

THIRTY-FOURTH ORDINARY SESSION

In re CONWAY

Judgment No. 256

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Labour Organisation (ILO) drawn up by Mr. Daniel Edward Conway on 1 July 1974, the Organisation's reply of 30 September 1974, the complainant's rejoinder of 16 December 1974, the Organisation's surrejoinder of 24 January 1975, the complainant's further memorandum of 31 January 1975 and the Organisation's communication of 11 March 1975;

Considering Article II, paragraph 1, and Article VII, paragraph 1, of the Statute of the Tribunal and articles 1.3, 4.12, 13.1, 13.2 and 13.3 of the Staff Regulations of the International Labour Office;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

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

A. On 15 November 1973 Mr. Conway, a staff member with a wife and child, informed the International Labour Office that he and his wife had decided to seek a divorce in the Geneva courts. On 29 August 1973 their immunity from jurisdiction was accordingly waived. The Organisation maintains that he was so informed, but he denies it. For the purposes of the divorce proceedings, on 11 October 1973 the Personnel Department drew up at his request an attestation indicating the date on which he had joined the service of the ILO, stating that he held an appointment of indeterminate duration and setting out the components of his remuneration. At the end of 1973 Mrs. Conway's lawyer telephoned the Office to ask for another attestation. The second attestation declared that since 1 January 1970 the complainant had been regularly employed full time and without interruption in Geneva and indicated his hours of work and successive places of abode. The ILO sent the attestation to Mrs. Conway's lawyer on 29 November 1973 without informing the complainant, who did not learn that it had been issued or see it until 9 February 1974, when he received a letter from his lawyer in the United States relating to proceedings for divorce and child custody which he had instituted in a court in the State of Maryland.

B. On 11 February 1974 the complainant filed a complaint under article 13.2 of the Staff Regulations. He stated that the attestation of 29 November 1973 given to his wife's lawyer had been produced in the Maryland court and he contended that it had constituted assistance to the other party in a suit filed by an ILO employee. He had not been consulted before it had been issued, nor been given a copy, and it did not appear in the only personal file (the "AN file") to which he had access. He regarded the attestation as accurate but incomplete and indicated the further information which he would have asked to have included had he been consulted beforehand so as to give the Maryland court a fuller picture of the situation. He accused the ILO of having helped his wife to challenge the competence of the Maryland court. He went on: "The consequence may be that the court will dismiss the suit without hearing it argued on its merits and I may lose any chance I might have had of being awarded custody of my son. Such a loss would be a blow to me of a magnitude beyond measure. n He contested the right of the International Labour Office to issue such an attestation without consulting or at least informing him. In his view articles 1.3 and 4.12 of the Staff Regulations had been infringed in that information known to an official by reason of his official position had been improperly communicated to third parties and the confidential nature of personal files had been disregarded. He asked that the official who had signed the attestation should incur a sanction, that the request made by his wife's lawyer and his personal "B" file should be communicated to him and that the procedure for divulging information to third parties should be reviewed.

C. Replying on behalf of the Director-General on 19 February 1974, the Chief of the Personnel Department dismissed the complaint on the ground that the attestation supplied on oral request bore on matters of fact which were not confidential: though admittedly it might have been courteous to inform the complainant that an attestation had been issued the failure to do so had not been a breach of the Staff Regulations. At the same time the

complainant was given a supplementary attestation which met all but one of the points he had raised. On 27 February 1974 he wrote a minute thanking the Office for the supplementary attestation but repeating his contention that the issue of the attestation of 29 November 1973 had been a breach of article 4.12 of the Staff Regulations, that information in a staff member's personal file was by nature confidential, that a copy of the attestation should have been put in his file and that the existence of "B" files which staff members could not consult was also a breach of article 4.12 of the Staff Regulations. Meanwhile, on 12 March 1974, the divorce decree granted to Mr. and Mrs. Conway in Geneva had become absolute. On 4 April 1974 the Chief of the Personnel Department replied on behalf of the Director-General pointing out that the information in the attestation had already been published or was a matter of public knowledge and that the mere inclusion of published or known information in a staff member's personal file did not make that information confidential. While conceding that it would have been courteous and indeed proper to inform the complainant that the attestation had been issued, the Director-General held to the view that the failure to do so had not been a breach of the Staff Regulations. On 8 May 1974 the complainant acknowledged receipt of that reply and put two questions to the Administration: first, had he exhausted the internal means of redress? and, secondly, did the ILO deny the existence of personal files to which staff members did not have access? On 13 May 1974 the Chief of the Personnel Department informed the complainant that the Director-General's decision of 4 April 1974 was final. The complainant now impugns that decision, originally taken on 4 April and upheld on 13 May 1974.

D. The complainant asks the Tribunal

(1) to declare that the giving of an attestation containing information on conditions of his employment and information relating to his personal life was a violation of article 4.12 of the Staff Regulations which stipulates that "personal files shall be confidential";

(2) to declare that the issue of an attestation written on ILO stationery, signed by an ILO official for the chief of an ILO branch and bearing the ILO seal is an official act within the meaning of article 4.12 and that consequently the failure to place a copy of the attestation in the personal file available to the complainant for consultation constituted a violation of article 4.12;

(3) to declare that there is sufficient evidence to conclude that one or more secret files exist which contain information relating to the complainant and which he cannot consult in the office where it or they are kept;

(4) to declare that the existence of such files is a violation of article 4.12, which speaks of "a personal file" in the singular;

(5) to order the ILO to desist from maintaining such files and to make them available to the complainant for consultation;

(6) to declare that the inclusion in files of any information other than that specified in article 4.12 is a violation of the Staff Regulations;

(7) to order the ILO to pay the complainant the sum of 140 dollars plus 16 ½ per cent interest to compensate him for the legal costs which he has incurred by reason of the issue of the attestation;

(8) to order the ILO to pay him the sum of 200 Swiss francs towards the costs of the present complaint; and

(9) to order the ILO to pay him the sum of 1,000 Swiss francs as compensation for the prejudice he has suffered as a result of the issue of the attestation in question, the ILO's having kept secret the issue of such an attestation, its dismissal of his original complaint and its failure to convene the Joint Committee, which has forced him to appeal to the Administrative Tribunal and to spend a great deal of time and energy in preparing the present complaint.

E. In its reply the Organisation first observes that the complainant's claims raise three questions: (1) Was the issue of the attestation to Mrs. Conway's lawyer a breach of article 4.12 of the Staff Regulations? (2) What kind of personal files is the ILO authorised by article 4.12 to maintain? (3) Are the claims for compensation valid?

F. The Organisation contends that the attestation had no binding effect on the complainant and does not constitute a decision which may be impugned before the Tribunal. It is merely a document provided by the International Labour Office which reproduces published facts and matters of public knowledge. In the Organisation's view, therefore, insofar as the complaint relates to the attestation of 29 November 1973 it is irreceivable since there is no

decision to impugn. The Organisation further argues: "Whether the ILO may be held liable for issuing the attestation to a third party - as it would be for any unlawful act prejudicial to its staff members - is quite another matter. If it may, ... then it appears that the staff member would have to impugn a decision to refuse compensation for the unlawful act. In the present case no such decision was taken because no compensation was claimed." The Organisation concludes that on such further grounds the complaint is irreceivable, there being no decision to impugn and the internal means of redress not having been exhausted. The Organisation further argues that the complainant is not competent to seek redress on the grounds of the issue of the attestation since the attestation does not constitute a decision and was not addressed to him. Even if it could be regarded as a decision he would have no grounds for complaint, first, because the attestation in no way alters his rights and duties as an ILO staff member and, secondly, because the attestation of 29 November 1973 was supplemented at his request by the attestation of 19 February 1974 and he expressed satisfaction with the two attestations when read together. Thus even if the attestation of 29 November 1973 afforded grounds for complaint the issue of the supplementary attestation gave the complainant satisfaction, removed any possible grounds for grievance and hence deprived his complaint of all foundation. In answer to his allegation of the existence of files to which he did not have access the Organisation points out that the attestation to which he objected contained no information drawn from any file unknown to him. The complainant challenges that contention. The Organisation maintains that he has no substantive grounds for basing any claim on the existence of files he may not consult but has only theoretical and abstract grounds for complaint. For all these reasons the Organisation prays that the Tribunal declare the complaint irreceivable.

G. In case the Tribunal holds the complaint to be receivable the Organisation submits the following arguments on the merits. The ILO cannot be held liable for unlawful issue of the attestation unless it is shown to have infringed a rule which lays some duty upon it, acted wrongly and caused prejudice to the complainant and unless a sufficient link of cause and effect between the act and the prejudice can be established. The Staff Regulations do not contain any provision concerning the communication of non-confidential information to someone outside the Office. In the present case the attestation of 29 November 1973 conforms to usual practice. It was issued to someone with a lawful interest in obtaining it, contained only non-confidential information and was tainted with no malice towards the complainant. The Organisation contends that the office could not have been expected to envisage the purpose for which the attestation was intended: it appeared only reasonable that Mrs. Conway should wish to obtain confirmation of known facts and matters of public knowledge for the purpose of obtaining a divorce in Geneva. The ILO cannot therefore be held liable for any wrongful act or malice. The complainant claims payment of 140 dollars and 1,000 Swiss francs in compensation for the prejudice he allegedly suffered because of the issue of the attestation. The Organisation believes that since the office did not act wrongfully in issuing the attestation it cannot be held liable to pay compensation on that account. Should the Tribunal take a different view, the Organisation prays that it award lower damages than are claimed. Furthermore, the complainant's allegation that he suffered prejudice because of the issue of the attestation of 29 November 1973 is mistaken. The reason why the complainant had to pay additional lawyer's fees to prepare his rebuttal to the motion to dismiss is that unknown to the office two divorce suits were pending in Geneva and in Maryland, and the Office cannot be held liable on that account. The Organisation denies that there is a sufficient link of cause and effect between the issue of the attestation of 29 November 1973 and the prejudice which the complainant alleges he suffered. The Office did not commit any unlawful act against the complainant for which it may be held liable. As to the meaning and object of article 4.12 of the Staff Regulations, the complainant alleges the existence of files which he may not consult and asks the Tribunal to declare that the practice of maintaining such files is a violation of article 4.12 and should cease and that the office is not entitled to keep information on a staff member unless it falls within the categories listed in that article. According to the Organisation, the object of article 4.12 is that the office shall allow the staff member access to a file including documents of which an exhaustive list is given and that those documents shall be confidential; but there is nothing in the article to prevent the office from keeping elsewhere documents which are not listed therein. That interpretation flows from the actual wording of the article - whatever the complainant may say - and respects the interests of the staff member, third parties and the Organisation itself.

H. The Organisation prays that the Tribunal declare the complaint irreceivable; subsidiarily, that it hold the complaint to be without foundation; and, again subsidiarily, to reduce the damages claimed.

I. In his rejoinder the complainant develops the arguments put forward in his original memorandum and asks the Office to provide him with a list of all documents contained in the secret personal file or files relating to him. If the Office declines to do so, he prays the Tribunal to order production of the list. In its surrejoinder the Organisation points out that the complainant is making further claims for relief and maintains that those claims should be declared time-barred and irreceivable in accordance with the case law of the Tribunal.

CONSIDERATIONS:

As to the issue of an attestation for the benefit of the complainant's former wife:

1. In the first of his claims for relief the complainant seeks a declaration that the Organisation violated article 4.12 of the Staff Regulations in issuing to his former wife's lawyer, on 29 November 1973, an attestation containing details of his recruitment and his private life.

In contesting the receivability Of that claim the Organisation argues, first, that unless it is a decision the issue of an attestation cannot be impugned. That argument is irrelevant. It is true that a complaint is receivable only if a decision is impugned. But that condition is fulfilled in the present case since the contested act was a decision in the true sense of the term, taken on 4 April and upheld on 13 May 1974 in the Director-General's name. On the other hand, there is no need for the impugned decision itself to pronounce on the validity of an earlier decision. Otherwise an appeals body could never be called upon to determine the lawfulness of any act other than a decision, and that would run counter to commonly held opinion. It is therefore immaterial in the present case whether or not the issue of an attestation may be regarded as a decision.

If the complainant's first claim is to be receivable, however, he must of course have an interest which is worth safeguarding. On that score there is no doubt. As the Organisation concedes, the validity of the complainant's claims for financial compensation depends on the impropriety of its issuing the attestation, i.e. the first claim for relief. Furthermore, the complainant already has an interest in securing a declaration - in particular by appealing to the Tribunal - of the unlawfulness of an act, such as the issue of an attestation, which may be repeated without his knowledge, i.e. without his having had the opportunity to contest it.

2. Contrary to what the complainant maintains, the Organisation did not commit a breach of article 4.12 of the Staff Regulations in issuing the attestation of 29 November 1973. That article provides for the establishment for each official of a personal file which shall be confidential. The confidential character of the file does not, however, apply to information which, though it may be deduced from the personal file, may be as readily obtained from other sources such as publications of the Organisation or public records.

In the present case the attestation of 29 November 1973 gave information on the date of the complainant's recruitment, the permanent nature of his appointment, his duty station, his working hours and all or some of his successive places of abode in Geneva. That is the kind of information which the complainant's former wife might have obtained either by consulting ILO publications or by applying to the competent authorities of the City of Geneva. Hence, even if that information might also have been found in the complainant's personal file, it was not confidential within the meaning of article 4.12. It was therefore not a breach of that article to communicate that information to the complainant's former wife.

3. Nevertheless in failing to inform the complainant of the request for information about him the Organisation failed to perform a duty by which it was bound.

In certain circumstances information which third parties seek from the Organisation about its officials may be used to the prejudice of the latter. Hence, in its capacity as an employer bound to safeguard the lawful interests of its staff members insofar as is compatible with its own interests and those of third parties, the Organisation is as a rule bound to inform its staff members of requests for information about them before answering such requests, in particular to enable staff members to prevent the injurious effects of using the information divulged. Although that duty does not derive from any express provision, it corresponds as it were to the staff member's duty of loyalty towards the Organisation and is implicit in the Staff Regulations. In view of the possible consequences of a breach it is in fact a legal duty and not just a rule of courtesy or expediency. True, the principle is not an absolute one, but is subject to exceptions, for example in cases of emergency when the Organisation cannot reach the staff member concerned in time or when interests superior to the staff member's interests prevent his being consulted.

In the present case there was nothing to warrant a derogation from the rule. The Organisation does not contend either that it would not have had time to inform the complainant of the request from his former wife or that some interest would have prevented its doing so. On the contrary, it had all the more reason to consult the complainant in that, as it admits, it did not know the attestation's intended purpose, which in all likelihood was of an exclusively private nature. Knowing as it did that the complainant was a party to divorce proceedings, the Organisation ought actually to have realised that in asking for the attestation the other party was seeking to obtain information to

support her case. The non-contentious nature of the proceedings before the Swiss court did not rule out such an assumption. Indeed, had the lawyer of the complainant's wife wished to act in the spouses' common interest he would probably have left it to the complainant himself to obtain a document which the latter could have obtained more readily than someone from outside the Organisation.

The fact that the attestation contained only information which had been published or was a matter of public knowledge is not decisive. The most that can be said is that that fact would have relieved the Organisation of the duty to consult the complainant if the information sought had plainly not been of such a nature as to cause him any prejudice whatever. Such was not the case, however, since the lawyer's request should have aroused the Organisation's suspicions. Besides, the attestation did entail certain expenses for the complainant, who had to engage a lawyer to answer the plea of incompetence submitted by his wife to a United States court on the basis of that attestation. Moreover, the prejudice which the complainant suffered was not fully compensated by the issue to him of the second attestation on 19 February 1974. Although the second attestation enabled him to give a full picture of his professional situation to the United States court, nevertheless, as has been stated, he had to engage counsel in the interval between the filing of the first and second attestations, and so to incur expense.

In the circumstances the Organisation had no relevant reason for not informing the complainant of the request made by his former wife's lawyer. The failure to consult him was not only discourteous and inexpedient, but a breach of a duty implicit in the Staff Regulations.

As to the placing of the attestation in the complainant's personal file:

4. In his second claim for relief the complainant asks the Tribunal to declare that the failure to put a copy of the attestation of 29 November 1975 in his personal file constituted a violation of article 4.12 of the Staff Regulations. That article provides for the establishment of personal files and gives staff members access at any time to information on their professional situation and in particular reports on their work performance. It also has the purpose of keeping the competent ILO bodies informed on each staff member's career. Since the provision was adopted in the interests of staff members as well as of the Organisation, it is open to the complainant to allege a breach. His second claim must therefore be considered on the merits.

5. That claim is unfounded. Of the five categories of documents which according to article 4.12 shall be put in the personal file, only the last is relevant to this case, i.e. "any other documents relating to measures officially taken or considered in connection with the official". In itself the text is ambiguous. On the narrow construction advocated by the Organisation it refers solely to measures which give rise to rights or duties. On the broader construction which the complainant seems to support it relates to all measures which may, whether closely or remotely, affect a staff member. Literal interpretation not being conclusive, it is necessary to consider the purpose of article 4.12 in order to determine its true meaning. As appears from paragraph 4 above, its purpose is to make available information on the professional situation of each staff member. Thus the phrase "documents relating to measures officially taken or considered in connection with the official" should be construed to mean documents which affect his professional situation. Accordingly, the Organisation was under no duty to put in the complainant's personal file the attestation of 29 November 1973, which had been issued for purely private purposes. The placing of similar documents in that file affords no reason for enlarging the Organisation's duties beyond the scope of article 4.12.

As to the establishment of one or more confidential files in addition to the complainant's personal file:

6. In his third, fourth and sixth claims for relief the complainant asks the Tribunal to declare that one or more confidential files exist which contain information relating to him, in violation of article 4.12 of the Staff Regulations. In his fifth claim for relief he asks for the abolition of such files and the right to consult them. These claims are receivable since the complainant has an interest in ensuring that all documents concerning him should be put in his personal file, to which he has free access under article 4.12. Also receivable are the claims for relief in his rejoinder whereby he asks for a list of the documents to which he is denied access, those claims being implicitly included in his original claims for relief.

7. By virtue of article 4.12 of the Staff Regulations each staff member may freely consult his personal file. Like any public administration, however, the Organisation is entitled not to put in an official's personal file some of the documents which concern him, that is keep such documents secret from him. Refusal to reveal the existence of any particular document is warranted not only by the interests of the Organisation or of third parties but also by those of the staff members themselves. According to circumstances the revelation of performance reports, criminal charges,

official action and even medical certificates may be harmful both to their authors and to the staff member concerned.

This right of the Organisation is of course not an absolute one. First, it may be exercised only in order to safeguard legitimate interests, i.e. interests superior to the staff member's interest in consulting confidential documents. Moreover, the Organisation cannot use documents of that kind as it pleased as a basis for taking decisions unfavourable to staff members. In particular, in the event of proceedings before the Tribunal the Organisation may be required to submit to it documents alleged to be confidential so that the Tribunal may ascertain their true nature. Unless there is a specific dispute, however, a staff member is not entitled to examine documents which are not placed in his personal file.

In the present case, and in view of these principles, the complainant is mistaken in objecting to the establishment of confidential files. Moreover, there being no current dispute concerning the use of the allegedly confidential documents, his claim to consult them is unfounded, as also is his request to the Tribunal to take cognisance of them.

As to the complainant's claims for financial compensation:

8. In his seventh, eighth and ninth claims for relief the complainant asks for the reimbursement of lawyer's fees, compensation for preparation of his complaint, and damages. Those claims were not submitted to the Director-General, and in a minute addressed to the Organisation the complainant merely reserved the right to submit them later.

According to Article VII, paragraph 1, of its Statute, that is by virtue of the rule relating to the exhaustion of internal means of redress, the Tribunal may consider only questions which have already been settled within the Organisation. That rule does not apply, however, to claims which by their very nature could not have been examined within the Organisation. In the present case that is true of the eighth claim, i.e. the claim for award of the costs of the current proceedings, and of the ninth claim insofar as it is based on the Director-General's refusal to give the complainant satisfaction. Hence only the seventh claim and the remainder of the ninth claim, not having been submitted to the Director-General, are irreceivable.

Since the complaint is allowed in part, the eighth claim and, insofar as it is receivable, the ninth claim are well founded, and a sum is awarded in total compensation which is fairly determined at 1,000 Swiss francs.

DECISION:

For the above reasons,

1. The impugned decision is quashed insofar as it fails to acknowledge that the issue on 29 November 1973 of an attestation for the benefit of the complainant's wife without consulting him beforehand constituted a breach of duty.
2. The Organisation shall pay the complainant 1,000 Swiss francs.
3. The complainant's other claims are dismissed.

In witness of this Judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar Of the Tribunal.

Delivered in public sitting in Geneva on 5 May 1975.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

