments Nos. 564 and 565, under A. On 1 January 1975 he was transferred to a post as an industrial specialist in the Sectoral Activities Department and his post was upgraded from P.3 to P.4 with effect from the same date. He is a member of what since September 1981 has been known as the Manufacturing Industries Branch of the Department. Since 1975 he has sought the regrading of his post. On 8 December 1981 he formally applied for a grading survey. After an exchange of minutes with the head of his branch, Mr. Abate, and the Personnel Department, he was asked to fill up a "position description questionnaire" in accordance with ILO Circular series 6 No. 108, on the classification procedure. He sent it to Mr. Abate on 27 July 1982. Mr. Abate wrote him a minute on 30 July saying that his account of his duties was inflated and asking him to fill up the questionnaire more objectively. In a minute of 9 August to the Chief of the Personnel Department the complainant accused Mr. Abate of delaying tactics and refused to alter a word. On 18 August Personnel pointed out that according to the procedure in the circular the survey could not go ahead without Mr. Abate's signature. On 4 January 1983 the complainant applied to the Chief of the Personnel Department for "review" under Article 13.1 of the Staff Regulations, objecting to the failure to do the survey. On 13 May he filed his complaint impugning what he inferred to be rejection of his application.

B. The complainant sees in this dispute further evidence of the harassment and injustice he feels he has been the victim of for many years. He contends that according to any one of several criteria set out in Circular 108 a survey is overdue, and to obstruct it, and for so long, is a breach of his rights. He accuses his supervisor of malice and, particularly in writing his inaccurate and ill-informed minute of 30 July 1982, of abusing his authority. He alleges personal prejudice, to be inferred from his account of the facts. A fair survey would reveal that his duties have altered and that this, and his long experience, warrant upgrading, to which he sees no administrative financial or other impediment. He seeks upgrading with effect from 1 September 1981, damages for material and moral injury and an order that "all discrimination, bias and harassing practices" should cease forthwith.

C. The ILO replies that the complaint is irreceivable. As the Chief of Personnel informed the complainant in a minute of 11 January, an official is required to submit the questionnaire in draft to his supervisor and the latter is responsible for the final form. This is in line with what Mr. Abate said in his minute of 30 July 1982 and another of 6 January 1983 to the Chief of Personnel. An application under Article 13.1 is normally made only when the supervisor overrules the official. Instead Mr. Abate gave the complainant a chance to redraft the questionnaire. It is he, not the Organisation, that has failed to act. Moreover, there are means of redress he has not even-ried, the lodging of a "complaint" under Article 13.2 or, as provided in ILO Circular series 6 No. 105, clause 70, a complaint to the Professional Grading Appeals Committee alleging abuse of authority by Mr. Abate. In any event the complaint is devoid of merit. The Tribunal will not normally replace the Organisation's views with its own on matters of grading, nor grant a demand for regrading made directly to it. Besides, the complainant offers no evidence to show his post is undergraded, his brief being taken up with unfounded and irrelevant accusations

against his supervisor. He has never properly answered Mr. Abate's minute. Some of his draft entries in the questionnaire are misleading or inaccurate. Grading does not depend on his seniority or other qualifications, but on objective assessment of the duties of his post. There has been no obstruction: on the hypothesis most favourable to him no survey was due under Circular 108 until early September 1981, when his branch was reorganised. His supervisor has acted solely in the ILO's interests. His allegations of victimisation are groundless. Even if the Tribunal allowed the complaint there would be no grounds for an award of moral damages. He has largely his own unreasonable attitude to blame for what has happened.

D. In his rejoinder the complainant maintains that his complaint is receivable. He has been trying for years to get the grading survey done. The ILO did not even answer his Article 13.1 application and its dilatoriness left him no choice but to go to the Tribunal. Clause 70 of Circular 105 is irrelevant since a complaint lies to the Professional Grading Appeals Committee only when a survey has been done and there are still material differences between official and supervisor over entries in the questionnaire. As to the merits, he argues that the refusal of a higher grade to someone with his record and the promotion of officials of no greater worth show how he is discriminated against. He states detailed objections to the ILO's version of the facts. He has consistently asserted his right to a survey since 1975, when there was an office reorganisation and the Sectoral Activities Department was set up. His duties have also altered and increased since then. The ILO's obstructiveness is beyond question. A survey can go ahead even if official and superior disagree over the questionnaire. The Tribunal may itself order the regrading and he again invites it to do so, since any ILO survey would be unfair. He describes his duties, which he says the ILO has misrepresented, and again contends that they warrant a higher grade. He seeks the disclosure of files relating to another member of the branch and to the grading of that staff member's post. E. In its surrejoinder the ILO develops its pleas, which it feels the complainant has ignored or distorted, much of his rejoinder being irrelevant. It seeks to correct his description of his duties and other factual allegations and observes that his own opinion of his merits is no yardstick in grading or, for that matter, promotion. It objects to his seeing the confidential files of another official, but not to the Tribunal's doing so.

## CONSIDERATIONS:

### Receivability

1. Article VII of the Statute of the Tribunal sets two conditions for the receivability of complaints.

The first appears in paragraph 1: the impugned decision must be final, that is, the complainant must have exhausted such means of resisting it as are available to him under the Staff Regulations of the organisation.

The second condition is in paragraph 2. When the complainant is challenging an individual decision he must file his complaint within ninety days after it was notified to him. Paragraph 3 adds that where the Administration fails to take a decision on a claim within sixty days from the date of its notification, the period of ninety days shall run from the expiry of the sixty days.

2. Two means of redress are available to ILO staff under the Staff Regulations.

(a) According to Article 13.1 an official who considers that he has been treated inconsistently with a provision of the Regulations or his contract of employment, or subjected to unjustifiable or unfair treatment, may request that the issue be reviewed with a view to its settlement.

The decision on such a request for review is not the final one. It does not necessarily close the matter or prevent the official from addressing an appeal to the Director-General under Article 13.2. Accordingly a request for review is not a means of redress within the ambit of Article VII(1) of the Statute of the Tribunal, and there is no need to make such a request before filing a complaint with the Tribunal.

(b) Under Article 13.2 an official who considers that he has been treated inconsistently with the provisions of the Regulations or his contract of employment, or that he has been subjected to unjustifiable or unfair treatment, may address a "complaint" to the Director-General within six months of the treatment complained of.

Unlike the decision on a request for review, the decision on a "complaint" is final in that it is taken by the executive head of the Organisation and not subject to further internal appeal. Accordingly an Article 13.2 appeal is a means of redress within the ambit of Article VII(1), and the Tribunal will not entertain the complaint where no such appeal has been made.

3. The complainant did submit a request for review under 13.1 to the Chief of the Personnel Department on 4 January 1983. But he addressed no appeal to the Director-General under 13.2. He therefore failed to exhaust the means of redress as required by Article VII(1) and the complaint must be dismissed as irreceivable.

The complainant is right not to argue that his minute of 11 June 1982 may be treated as an Article 13.2 appeal. It is not described as such and it makes no specific claim. Besides, even if it did amount to an appeal, the complaint would be out of time and would fail anyway. Since the Director-General did not answer the minute a complaint would not have been receivable under Article VII(3) of the Statute unless filed within ninety days of the expiry of the sixty days. In fact it was filed much later, on 9 May 1983.

4. The ILO submits in its reply that the complainant ought to have appealed to the Professional Grading Appeals Committee. The Tribunal need not determine whether that is a means of redress within the ambit of Article VII(1) of its Statute. Whether it is or not, such appeal will lie only against a recommendation by the Personnel Department. Since no such recommendation was ever made the plea is irrelevant.

Application for a provisional order

5. The complainant contends that comparison of his own personnel records with those of another staff member will show he did not receive equal treatment. He invites the Tribunal to order disclosure to him of the staff member's personal file and the file on the grading of his post. Subsidiarily, he asks the Tribunal to take account of those items. The ILO objects to disclosing another official's records to the complainant but is willing to let the Tribunal see them.

6. As appears from 3 above, the complaint will be dismissed as irreceivable. There is therefore no reason to order disclosure of the items, which have no bearing on the question of receivability.

7. Besides, even if the Tribunal went into the merits it would reject the application.

There are three hypotheses. The first is that the complainant was treated unlawfully, and if so the Tribunal need only declare that he was and need not rule on the allegation of unequal treatment. The second is that the complainant was treated lawfully and the other staff member unlawfully. In that case the complainant may not rely on unlawful treatment which conferred benefit on the other staff member: equality in law does not mean equality in the breach of it. The third hypothesis is that both of them were treated lawfully. If there was inequality in the treatment they received it arose in circumstances which allowed the exercise of discretion and in which the Tribunal has no power of review.

In any event the Tribunal would not order disclosure of an official's personal records without first consulting him.

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 Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1984.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

