

## SEVENTY-SIXTH SESSION

### *In re* FAYMANN

#### Judgment 1314

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Anton Faymann against the International Labour Organisation (ILO) on 18 November 1992, the ILO's reply of 1 March 1993, the complainant's rejoinder of 8 April and the Organisation's surrejoinder of 15 July 1993;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 4.2 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, an Austrian citizen who was born in 1933, joined the ILO in 1979 as a chief technical adviser at grade P.5 under technical co-operation programmes in Latin America and the Caribbean. In 1981 he became regional adviser for Latin America and the Caribbean, also at grade P.5. Having won a competition for a P.4 post in the Hotel and Tourism Branch (HOTOUR) as a specialist in the hotel industry, catering and tourism, he was transferred in 1982 to the Organisation's headquarters in Geneva.

The ILO's programme and budget for 1992-93 provided for establishing a post in HOTOUR to grant advisory services that had till then been paid for out of funds for technical co-operation. In a minute of 5 April 1991 to the chief of the Personnel Development Branch (P/DEV) the complainant said that he hoped to see the post put up for competition and to be considered for it. The chief of P/DEV told him in a minute of 7 January 1992 that the Director-General had ordered review of the transfer of such posts from the programme for technical co-operation to the Organisation's regular budget and that the post was not yet to be filled. In February 1992 the Organisation issued a list of the "staff movements" that had taken place in January. It thereby announced the transfer of an inter-regional adviser, Mr. Serge Delpech, to HOTOUR at grade P.5.

On 6 May 1992 the complainant submitted a "complaint" under Article 13.2 of the Staff Regulations objecting to "the appointment of another official to the P.5 position by direct selection". He alleged discrimination and treatment inconsistent with the Regulations. In a letter of 13 October 1992 the Director of the Personnel Department informed him on the Director-General's behalf that since the Organisation had not yet filled the vacancy his allegations were unfounded. That is the decision he impugns.

After the filing of his complaint the ILO issued a staff list in February 1993 in which it showed Mr. Delpech as the holder of a P.5 post in the complainant's branch. By an undated corrigendum it removed Mr. Delpech's name. By a minute of 2 March 1993 the chief of the Personnel Planning and Career Development Branch informed the complainant that the Director-General had awarded him personal promotion to P.5 as from 1 October 1991.

B. The complainant submits that the decision to transfer Mr. Delpech to the new post was in breach of the Staff Regulations and tainted with bias and misuse of authority. He relies on the provisions in Article 4.2(e) listing the sort of vacancies that "direct selection by the Director-General" shall be the "normal method" of filling. They include posts "in technical co-operation projects" and those "of a purely temporary nature, up to two years, of a specialist nature, not expected to lead to a career in the ILO". Under 4.2(f) the Director-General decides "after consulting the Selection Board" how to fill any other vacancy below grade D.1, the ordinary method being competition.

Had Mr. Delpech been kept on a post in technical co-operation direct selection would have been proper. But the Director-General was wrong to put him on a P.5 vacancy funded from the regular budget without having consulted the Selection Board and held a competition. The announcement in February 1992 of Mr. Delpech's transfer shows that there was budgetary provision for the new post and that Mr. Delpech had not merely had his contract under the technical co-operation programme extended. There was no reason to assume that the new post would prove

temporary; even if the Director-General had plans that might affect the branch's future the holding of a competition would not have tied his hands since the successful candidate might have kept the same type of contract with only a change in grade.

The complainant also charges the chief of his branch with "manoeuvring" to give Mr. Delpech the new post. As the complainant had served under the technical co-operation programme at a higher grade than the one he held at headquarters after winning a competition it was plain that the Director-General had given Mr. Delpech an "unjustified advantage".

The complainant seeks (1) the quashing of the decision to transfer Mr. Delpech as "announced in the list of staff movements in January 1992"; (2) the award of suitable damages for injury to his career in the loss or at least the delay of the opportunity (a) to assume the responsibilities of a P.5 official and (b) to obtain a higher salary and pension; (3) as an alternative to (1) and (2), the award of suitable damages for "injury to career prospects and loss of opportunity to obtain improved salary and pension entitlements"; and (4) 5,000 Swiss francs in costs.

C. In its reply the ILO submits that the complaint is misconceived since it has taken no decision to transfer Mr. Delpech. It merely extended his contract pending the filling of the new post so that he could carry out duties much like those he had already been performing. Although his name appeared by mistake in the list of staff movements in January 1992, the list had no force in law. Paying him out of funds allotted for a vacant post did not amount to filling it. Whether a vacancy is temporary or not is a matter for the Director-General, not the complainant, to decide. Besides, the decision to postpone filling the post was discretionary. Had Mr. Delpech and not the complainant won the post by competition the ILO would have had to change the type of contract he held, and that might have put a burden on the Organisation.

The complainant offers no evidence to bear out his allegations of discrimination and misuse of authority. Far from mistreating him, his supervisor made favourable appraisals of his work and recommended the merit increment he got in 1990. The Director-General's decision to delay filling the post was taken in the context of a general policy - not limited to the vacancy in the complainant's branch - that was intended to safeguard the Organisation's interests at a time when changes in its programme and budget were looming.

In any event the complainant's claim to damages must fail because he would have had no certainty of winning a competition if the Administration had not postponed it.

D. In his rejoinder the complainant acknowledges that the decision of 2 March 1993 to grant him personal promotion to P.5 as from 1 October 1991 satisfies his claim to damages for material loss. But it leaves his claim to damages for moral injury since his status, duties and "career satisfaction" are lower than they might have been if he had won the competition. Developing his earlier pleas, he cites further evidence of Mr. Delpech's transfer in the staff list issued in February 1993 and describes the "gradual process" by which his chief strengthened Mr. Delpech's position in HOTOUR.

He presses claims (1) and (4) and narrows claim (2) to damages for loss or delay of the opportunity to assume P.5 responsibilities and (3) to damages for injury to career prospects.

E. In its surrejoinder the ILO contends that, the complainant having had personal promotion, there is no evidence of the injury he alleges. For him to qualify for personal promotion his services had to be at a higher level than his post ordinarily required. The Governing Body of the International Labour Office having recently approved the Director-General's programme and budget proposals, a competition is soon to open for the post.

#### CONSIDERATIONS:

1. The complainant joined the ILO in 1979 and was by 1991 serving as an "industrial specialist (hotel, catering and tourism)" in the Hotel and Tourism Branch (HOTOUR) of the Sectoral Activities Department of the International Labour Office. That was a grade P.4 post funded out of the Organisation's regular budget. Having learnt that the posts of some industrial specialists in the Department had been regraded P.5, he applied in February 1991 for review of the grading of his own post. His request was refused.

2. Another ILO employee, Mr. Serge Delpech, was in 1991 serving as a technical co-operation expert; he held a P.5 post as "inter-regional adviser (hotel, catering and tourism)" under a fixed-term appointment that was to expire on 31 December 1991; and that post was being financed out of what are known as the ILO's Regular Budget

Technical Co-operation (RBTC) funds.

3. The Organisation decided to make the inter-regional adviser's P.5 post as from January 1992 a regular budget one in HOTOUR. In a minute of 5 April 1991 to the chief of the Personnel Development Branch the complainant wrote:

"I hope the post will not be filled by a direct selection, but that all professionals attached to this Branch [HOTOUR] whose careers are blocked are equally given a chance to be considered for this position through a competition."

He expressed his own interest in the post.

4. In September 1991 the ILO decided to fill the post by holding an internal competition open to technical co-operation experts. But in the event that is not how it filled the post. It explains that before a notice of vacancy went out the Director-General decided for reasons of policy to review, among others, all positions financed out of RBTC funds; by mid-December 1991 it became clear that there would be a reduction in HOTOUR's activities in 1994-95; so it was decided to postpone filling the vacancy until the review had been completed and, to prevent disruption of the programme, to extend Mr. Delpech's contract by one year to enable him to perform temporarily much the same duties as before. The Organisation further submits that because the post was specialised and was not certain to survive in the long term it would have been entitled to fill the vacancy under Regulation 4.2(e) by transfer of Mr. Delpech but in fact it did not act under that provision. The upshot was that by a minute of 7 January 1992 the chief of the Personnel Development Branch informed the complainant that the position would "not be filled at this stage".

5. The complainant alleges that the Organisation did fill the vacancy without holding an internal competition. He relies on the list which the Organisation issued in February 1992 of the staff movements that had taken place in January 1992 and which announced the transfer of Mr. Delpech from RBTC to HOTOUR as from 1 January 1992 at grade P.5; that, he says, could mean only that Mr. Delpech had been appointed to the new P.5 post for inter-regional adviser in HOTOUR.

6. In the "complaint" which he submitted on 6 May 1992 in accordance with Article 13.2 of the ILO Staff Regulations the complainant cited the list of staff movements in January 1992. In a minute of 13 October 1992 in reply the Director of the Personnel Department, while stating that, for the same reasons as those set out in 4 above, the vacancy in HOTOUR had not yet been filled, did not say that there was any error in the list of staff movements.

7. In his present complaint the complainant claims:

"annulment of the decision to fill the grade P.5 vacancy in the Hotel and Tourism Branch by the transfer from the Technical Co-operation Programme of Mr. Delpech, announced in the list of staff movements in January 1992."

In its reply the Organisation admits that the list wrongly described the movement of Mr. Delpech as transfer, but pleads:

"this list has no legal status, being a document intended purely for information and showing simply a record of staff movement. It does not and cannot create legal obligations."

8. The ILO has unequivocally stated, and it is plain on the evidence, that the Organisation took no decision to fill the P.5 post for an inter-regional adviser in HOTOUR by the transfer of Mr. Delpech or otherwise. So the complainant has suffered no injury. His principal claim must therefore fail, there being no decision for the Tribunal to quash. Yet he had to come to the Tribunal because the ILO left the matter uncertain: the list of staff movements led him to believe that the post had been filled by the transfer of Mr. Delpech; and the Organisation failed to make it clear in its reply to his Article 13.2 "complaint" that in that respect the list was wrong. The uncertainty continued even up to May 1993, when the Organisation found it necessary to write to Mr. Delpech to correct any similar misunderstanding he might have had about his own status. The Tribunal accordingly grants the complainant an award towards costs and sets the amount at 2,000 Swiss francs.

9. As to his claims to damages, the complainant acknowledges that the personal promotion to P.5 he was granted *pendente lite* as from 1 October 1991 has fully satisfied his claim to an award of material damages. In any event those claims cannot succeed, being consequential upon the quashing of a decision that was never taken.

DECISION:

For the above reasons,

1. The ILO shall pay the complainant 2,000 Swiss francs in costs.
2. His other claims are dismissed in their entirety.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda  
William Douglas  
Mark Fernando  
A.B. Gardner