

In re Goode

Judgment 1881

The Administrative Tribunal,

Considering the complaint filed by Mr Jeffrey Harold Goode against the International Labour Organization (ILO) on 30 July 1998, the ILO's reply of 29 September, the complainant's rejoinder of 3 November 1998 and the Organization's surrejoinder of 15 January 1999, the complainant's further submissions of 29 January and the ILO's comments thereon dated 4 May 1999;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

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, a citizen of the United States who was born in 1954, entered the service of the International Labour Office, the Secretariat of the ILO, on 15 December 1996 in the ILO branch office in Washington. As from 13 January 1997 he was stationed at ILO headquarters in Geneva as a senior research officer (labour economist) at grade P.4 in the Conditions of Work and Welfare Facilities Branch. The first two years of his appointment, which was initially for one year, were a period of probation pursuant to Article 5.1 of the Staff Regulations. The complainant was responsible for a research project on the relationship between working time and employment which was scheduled for publication in the summer of 1998.

On 5 September 1997, the complainant's first-level supervisor, the chief of the Branch, completed his first performance appraisal report, covering the period 15 December 1996 to 31 August 1997. She considered that his performance was not satisfactory in terms of quantity and quality and criticised the complainant for not showing "the initiative and research skills expected". The complainant signed the report on 10 September and attached his comments. He refuted the allegations of his first-level supervisor and accused her of managing the Branch in an authoritarian manner and of being hostile towards him. The complainant's second-level supervisor, the Director of the Working Conditions and Environment Department, initialled the report on 19 September and approved the appraisal made of the complainant's performance. On the same day, he forwarded it to the Reports Board.

At the request of the Reports Board, on 8 October 1997 the Director of the Department made the following recommendation: "Based on his performance during the period under review, it is clear that Mr Goode is not suitable for the effective implementation of the work of the Branch". The complainant was also heard by the Board which, in comments dated 12 November 1997, concluded that the quality and quantity of the work provided by the complainant were not sufficient to recommend the renewal of his contract. By a minute dated 11 December 1997, the chief of the Personnel Planning and Career Development Branch informed the complainant that the Director-General had decided to endorse the recommendation of the Reports Board. However, to enable the complainant and his family to make the necessary arrangements, he had accepted his request for an extension of his contract up to 31 July 1998.

On 9 February 1998, the complainant filed a "complaint" under Article 13.2 of the Staff Regulations against the decision not to renew his contract. He described several flaws invalidating the procedure for the appraisal of his performance, and particularly that the period covered by the appraisal was less than nine months. By a letter of 6 March, the Director of the Personnel Department informed the complainant that the Director-General had requested the Board to review the points made in his complaint and to confirm or withdraw the opinion that it had issued. At the request of the Board, the complainant's first-level supervisor undertook an appraisal of his performance for the month of September 1997 and of a draft text which was to be the second chapter of the publication on working time. She maintained her previous appraisal. On 23

April 1998, having examined the new report and the complainant's observations thereon, the Board reiterated its comments and recommendation.

The complainant received a copy of this opinion on 28 April and submitted his observations on 11 May. By a letter dated 29 May 1998, which is the impugned decision, the Director of the Personnel Department informed the complainant of the final decision of the Director-General to confirm the decision not to renew his contract.

B. The complainant contends that, according to Articles 5.1 and 5.5 of the Staff Regulations, the period of probation is two years and that the probationary performance appraisal shall be established after eighteen months of service. Under Article 6.7.3 that appraisal is preceded by a first performance appraisal after nine months' service. In his case the decision to end his employment was based on only eight-and-a-half months of service. Moreover, in breach of the case law of the Tribunal, the ILO did not give him an opportunity to improve and terminated his appointment even though his supervisor had assured him when he was recruited that the period of probation was only a formality.

He denounces the bad faith of his first-level supervisor. He says she brought forward the date on which part of his work was due with the sole aim of preventing him from keeping to the deadlines and she deliberately shortened the appraisal period to exclude from his performance report certain tasks with which he had been entrusted and which he had carried out. He adds that his second appraisal, for his performance in September 1997, was tantamount to "retaliation" to punish him for lodging a complaint.

The complainant submits that the Reports Board issued its recommendations on the basis of an appraisal, issued on 8 October 1997 by the Director of the Department, which was not a recommendation made in due form. He states that the Board committed several procedural errors, particularly in indicating in its comments that the complainant had not started work on the second chapter of the publication. He notes that his supervisors submitted his draft chapter to third persons, without any other information, and complains that their comments were referred to the Reports Board.

He contends that the ILO's attitude has caused him substantial financial prejudice, harmed his and his wife's health and damaged his reputation, particularly with his former employer.

The complainant seeks: (1) the quashing of the impugned decision; (2) the withdrawal of the appraisal report, the comments of the Reports Board and any document relating to the appraisal of his performance in his personnel file; (3) his reinstatement as a probationary employee and the payment of his salary and allowances since 1 August 1998 or, if this is not possible, the payment of two years' salary and allowances; (4) the award of 30,680 United States dollars in compensation for the costs directly incurred by his premature return to the United States; and (5) one year's salary and allowances as damages.

C. In its reply, the Organization contends, as the main issue, that decisions relating to the appraisal of performance, as well as decisions on the renewal of contracts, lie within the discretionary authority of the Director-General and that the Tribunal has only a limited power of review over them.

Moreover, the ILO points to the absence of evidence of the bad faith of the complainant's first-level supervisor and explains that she could not have given any assurance as to the nature of the period of probation. It considers that the appraisal made by the Director of the Department was sufficiently explicit for the Reports Board to issue its opinion. It says that the comments made by third persons on his performance were not part of the appraisal process and demonstrate the objectivity of his supervisors. Finally, although the case law of the Tribunal does indeed provide that the period of probation should give the official an opportunity to improve, it does not oblige an organisation to renew the contract of an official who, after one year's probation, is deemed incapable of carrying out the functions of his post.

The ILO contends that the complainant's fourth plea is not receivable through failure to exhaust the internal remedies and that he has no contractual right to reinstatement.

D. In his rejoinder, the complainant submits that the ILO had the moral and legal obligation to accord him two years to prove himself. In his view, the errors and unfairness of his performance appraisal are sufficiently well documented to allow the Tribunal to invalidate the impugned decision. Moreover, the Guide

to the ILO's Monitoring, Evaluation and Reporting System (MERS) states that work plans should be prepared not later than 31 January each year, whereas his work plan, which was used to appraise his performance from 15 December 1996 to 31 August 1997, was only approved on 3 July 1997.

He denounces the bad faith of the ILO in attaching to its reply minutes which had been withdrawn by common agreement. He produces documents to demonstrate that the poor management of his first-level supervisor had caused many difficulties for members of the Branch and that the Staff Union had been informed.

The complainant contends that only the official concerned and his direct supervisors are authorised to take part in the performance appraisal process. Recourse to third persons, whose comments were taken word for word by the chief of the Branch without even citing them, constitutes a procedural flaw. He adds that his career record gives sufficient grounds for doubting the allegation that he lacked the capacity to effectively implement his work as a senior economist.

E. In its surrejoinder, the ILO refutes the complainant's claim that he had a right to a two-year appointment. It contends that, if there were flaws in the first performance appraisal, they were remedied by the second appraisal. The defendant explains that it produced the minutes which had been withdrawn to demonstrate that the complainant was well aware of what was expected of him.

F. In further submissions, the complainant claims not to have seen a minute written by his first-level supervisor to the Reports Board on 2 March 1998, which was produced by the defendant in its surrejoinder. He states that the minute was defamatory and wrongly alleged that he had submitted his complaint to the Reports Board. In his view, this constitutes a violation of the procedures of the Reports Board and proves that his supervisor endeavoured to manipulate the Board.

He considers that the surrejoinder demonstrates the strong bias of the Organization against him and denigrates him. He calls on it to retract its statements and says that it owes him an apology.

G. In its comments on the complainant's further submissions, the ILO asserts that it produced the above minute to demonstrate that any lack of restraint by the chief of the Conditions of Work and Welfare Facilities Branch occurred, not when she was acting as his supervisor, but as a reaction to defamatory statements made against her in the internal complaints procedures.

The Organization recognises that the complainant had not submitted his "complaint" to the Reports Board, but observes that the Board would have to examine it because it questioned its first conclusions. However, as his supervisor's criticisms had nothing to do with the quality of his work during the period under review, there was no reason to seek the complainant's views on the subject.

CONSIDERATION:

1. The complainant was engaged as a senior research officer with effect from 15 December 1996. From 13 January 1997, he was stationed in Geneva. In accordance with the applicable staff rule, the first two years of his appointment, which was initially for one year, were to be probationary.

2. A probationary employee's first performance appraisal is supposed to take place after nine months. In fact, in the complainant's case, the effective date of his first performance appraisal report was 31 August 1997, just eight-and-a-half-months after his appointment. The report, prepared by the complainant's first-level supervisor, was extremely unfavourable. After being reviewed by the Department Director and by the Reports Board (a committee of senior officials whose function is to advise the Director-General on such matters) the report reached the Director-General who, on 11 December 1997, decided that the complainant's contract, originally due to expire on 14 December 1997, instead of being renewed to allow for the completion of the normal probationary period of two years, should only be extended to 31 July 1998.

3. The complainant filed a "complaint" to the Director-General on 9 February 1998. In that complaint, he attacked the decision not to renew his contract for the usual one year period on a number of grounds relating both to the process followed and to the substance of the decision. He also alleged abuse of authority and unfairness on the part of the supervisor who had prepared the original unfavourable performance appraisal report. The Tribunal views this part of the internal complaint as including an allegation of

personal prejudice against the complainant's supervisor.

4. The internal complaint was divided into two parts. The Director of Personnel told the complainant by a letter of 6 March 1998 that the Director-General was asking the Reports Board to review both its report, and the process leading to the original decision not to extend the complainant's contract beyond 31 July 1998, in the light of further inquiry and evaluation and consideration of other relevant material. Following receipt of the Board's report, the Director-General would decide whether to renew the complainant's contract until the end of the normal probation period of two years or to confirm the expiration date of 31 July 1998.

5. The consideration of that part of the internal complaint which related to abuse of power and unfair treatment by the complainant's supervisor was deferred and would be dealt with according to the letter of 6 March 1998 "at the same time", that is after the report was received from the Reports Board.

6. The Reports Board carried out the investigation requested by the Director-General. It sought and obtained a new performance appraisal report and other information regarding the complainant's work and productivity. It examined and itself evaluated an important and critical part of his work product. It received representations from the complainant and his superiors. After due deliberation it reported to the Director-General that "the additional elements presented to it were not sufficient to make it alter its views" and that it was not in a position to recommend an extension of the complainant's contract. The report of the Board, dated 23 April 1998, was submitted to the complainant for his comments which were submitted, along with the report itself, to the Director-General. The latter, by a decision of 29 May 1998, confirmed the non-renewal of the complainant's appointment. That is the impugned decision.

7. Notwithstanding the terms of the letter of 6 March 1998, referred to above, the second part of the complainant's complaint to the Director-General does not appear to have been dealt with. Both the complainant and the Organization indicate that it is still under investigation.

8. The complaint to the Tribunal attacks the impugned decision on both procedural and substantive grounds. In particular, it asserts non-compliance by the Organization with certain provisions of the Staff Regulations relating to probationary employment. It also complains of unfair treatment by the complainant's supervisor and attacks the substance, both of the original performance appraisal report and of the revised performance appraisal conducted in March 1998 which formed the basis of the report by the Reports Board.

9. The Organization, for its part, takes the position that the only issue is the decision not to renew the complainant's original one-year contract. It states, correctly, that the complainant did not have a guarantee of two years' employment and the fact that a probationary period is two years does not create such a guarantee. It accordingly frames the issue in terms of its discretionary right to renew or not to renew an employee's contract upon its expiry. On that basis, it takes the position that most of the arguments advanced by the complainant are irrelevant.

10. This is too absolute a position. Even if the decision not to renew the complainant's contract for a further year was purely a matter of discretion, that decision is subject to review by the Tribunal if it is shown that it was procedurally defective or resulted from an abuse of power or from personal prejudice. But these are the very allegations which the complainant has made against his supervisor and on which the Organization says it cannot take a position because it is still in the process of investigating them.

11. The supervisor was the first line author of both the original performance appraisal report of 5 September 1997 and of the revised report of March 1998. If it is shown that she had abused her power or had acted out of personal prejudice towards the complainant, her critical role in the ultimate decision not to renew his contract is such that the decision itself could be reviewed on that basis.

12. The Organization limits its plea on the question of personal prejudice to the simple assertion that there is no evidence to support the complainant's position. It asserts that the language employed by the supervisor in her various communications about the complainant was generally moderate and professional in tone.

13. The evidence does not bear out this assertion by the Organization. In at least one document, a minute

addressed to the Reports Board, dated 2 March 1998, the supervisor engages in very strong language to describe the allegations of the complainant. (1) The issue of personal prejudice is of course likely to turn on far more than whether or not the complainant's supervisor was polite. The point is that the Tribunal is simply not in a position to judge the issue since neither party has pleaded it fully.

14. The Tribunal deplors this situation. It was wrong for the Organization so to deal with the complainant's internal complaint as to divide it into two parts which are in fact logically inseparable. Great cost and inconvenience might have resulted if the Tribunal had found itself obliged to adjourn the matter to its next Session in order to have the parties complete their pleadings.

15. As it turns out however that will not be necessary. As indicated above, the material produced includes a minute of 2 March 1998 addressed by the complainant's supervisor to the Reports Board. That minute contains very unflattering and tendentious language about the complainant. It was only produced by the Organization in the present record in January 1999 at the time it filed its surrejoinder.

16. Immediately after receipt of the surrejoinder the complainant sought leave from the Tribunal to produce a further pleading. Such leave was granted and the Organization also was given the right to reply thereto. Those new pleadings have now been received.

17. The complainant asserts and the Organization does not deny that the minute of 2 March 1998 addressed to the Reports Board was not seen by him nor sent to him prior to the production of the Organization's surrejoinder.

18. There is here a clear breach of the rules of natural justice. The minute in question is dated just prior to the Reports Board undertaking a new and complete reassessment of the complainant's performance appraisal. The resulting report of the Reports Board was at the very foundation of the final decision reached by the Director-General which is the decision impugned in these proceedings.

19. It was highly prejudicial towards the complainant and wrong for his supervisor to have been permitted to make *ex parte* representations to the Reports Board, especially at this critical time. It was also improper for the Reports Board not to have communicated the minute in question to the complainant and invited his comments on it.

20. The Organization argues that the supervisor's unflattering comments to the Reports Board concerning the complainant "had nothing to do with the quality of his work during the period being reviewed by the Board". Even if it were true, the submission is beside the point. Prejudicial comments made to a body advising the decision-maker by one of the parties to a dispute are often irrelevant to the actual substance of the dispute. They are nonetheless prejudicial. If such comments are made, an opportunity must be given to the other party to respond to them. By failing to do this the Reports Board breached its duty of fairness.

21. The report of the Reports Board being vitiated, the decision of the Director-General which is based upon such report cannot stand and must be quashed.

22. The complainant is entitled to be paid his salary and benefits for the period from 1 August 1998 to 15 December 1998 the date on which his term of contract for a normal probationary period would otherwise have expired, less the amount of any occupational earnings during that same period.

23. The complainant is not as yet entitled to any moral damages. If and when the question of personal prejudice has been decided and if that question comes before the Tribunal, then the issue of moral damages may be dealt with at that time.

24. Given this result and the fact that the complainant's remaining pleas could not give him any better result, such pleas will be dismissed.

DECISION

For the above reasons,

1. The impugned decision is quashed.

2. The Organization shall pay the complainant his salary and benefits for the period from 1 August 1998 to 15 December 1998 less the amount of any occupational earnings during that period.

3. All his other claims are dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

**Michel Gentot
Mella Carroll
James K. Hugessen**

Catherine Comtet

1. The complainant quotes, but does not produce, another document produced by his supervisor after the impugned decision which engaged in similar hyperbole.