

## SEVENTY-SECOND SESSION

### *In re* DURAI

#### Judgment 1145

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Thiagaraja Rama Durai against the International Labour Organisation (ILO), received on 15 January 1991 and corrected on 25 January, the ILO's reply of 25 March, the complainant's rejoinder of 18 April as supplemented on 29 May and the Organisation's surrejoinder of 12 July 1991;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal and Articles 4.6, 11.4 and 13.2 of the Staff Regulations of the International Labour Office;

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

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

A. The complainant, an Indian who was born in 1945, took up duty in the ILO's Office in New Delhi in 1980. He worked on a technical co-operation project as a clerk and typist at grade L.3. He was granted a fixed-term appointment, promoted to senior clerk and kept on under the project until 1983, when he got an L.4 post as secretary to the regional adviser on workers' education, still in New Delhi.

In a minute of 13 July 1984 to the director of the office he said that he was "willing to be considered" for a post as administrative assistant to a technical co-operation project for workers' education, 78/IND/02. He was appointed to that post as from 1 July 1984 and was promoted to L.5. The post was eventually graded L.7.

The project ended in April 1988 but there was "follow-up" until June 1989. When the complainant's contract expired at 31 March 1988 he had it extended by fifteen months up to the end of the follow-up, and then by another three, to cover the winding up. By a letter of 8 September 1989 the deputy director of the office warned him that because of the termination of the project his appointment could not go beyond 30 September 1989. It ended at that date.

In a letter of 19 February 1990 the complainant claimed nine-and-a-half months' pay in termination indemnity under Article 11.4.3 of the ILO Staff Regulations.\* (\* "An official whose appointment is terminated under paragraph 1(a), (b) or (d) of this article shall be given one month's notice and shall be paid an indemnity" reckoned according to a schedule that follows.) In a letter of 22 February the deputy director refused his claim. On 13 August 1990 he submitted an internal "complaint" under Article 13.2 of the Staff Regulations alleging short notice of termination, wrongful refusal of the indemnity, breach of the Staff Regulations and breach of a promise by the deputy director to consider him for vacancies.

By a letter of 19 November 1990 - the decision impugned - the Director of the Personnel Department rejected his claims but said that since there had been breach of the ILO's practice of giving at least two months' notice of non-renewal of contract he was granted another two months' pay in lieu. He was paid that amount on 20 December 1990.

B. The complainant observes that in 1983, when he left the project he had been with since 1980, he became an ILO official and came under the regular budget. It was therefore wrong to deny him the termination indemnity on the grounds that he had been a member of project personnel. It was not at his own request that he was moved to project 78/IND/02, but by a unilateral decision, the reason being that his post as secretary to the regional adviser was not financed under the budget for 1984-85. His right to be kept on as an ILO official was infringed, and he protested orally at the time. While he was with the project suitable vacancies arose in the office but he was overlooked. In 1986 the director of the office even turned down his supervisor's suggestion for upgrading his post on the pretext that that would make it harder to reinstate him in the office. The Staff Regulations draw no distinction anyway between officials and project personnel as to entitlement to the 11.4 indemnity. In his letter of 8 September 1989 the deputy director promised to keep him in mind for any suitable vacancy, yet in March or April 1990 another project employee was preferred to him for a post as programme assistant. His career is "beyond

repair".

He claims reinstatement in "the post in the ILO Office" and the award of such other compensation as the Tribunal deems fit.

C. In its reply the ILO observes that since projects like 78/IND/02 are of limited duration the position of their staff is bound to be temporary. The complainant knew full well when he applied that the position would end with the project itself.

The grant of two months' pay was in keeping with precedent in the case law on notice of non-renewal of contract. Article 4.6(d) of the Staff Regulations states that a fixed-

term contract carries no expectation of renewal and "shall terminate without prior notice on the termination date fixed" in the contract. So there is no contractual right to notice of non-renewal and no question of implied renewal in the event of failure to give it. Yet in practice two months' notice is given. The payment the complainant got in lieu gave him time to look for other employment and he found it with the World Health Organization (WHO) as early as 25 October 1989, also in New Delhi.

He has no right to the indemnity under Article 11.4.3, which is due only to someone terminated under 11.4.1(a), (b) or (d). His case is not about termination, but about expiry of contract, and comes under 4.6(d): 11.4.3 does not apply.

His objections to appointment to project 78/IND/02 are irreceivable because he failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires. There is no trace of any oral protest by him; in any event he did not follow the appeal procedure in the Staff Regulations. Besides, the funding of his earlier post as secretary to the regional adviser was limited in duration; so his transfer to the project, which he himself suggested, gave him employment for longer, besides promotion to L.5.

His objections to the director's refusal to upgrade his post in 1986 are also irreceivable under VII(1).

With one exception he fails to say what vacancies he might have been appointed to, and his claims to hold any one of them are again irreceivable for failure to appeal in time. The letter of 8 September 1989 on which he relies merely said: "every effort will be made to find a suitable post for you whenever this is possible". That was not a formal commitment. Though the ILO did consider him for the one post he mentions, it found, and preferred, someone with greater experience of fellowship assistance.

His claim to reinstatement is irreceivable under VII(1) because it did not form part of his internal "complaint". He cannot be reinstated in a post that no longer exists. Even if he were entitled to damages the amount should be small since he got two months' pay and then found work with the WHO.

D. In his rejoinder the complainant enlarges on the circumstances of his transfer in 1984, the director's refusal in 1986 to consent to the upgrading of his post and what he sees as the undertaking in the letter of 8 September 1989 to consider him for vacancies. In his view he ought to have been given preference for the post of programme assistant, which he was quite fit for. His job at the WHO is temporary, does not match his experience and offers no security.

He develops his contention that he consented to the transfer only in the hope of finding more stable employment: the transfer was in the ILO's interest, not his own, he was unaware of the jeopardy he was in, and the director assured him time and again that he would be brought back to the office as soon as a vacancy arose. He was victimised. He had a much better record than others who got longer contracts. The reason why he did not appeal against the transfer at the time was that he believed the promises.

He has lost seniority, salary increments and promotion. He and his family have suffered stress. His children's education has been disrupted. His future is bleak. He presses his claims.

In a supplement to his rejoinder he states that the director has failed to let him have a minute of 30 May 1984 about his transfer to the project. He submits that the ILO has destroyed the item from a wish to mislead the Tribunal.

E. The Organisation contends in its surrejoinder that the complainant's rejoinder is disjointed and repetitive, makes

untrue or unproven allegations and misrepresents his career, which is not at issue anyway, and simply ignores the material issues.

The ILO reaffirms that most of his claims are irreceivable for failure to exhaust the internal means of redress. He is objecting to decisions he ought to have challenged years ago, his claim to reinstatement is irreceivable because it was not part of his internal appeal, and his rejoinder levels new and so irreceivable charges of victimisation.

As for his claim to the indemnity and his allegation of failure to give proper notice, he fails even to address the ILO's pleas. His charges of discrimination, besides being irreceivable, are unproven: the non-renewal was due solely to the demise of the project. He got no promise of any post, just an assurance that he would be considered if that proved possible. It is hard to find a suitable vacancy for everyone in a small office like New Delhi. He had a run of contracts with the WHO and, whatever his position there may have been, he never had security of tenure in the ILO either; so he was no worse off.

#### CONSIDERATIONS:

1. As is said above, under A, the complainant used to serve in New Delhi as administrative assistant to an ILO technical co-operation project for workers' education in India. The project bore the number 78/IND/02, and he held grade L.7. Although the project itself came to an end in April 1988 the follow-up lasted until June 1989. The complainant had a fixed-term appointment which expired at 31 March 1988, but it was extended up to the end of the follow-up and again to cover a three-month period of winding up, which ended at 30 September 1989. By a letter of 8 September the deputy director of the ILO office in New Delhi warned him that his appointment too must end at that date, and indeed that was when he left the Organisation's service.

In a letter of 19 February 1990 he claimed under Article 11.4.3 of the Staff Regulations of the International Labour Office payment of termination indemnity equivalent to nine-and-a-half months' pay, but the deputy director of the office refused his claim on 22 February. On 13 August he filed a "complaint" under Article 13.2 of the Staff Regulations alleging short notice of termination, wrongful refusal of the indemnity, breach of the Staff Regulations and breach of a promise by the deputy director to consider him for any vacancy.

The decision that he is impugning is the reply of 19 November 1990 from the Director of the Personnel Department. That letter, while rejecting his claims, acknowledged breach of the practice of giving at least two months' notice of non-renewal of contract and granted him another two months' pay in lieu. He has two claims: one to reinstatement in "the post in the ILO Office", and the other to any further compensation the Tribunal may award him.

2. The three main issues in this case are:

- (1) whether, since he did not receive word of the non-renewal until 8 September 1989, he was served proper notice;
- (2) whether he is entitled to the compensation he claims under Article 11.4.3 of the Staff Regulations; and
- (3) whether he is to be reinstated.

The period of notice

3. What the complainant held at the time of his departure from the Organisation was a "project position" as administrative assistant to a technical co-operation project for workers' education. He himself had applied for the position in a minute of 13 July 1984 in which he told the director of the New Delhi office that he was "willing to be considered". He was duly appointed and promoted to L.5, and the position was eventually graded L.7.

4. As he knew full well, the duration of project positions is limited and the financing of them covers only that duration. His position accordingly came to an end with the project itself. That was indeed why he was granted a fixed-term appointment, and the material rule is Article 4.6(d) of the Staff Regulations, which states that such an appointment

"... shall carry no expectation of renewal or of conversion to another type of appointment, and shall terminate without prior notice on the termination date fixed in the contract of employment".

Notwithstanding the terms of 4.6(d) the practice in the ILO is to give at least two months' notice of non-renewal of a fixed-term appointment. The Organisation admits that the practice was not followed in the complainant's case but points out that he got compensation for its mistake in the form of another two months' pay.

The Tribunal holds such compensation to be adequate and therefore rejects his claim.

The claim to termination indemnity

5. Article 11.4.3 of the Staff Regulations reads:

"An official whose appointment is terminated under paragraph 1(a), (b) or (d) of this article shall be given one month's notice and shall be paid an indemnity in accordance with the following schedule ..."

The schedule does not apply to the complainant. The complainant's employment ended, not because of any termination, but because his fixed-term appointment expired. The material rule is therefore Article 4.6(d) of the Staff Regulations, which does not prescribe the payment of an indemnity. Payment of the indemnity depends, not on whether someone has been employed under a technical co-operation project or paid out of regular budget funds, but on whether his appointment has been terminated for any of the reasons stated in the above-cited clauses of Article 11.4.3.

The claim is dismissed.

The claim to reinstatement

6. The complainant's claim to reinstatement is irreceivable under Article VII(1) of the Tribunal's Statute because it has not formed part of any internal "complaint" from him under Article 13.2 of the Staff Regulations and he has therefore failed to exhaust the internal means of redress.

7. In any event it must fail for the following reasons as well.

The complainant submits:

(a) Not at his own request but by a unilateral decision was he moved to project 78/IND/02 in 1984, the reason being that his post as secretary to the regional adviser on workers' education was not financed under the budget for 1984-85. There was breach of his right to be kept on as an ILO official and he protested orally at the time.

(b) While he was with the project suitable vacancies arose in the New Delhi office but he was overlooked.

(c) In 1986 the director of the office rejected a suggestion of his supervisor's for upgrading his post on the grounds that that would make it harder to reinstate him in the office.

(d) Although the deputy director promised in a letter of 8 September 1989 to keep him in mind for any suitable vacancy, another project employee was preferred to him in March or April 1990 for a post as programme assistant.

Since the complainant has never made claims based on pleas (a), (b) or (c) in any internal appeal he has again failed to satisfy the condition of receivability in Article VII(1) of the Tribunal's Statute. Besides, as to (a), the ILO did not transfer him unilaterally to the project: he expressed interest in the transfer, no doubt lured by the prospect of promotion and higher pay, and the Organisation chose him.

As for plea (d), the ILO's letter of 8 September 1989 notifying the non-renewal read:

"We take this opportunity in expressing our appreciation of your good work and deep sense of devotion and assure you that every effort will be made to find a suitable post for you whenever this is possible."

That assurance constituted no formal commitment towards him. There is no reason to suppose that the ILO did not do its utmost to find him a suitable position. For example, it considered him for appointment as an assistant to the "Improve your business" programme, but the position went to someone it found better qualified.

8. However he may have fared in his subsequent career at the WHO or elsewhere, that is immaterial to the

lawfulness of the decision he is impugning. For the foregoing reasons his claims fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux  
Mohamed Suffian  
William Douglas  
A.B. Gardner