

SIXTY-FIFTH SESSION

In re NOOR

Judgment 939

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hassan Noor against the International Labour Organisation (ILO) on 27 January 1988 and corrected on 1 February, the ILO's reply of 30 March, the complainant's rejoinder of 6 July, as corrected on 12 July, and the ILO's surrejoinder of 30 September 1988;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 1.9(a), 4.2(f), 10.1 and 13.1 and .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, a citizen of Somalia, joined the ILO in 1966 at grade P.1 and in 1967 was granted an appointment without limit of time. He was assigned to the Human Resources Department at headquarters in Geneva. Having asked for a transfer, on 1 April 1973 he was sent out to the ILO's Regional Office for Africa, in Addis Ababa, as a P.2/P.3 programme officer. He got grade P.3 on 1 January 1975. He was transferred again to the ILO office in New Delhi as from 1 October 1976 and put in charge of technical co-operation. The director of that office, Mr. Ghosh, thought poorly of his performance.

On 1 March 1981 he was made deputy director of the ILO office in Islamabad at grade P.4. In December 1982 the director of that office, Mr. Chambers, reporting on his performance in 1981-82, said he was unfit for his post and should be recalled. The Assistant Director-General for Asia and the Pacific also recommended the complainant's transfer to headquarters. His salary step increment for 1983 was withheld. On 10 March 1983 headquarters transferred him again, as "officer on special duties" to the Regional Office for Asia and the Pacific, in Bangkok, and he moved there in mid-April. In reports for 1982-83 and 1983-84 his supervisor recommended "a period of time in Geneva preparatory to field assignments in Africa".

He went to Geneva and Addis Ababa in July and August 1985 to see about other assignments, and headquarters told him by a telex of 10 September that as from 1 October he was transferred to the Technical Co-operation Department in Geneva for three months, "with possibly a short extension into 1986 awaiting transfer elsewhere". No post being vacant, he was put on "mission status".

A minute of 24 March 1986 informed him that he was appointed deputy director of the ILO office in Lagos as from 1 July, but on 7 July the Director of the Joint Medical Service in Geneva, Dr. Demé, recommended keeping him in Geneva for about a year for reasons of health. On 12 June 1987 Dr. Demé reported that there was no reason for him not to work in a developing country and on 26 June he was told his assignment to Lagos would start on 1 September. On 13 August he made a request for review under Article 13.1 of the Staff Regulations, saying that the climate of Lagos would harm his health. A minute of 28 October appointed him deputy director of the ILO office in Dar es Salaam as from 1 January 1988. The ILO Staff Union Committee, of which he was a member, took up his case. He lodged a "complaint" under Article 13.2 on 5 November, but the Director-General rejected it in a letter of 16 December 1987, the decision he impugns. His transfer to Dar es Salaam was confirmed on 13 January 1988 as from 1 February.

B. The complainant alleges (1) breach of the terms of circular 180 (series 6) of 22 May 1980, which says that field service shall ordinarily be for three years and the ILO will look for a post at headquarters for someone who has served long in the field. (2) He submits that he has been unfairly treated. The ILO have packed him off again to the field after nearly 13 years' being moved about from pillar to post, when many officials have spent little or no time outside Geneva. It is outrageous to make the alleged lack of a post a pretext for transferring him when many suitable posts are vacant at headquarters. The Organisation are in breach of good faith because all along they promised him assignment to headquarters and he has incurred expense settling in Geneva. (3) When someone is to go to the field the custom is to offer him promotion and return to Geneva after three years at most and to seek his

consent. The ILO have sent the complainant out to Dar es Salaam against his will, offered no guarantee of return and granted him no promotion. (4) The ILO are in breach of Article 4.2(f) of the Staff Regulations: "The method of filling any other vacancy below the grade of D.1 shall be decided by the Director-General after consulting the Selection Board". The ILO told the complainant of his transfer without even informing the Board. No competition was held. He asks for disclosure of "all the relevant papers" about the filling of the post. (5) Since June 1987 he has been on the Staff Union Committee provided for in Article 10.1, he will remain a member until November 1988, and it is in breach of freedom of association and of 10.1(c), which requires the release of members from their official duties, not to let him continue to act as such. (6) The transfer disregards his personal circumstances, in particular the state of his health.

He seeks the quashing of the impugned decision, the grant of a post at headquarters, damages and costs.

C. In their reply the ILO submit that insofar as the complainant's pleas and claims go beyond the scope of his internal appeal of 5 November 1987 they are irreceivable on the grounds of his failure to exhaust the internal means of redress.

As to the merits, the Organisation observe that according to the terms of his contract of 29 May 1967 "during your appointment with the ILO, the Director-General may transfer you to other posts or duty stations" than Geneva. Moreover, the Director-General has discretion to transfer staff in the ILO's interests under Article 1.9(a) of the Staff Regulations: "The Director-General shall assign an official to his duties and his duty station subject to the terms of his appointment, account being taken of his qualifications". The transfer will be lawful provided the exercise of discretion shows none of the flaws that warrant setting it aside. The transfer of the complainant to Dar es Salaam shows no such flaw. In particular it neither impairs his dignity nor causes him financial injury. His allegations of procedural flaws are unfounded: no competition is held when the Selection Board recommends "direct selection", as it did in this case.

The treatment of him has been consistently fair, his allegations on that score being tendentious. Many spend longer in the field than he has and besides he volunteered for field work. The Organisation did their best to place him at headquarters, as his supervisors had recommended and he himself wanted, but it was made plain to him that if no suitable post fell vacant in Geneva he would spend only a short while there before going back to Africa. He was not promised a lengthy stay in Geneva. It is not the ILO's fault that he proved unsuccessful in the competitions he entered for headquarters posts. What he really wants is a break with the rules to let him stay on in Geneva. Circular 180 did not apply when he first moved to the field. Besides, it is just a statement of policy, its application being subject to the rules and to financial constraint. The ILO's interests come before the staff member's own wishes.

There was no breach of Article 10.1, which is irrelevant anyway. The complainant is not alleging abuse of authority in that the ILO's purpose was to get rid of a staff militant; what he seems to be arguing is that staff union representatives should be immune to transfer altogether, and that is not what 10.1 means. He stood in the Staff Union elections after he had been told of his transfer to Lagos. Besides, he may still serve the Union in East Africa.

As for his personal circumstances, the state of his health was not ignored: the ILO got Dr. Demé's consent to his transfer. At all events he knew that his stay in Geneva would be short and had no good reason to run up expense settling in. The domestic and personal inconvenience of transfer is something employees of a worldwide organisation have to put up with.

D. In his rejoinder the complainant comments in detail on many points in the ILO's version which he sees as mistaken, tendentious or irrelevant.

As to the issues of law, he reaffirms breach of circular 180, which he submits does lay down rules that the staff member may rely on and does apply to his case because by the time it came into force he was already in the field, in New Delhi. The ILO's attempts to refute his allegations of unfair treatment are condescending in tone and implausible in content. He has been victimised and his dignity injured. He asks for information and statistics on transfers of P.4 officials between the field and headquarters since 1980, submitting that they will show how far he has been discriminated against. There were posts in Geneva he could have been given. He develops his allegations of breach of Articles 4.2 and 10.1. He seeks disclosure of the records of the Selection Board's discussion of his case. He observes that he was a member of a joint union-management body and may no longer serve as such in Dar es Salaam; moreover, his transfer is incompatible with the exercise of his responsibilities as a staff union representative at headquarters. The ILO have disregarded in particular certificates from two doctors in Geneva

subsequent to Dr. Demé's minute of 12 June 1987. He was told that his transfer to the Technical Co-operation Department would be short, the implication being that he would soon get another post at headquarters. He presses his claims.

E. In their surrejoinder the ILO develop their pleas, observing that the rejoinder is irrelevant and tendentious in its version of the facts, which they seek to correct, and levels gratuitous and offensive accusations, which they reject. The complainant imputes to circular 180 a binding force it was never meant to have. Though the aim of rotation of staff between headquarters and the field holds good, there are financial difficulties in applying it strictly. Besides, the matter at issue is not the complainant's return to Geneva but his assignment to the field, and in that respect the circular preserves the Director-General's prerogatives. The Director-General has properly exercised his discretionary authority on the Selection Committee's recommendation. The complainant is mistaken in likening his position to that of officials at the same grade who have stayed at headquarters and not to officials, like himself, who have been transferred to the field.

CONSIDERATIONS:

1. The complainant was recruited to the staff of the International Labour Office on 25 August 1966. His contract provided that he would be assigned initially to the Human Resources Department at headquarters in Geneva, but that during his appointment the Director-General might transfer him to other posts or duty stations. He was granted study leave for 16 months, from September 1970 to December 1971. On 1 April 1973 he was transferred at his request to the ILO's Regional Office for Africa, in Addis Ababa, as a programme officer and was promoted to grade P.2/P.3. His post was graded P.3 at 1 January 1975.
2. The complainant was offered a vacant P.3 post in the ILO office in New Delhi in 1976. He was also told that the P.4 post of deputy director of that office might fall vacant the following year and that if his work proved satisfactory he would have a chance of getting it. He made his acceptance conditional on immediate promotion, but it was refused and he was transferred under Article 1.9(a) of the Staff Regulations.
3. Though difficulties arose in New Delhi, the report on his performance in the period from 1 October 1978 to 30 September 1980 recorded some improvement in the quality of his work and in his working relations.
4. He was promoted to P.4 on 1 March 1981 on appointment as deputy director of the ILO office in Islamabad. Again there were difficulties, and his step increment for 1983 was withheld.
5. He applied on 24 August 1982 for a post at headquarters in the Department of Employment and in October 1982 for his transfer to Geneva in accordance with the terms of ILO circular 180 (series 6) of 22 May 1980, which is about the transfer of staff between headquarters and the field.
6. Because of deteriorating relations between the complainant and the director of the Islamabad office an immediate solution was called for. The complainant was transferred to Bangkok in March 1983 as an officer on special duties. In accepting the transfer he stated his understanding that it would not affect his request for reassignment to headquarters.
7. He applied several times over the next two years for vacant posts at headquarters but despite efforts on his behalf by the Personnel Department was unsuccessful.
8. In comments on the report on his performance in the period from October 1982 to September 1983 he stated his feeling that after 10 years in the field it would be beneficial to his career for him to have a period at headquarters before further field assignments. His then supervisor, the Deputy Director of the ILO Regional Office for Asia and the Pacific, in Bangkok, endorsed that view, adding that he would like to serve in Africa after a spell at headquarters, and strongly recommended that he "spend a period of time in Geneva preparatory to field assignments in Africa". He signed the report without comment on 27 March 1984.
9. In his next appraisal report, for the period from October 1983 to September 1984, he again asked for transfer to headquarters in accordance with circular 180. The Deputy Director again endorsed his request, observing that he wanted to return to Africa after time at headquarters, and again strongly recommended letting him "spend a period of time in Geneva preparatory to assignments in Africa, as he belongs to that region and started his career in Africa". The complainant signed the report without comment on 12 April 1985.

10. From November 1984 to March 1985 he was on special assignment in Dakka.
11. In July and August 1985 he visited Geneva at his own expense and the Chief of the Personnel Development Branch arranged several interviews for him in branches in which he might be used, without finding any vacancy.
12. The Organisation contend that a realistic solution was then found that took account of all the circumstances and that the complainant agreed to it, though he denies that. It consisted in his temporary assignment to headquarters for intensive retraining with a view to his transfer to administrative work in Africa.
13. The complainant was accordingly sent in August 1985 to the ILO's Regional Office for Africa, in Addis Ababa, to see Mr. Abdel-Rahman, the Assistant Director-General in charge of Africa, and to find out what vacancies there were in the African field offices.
14. By a telex dated 10 September 1985 he was informed of his assignment to the Technical Co-operation Department in Geneva from 1 October, initially for three months but with the possibility of a short extension in 1986 pending transfer elsewhere. He was later temporarily assigned to the Policy and Programme Section of the Department.
15. He was placed on mission status from 1 October to 31 December 1985, the costs being charged to his post in Bangkok.
16. After consultations between headquarters and the Regional Office for Africa he was informed on 24 March 1986 of his appointment to the post of deputy director of the ILO's office at Lagos with effect from 1 July 1986. In a letter of 8 April he objected to any transfer from headquarters and asked for reconsideration of the decision and for appointment to a post at headquarters. He then obtained on grounds of health the suspension of his transfer for twelve months.
17. In October 1986 he stood for election to the Committee of the ILO Staff Union. He was co-opted as a member of the Committee in June 1987 on the departure of one of the elected members. The same month the Director of the Joint Medical Service in Geneva gave his opinion that there was no medical reason why he should not be posted to a developing country. He was informed on 26 June 1987 of his appointment as deputy director of the Lagos office with effect from 1 September 1987.
18. On 9 July he again objected to the transfer. He was told on 20 July that despite the Personnel Department's considerable efforts and his own (he had not won any of the internal competitions he had entered) no vacant budgeted post had been found at headquarters that suited his qualifications and his appointment to Lagos was consequently confirmed.
19. The complainant again asked on 13 August 1987 for reconsideration on the grounds that the humid climate of Lagos posed a risk to his health.
20. The Director of the Personnel Department said he was willing to reconsider the duty station but confirmed the transfer to Africa, "the only Department where we have vacancies corresponding to your qualifications".
21. A minute of 28 October 1987 from the Chief of the Personnel Development Branch notified his transfer to the post of deputy director of the ILO office at Dar es Salaam with effect from 1 January 1988. His internal "complaint" dated 5 November 1987 was rejected on 16 December 1987, and that is the decision he impugns, his appointment to Dar es Salaam having been confirmed on 13 January 1988 with effect from 1 February 1988.
22. In deciding to transfer any official the Director-General acts under Article 1.9(a) of the Staff Regulations, which reads:

"The Director-General shall assign an official to his duties and his duty station subject to the terms of his appointment, account being taken of his qualifications."
23. The method of filling vacancies below grade D.1 is prescribed in Article 4.2(f), which provides that it "shall be decided by the Director-General after consulting the Selection Board. The methods to be employed shall comprise transfer in the same grade, promotion or appointment, normally by competition". Annex I to the Staff Regulations lays down the internal competition procedure, which applies to "the filling of vacancies other than of a temporary

nature".

24. In circular 180, which the complainant cites, the Director-General states his intention of applying a policy "with a view to facilitating the assignment of staff in the Professional and higher categories to the field". The relevant points of the circular are as follows. At the time of recruitment officials will be told that they will normally be expected to undertake an assignment in an external office, some three years after joining the Office. Wherever possible applications will be invited to fill positions in the field. Fully satisfactory performance in field assignments will be one of the factors to be taken into account for promotion to any grade in the Professional and higher categories or for transfer to posts open to internal competition and for which field experience would be useful. If there are no suitable applicants for a field assignment it may be necessary to select an official for it. If the official is opposed to the transfer the Personnel Department will fully examine the objections, due weight being given to all factors before a final decision is taken. In the case of transfer from headquarters to the field, an official will go for a specified period, namely three years, after which there will be transfer back to headquarters. There may be an extension on request. The circular added that an intensive effort would be made in the next twelve months - viz. from May 1980 - to place "officials who have already spent a substantial period in the field and wish to return to Geneva".

The alleged breach of circular 180

25. The first ground on which the complainant challenges the decision to transfer him is breach of circular 180. Since he did not hold a post at headquarters at any time after the circular came into force the provision relating to transfer from headquarters to the field for a three-year period did not apply to him. The circular does not promise that service in the field will be limited to a specific number of years for any official, since it relates to officials transferred from headquarters posts. Nor does it make an unqualified promise to bring back to headquarters an official who has spent a substantial period in the field: all it promises is intensive effort to do so in the 12 months from May 1980. The complainant first applied for transfer to Geneva in August 1982 and indeed the Organisation did make considerable efforts to find a suitable post for him as he did himself. But headquarters posts are subject to internal competition, and although he applied for many such posts, he was never successful; nor did he allege that he had been wrongly refused any of them. In the event the decision to send him to Africa was made because only there were there vacant posts corresponding to his qualifications. In the circumstances there was no breach of circular 180.

Allegations of unfair treatment

26. The complainant alleges that it is unfair to post him back to the field when he has spent thirteen years there. The facts show that despite considerable efforts the only vacancies corresponding to his qualifications have been found in Africa. It is therefore not unfair to post him there even though other officials of the same grade have spent less time in a field office. Nor is his case unique, other officials having spent longer in the field than he.

27. The complainant further alleges that it was unfair to keep him for two years in Geneva without putting him on a proper post. The correspondence shows that when brought back to Geneva he was to be on mission status for three months with a possibility of a short extension. His failure to go to Lagos was for reasons of health and his departure was delayed for a year. Further delay occurred when he objected to the climate of Lagos and a search was made for a different post, which was eventually found in October 1987 to be the one in Dar es Salaam. The internal appeal proceedings having been completed his transfer to Dar es Salaam was confirmed and he was required to report there by 1 February 1988.

28. It is plain from the written evidence that the complainant was given no false promises about the basis of his stay in Geneva, which was at all times understood to be temporary. Moreover, since posts at headquarters are subject to competition and since he did not succeed in any of the many competitions he entered for such posts there is no unfair treatment in his having held no regular post in Geneva during his temporary stay there.

29. He further accuses the Organisation of bad faith in that he was assured in August 1985 that his transfer to headquarters had been decided and that, relying on that assurance, he incurred expense in settling permanently in Geneva. The Organisation replies that it always made it quite clear that if no suitable vacancy was found for him at headquarters his stay would be limited. The telex of 10 September 1985 from headquarters bears that out: the Organisation informed the complainant of his assignment to the Technical Co-operation Department at headquarters from 1 October, initially "for three months with possibly a short extension into 1986 while awaiting

transfer elsewhere". The wording is very clear, and the complainant should have been under no illusion that he was moving permanently to Geneva.

The alleged breaches of procedure

30. The complainant alleges that an official who is transferred to the field is offered promotion, financial advantages and return to headquarters in three years or less and that in any event he is not obliged to go. He submits that the procedure was violated in his case, except that he did get financial advantages.

For one thing, Article 4.2(f) prescribes the methods of filling a vacancy below grade D.1, which are "transfer in the same grade, promotion or appointment, normally by competition". In this case the decision was to fill the vacancy by transfer in the same grade. For another thing, the alleged requirement that the official return to headquarters after three years cannot in any event apply to the complainant since he has not been transferred from a post at headquarters. Nor is there any substance to his contention that an official cannot be constrained to go to the field. Circular 180 does not say so. If the Organisation's best interests so require, if the post suits the appointee's qualifications and if his contract so permits, the assignment may be ordered even against his wishes. The plea fails.

31. The complainant is alleging breach of Article 4.2(f), which reads: "The method of filling any other vacancy below the grade of D.1 shall be decided by the Director-General after consulting the Selection Board ...".

The ILO replies that since the complainant did not advance the plea in the internal proceedings he may not put it to the Tribunal. That is not a sound answer. Although the complainant submitted an internal appeal seeking the quashing of the transfer to Dar es Salaam, the claims he addresses to the Tribunal remain constant and he is free to submit to it a new plea in support of them. What he may not do is address to the Tribunal claims he has not already put to the ILO. That is not his case, and the Tribunal will therefore entertain the plea.

It is not in dispute that the Selection Board was not consulted before the transfer was decided on, and the Organisation does not plead urgency. The impugned decision is therefore flawed.

Yet the procedural flaw is a minor one in this instance. The Selection Board is consulted only on the method of filling a post; it does not give anyone a hearing; and in urgent cases the Director-General may, on certain conditions, decide at his own discretion on the method of filling the vacancy. In this instance, moreover, the Selection Board was consulted before the Director-General took his final decision on the internal appeal.

The staff of an international organisation are nevertheless entitled to expect the competent authorities to abide by rules of their own making. So although there is no call to set the decision aside, the flaw caused the complainant injury and the Tribunal will state the consequences below.

The alleged breach of right to home leave

32. The complainant further contends that his right to home leave was violated. The claim was neither raised in the internal "complaint" to the Director-General nor mentioned in the impugned decision. It is therefore irreceivable.

The alleged breach of Article 10.1 of the Staff Regulations.

33. The complainant submits that since he was a member of the Staff Union Committee from June 1987 his transfer to the field is in breach of Article 10.1 of the Staff Regulations, which relates to staff relations, and of the general principle of freedom of association.

There is no rule which forbids the transfer of a member of the Staff Union Committee outside Geneva and election to the Committee confers no immunity from transfer. If there were an abuse of authority in exercising the right of transfer - if, for example, the real reason were to get rid of a staff militant - the Tribunal would interfere. But plainly that is not the complainant's case. He should always have realised that his stay in Geneva was temporary and that his services to the Staff Union Committee might be curtailed when his transfer went through. It was indeed while his transfer was suspended for reasons of health that he stood for election. In those circumstances there has been no breach of Article 10(1) or of freedom of association.

The alleged disregard of personal circumstances

34. The complainant has a further argument that the Organisation did not take his personal and family situation or the state of his health into account.

As to the latter, the medical adviser stated in his opinion of 12 June 1987 that the complainant might be assigned to a developing country. Although he challenges that opinion, he submits no convincing argument or evidence in support of his contention.

As to the complainant's statement that transfer from Geneva is financially disastrous for some officials, that sort of general observation does not afford any grounds for setting the decision aside.

Conclusions

35. The impugned decision is tainted only with a procedural flaw of lesser importance. In accordance with Article VIII of its Statute the Tribunal will therefore refrain from quashing it and instead will order the Organisation to pay the complainant the sum of 4,000 Swiss francs in damages.

36. The complainant is also awarded 2,000 Swiss francs towards costs.

DECISION

For the above reasons,

1. The Organisation shall pay the complainant damages in the sum of 4,000 Swiss francs.
2. The Organisation shall pay him 2,000 Swiss francs towards costs.
3. His other claims are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner