

FORTY-THIRD ORDINARY SESSION

In re TARRAB (No. 4)

Judgment No. 395

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Labour Organisation (ILO) by Mr. Nazmi Tarrab on 18 December 1978, the ILO's reply of 27 February 1979 and the complainant's statement of 28 May 1979 that he did not wish to file a rejoinder and repeating his application for oral proceedings for the hearing of witnesses;

Considering Article II, paragraph 2, of the Statute of the Tribunal, Articles 3.7 and 4.2(e) of the ILO Staff Regulations, and ILO Circular No. 58 (Series 6) of 29 July 1970;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

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

A. After serving for several years in Cairo, on 29 August 1974 the complainant, who held grade P.4, was appointed as ILO representative in Aden. The appointment was confirmed on 19 September and took effect on 1 October 1974. On 15 November he was informed that he would be paid a special post allowance corresponding to step 3 of grade P.5. He took up duty in Aden on 16 January 1975. In April he went back to Cairo on leave. He had to remain there because of illness and then obtained special leave without pay for a total period of eight months on the grounds of difficult family circumstances. He then carried out several missions to the Middle East until the end of March 1977, when he was instructed to return to Aden. Having taken further periods of leave, however, including sick leave, he did not go back until 7 October 1977. On 15 April 1978 he filed a request under Article 13.1 of the Staff Regulations for review of his grade and on 22 April filed a "complaint" under Article 13.2 protesting against the fact that he had not been promoted to P.5 on his return to Aden. By a letter of 19 September 1978 the Director-General dismissed that "complaint". The complainant received that letter on 1 October 1978 and that is the decision he now impugns. On 1 July 1978 the post in Aden was abolished and the complainant was sent back to Cairo.

B. The complainant states that when he received his salary on 29 October 1977 he found that it was still being based on payment of a special post allowance corresponding to grade P.5 in accordance with Article 3.7 of the Staff Regulations and that he had not been promoted to P.5. He therefore takes the view that his "complaint" of 22 April 1978 was filed within the prescribed time-limit of six months. His assignment to Aden in October 1974 and his reassignment there in October 1977 - appointments which the Director-General made by direct selection - were stated to be "without limit of time", as indeed was plainly acknowledged and confirmed time and again in various official ILO documents. Hence Article 3.7, which relates only to temporary assignments, is not applicable. The relevant provision was Article 4.2(e)(3). He accordingly asks the Tribunal: (a) to quash the Director-General's decision that Article 3.7 should indeed be applied and that his request for promotion by direct selection to grade P.5 with retroactive effect from 7 October 1977 should be rejected; (b) to quash the Director-General's decision not to promote the complainant to P.5 by direct selection on the basis of qualifications, including length of service, on the grounds that that decision was based on mistakes of fact and that clearly mistaken conclusions were drawn from the facts; and (c) to order that the complainant be promoted to P.5 with retroactive effect from 7 October 1977.

C. The ILO takes the view that the complaint is time-barred. The decisions on the complainant's grade and salary in Aden were taken in the second half of 1974 and he should have filed his complaint within six months. He is mistaken in contending that his return to Aden in 1977 was a new assignment: it was still the same assignment as he had been given in 1974, even though there had been very long interruptions because of periods of leave and missions. He bases his argument that it was a new assignment on a letter which the Chief of the Personnel Department wrote to him on 30 May 1975 and which said: "It will therefore no longer be possible to keep you on [in Aden]". What that letter meant was that the complainant could not expect to be able to give concern for his family priority over the ILO's commitments towards the Yemen and Democratic Yemen, that he would have to be replaced in Aden during his absence and that he could not be sent back there afterwards. No other assignment could

be found for him at the time, however, he was not transferred and so he continued his assignment in Aden. As to the merits, the ILO points out that Articles 3.7 and 4.2 are on a par: neither can be given primacy over the other. Moreover, Article 4.2(e), on which the complainant relies, does not apply to assignments to posts like the one in Aden, which are governed by ILO Circular No. 58, Series 6, of 29 July 1970. Such assignments are to duty stations other than Geneva, many of them distant, where conditions may be arduous and service therefore seldom exceeds five years. They are genuinely temporary assignments. The description of the complainant's assignment in 1974 as "without limit of time" could not be taken to mean that the posting to Aden was permanent. That was why payment of the special post allowance provided for in Article 3.7 was warranted. That system of appointment is required to preserve the pyramid of grades in the Office. Moreover, had the complainant on his return to Aden been starting a new assignment, as he contends, it would have been an even shorter one and afforded all the greater justification for applying Article 3.7. Oral proceedings would serve no purpose whatever: the ease raises only questions of law and the evidence of witnesses would be immaterial. The ILO concludes that the complaint is irreceivable and, subsidiarily, that it should be dismissed on the merits.

CONSIDERATIONS:

The complainant merely asks the Tribunal to quash a decision taken by the Director-General on 19 September 1978 to continue to apply Article 3.7 of the Staff Regulations to him on his assignment to Aden and not to apply Article 4.2.

As to the application of Article 3.7 of the Staff Regulations:

1. The complainant had been serving in Cairo since June 1969, but in the interests of the Organisation had to be withdrawn from there in 1973. For personal reasons he refused an offer of an assignment at ILO headquarters in Geneva. Out of consideration for his family circumstances the Director-General decided to send him to an Arabic-speaking country.

By a decision of 4 September 1974 and a supplementary decision of 15 November, which were taken under Article 3.7 of the Staff Regulations and set no limit of time, the Director-General appointed him with effect from 1 October 1974 to the senior post of ILO representative in Aden, with responsibility for the Yemen and Democratic Yemen.

According to those decisions the complainant, who held grade P.4, was granted the salary and a special post allowance corresponding to step 3 of grade P.5.

The decisions of 4 September and 15 November 1974 assigning the complainant to Aden and determining his remuneration were not impugned before the Tribunal within the time limit. They had therefore become final when the complainant challenged them in April 1978 and remained in full legal force as long as they were neither amended by the Director-General himself nor invalidated by special circumstances of time or of place.

After a period of leave the complainant took up duty in Aden on 16 January 1975. Having spent nine weeks there, he joined his family in Cairo, where he stayed for 45 days on leave. He disobeyed instructions to return to Aden on 10 April and applied for six months' leave without pay. The period was later extended by two months. After a brief return to work to carry out several missions in the Middle East he was again instructed to go back to Aden, on 9 May 1977. On the grounds of further periods of sick leave he did not return to Aden until 7 October 1977. After yet another absence he was back in Aden again on 27 November 1977, and he stayed there until 1 July 1978, when his post was abolished.

It appears from the foregoing that on 27 November 1977 the decisions of 4 September and 15 November 1974 had not been cancelled and it was lawful for the Director-General to continue to apply them since no special circumstance warranted treating them as no longer valid.

As to the application of Article 4.2(e) of the Staff Regulations:

2. Article 4.2(e) reads: "Posts in the grade of P.5 shall be filled by the Director-General by (1) transfer, (2) promotion on the basis of internal competition, (3) promotion by direct selection on the basis of qualifications, including length of service, (4) appointment on the basis of qualifications, provided that this method may be employed only (i) when the provisions of (a) above cannot be satisfied by the employment of any other method, or (ii) when the post to be filled is that of chief of branch."

It is clear from the wording of that provision that the Director-General enjoys discretionary authority and is free, but not obliged, to make an appointment by direct selection.

The Director-General considered whether it was desirable to appoint the complainant to grade P.5. In the exercise of his discretionary authority he decided that there was no reason to do so. That decision is not tainted with any of the flaws which entitle the Tribunal to interfere.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 24 April 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy