

SEVENTY-THIRD SESSION

In re PINTO DE MAGALHAES (No. 3)

Judgment 1189

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Constantino José Pinto de Magalhaes against the International Labour Organisation (ILO) on 20 September 1991 and corrected on 11 October 1991, the ILO's reply of 31 January 1992, the complainant's rejoinder of 24 March and the Organisation's surrejoinder of 8 May 1992;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 4.3, 4.4, 10.2 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. In 1963 and until 1967 Article 4.3(b) of the Staff Regulations of the International Labour Office read as follows:

"In Geneva a locally recruited official shall ... be defined as an official who at the time of his appointment has been resident for at least three years in Switzerland or in French territory within a radius of 25 [kilometres] from Geneva, provided that Swiss nationals residing in Switzerland or in French territory within a radius of 25 [kilometres] from Geneva, and French nationals residing in French territory within that radius, shall be treated as locally recruited, irrespective of the duration of such residence."

Article 4.4(a) of the Staff Regulations read then and still reads:

"... An official's home shall remain unchanged for the duration of his service unless the Director-General, after consulting the Administrative Committee, decides that there are compelling reasons for permitting a change."

The complainant, a Portuguese citizen who was born in 1942, joined the Office at Geneva in July 1963 under a short-term appointment in the General Service category. He was treated as "locally recruited" and, by a minute of 13 January 1964 to the Personnel Office, he asked that any short-term or long-term appointment should be offered to him under local recruitment since he had been living in Geneva for three years. As from 1 June 1964 his appointment was subject to the Staff Regulations. On 1 April 1965 he took up an indefinite appointment as a locally recruited official.

He applied on 8 March 1985 for the grant of non-local status for family reasons. On 8 May 1985 the ILO refused on the grounds that he had been living in Geneva for almost twenty-four years and the Director-General had no authority under the Staff Regulations to derogate from Article 4.3.

The complainant wrote two minutes to the Personnel Policy Branch, one on 1 August 1985 and another on 27 February 1986, applying for review of the matter. Having got no answer, he sent a minute to the Director of the Personnel Department on 19 October 1989 seeking referral to the Administrative Committee, a joint advisory body provided for in Article 10.2 of the Staff Regulations. The Committee having failed to agree on any recommendation to the Director-General, the Personnel Department told him by a minute of 7 November 1990 that his claim had been refused.

On 22 April 1991 he submitted an internal "complaint" to the Director-General under Article 13.2 of the Regulations against the decision of 7 November 1990. The ILO rejected it on 24 June 1991 on the grounds that, besides being irreceivable, it disclosed no new issue warranting review of a decision that went back nearly 28 years and could succeed only by way of a derogation that might set a most awkward precedent. That is the decision under challenge.

B. The complainant submits that the Organisation has drawn clearly wrong conclusions from the evidence. Since he

was neither Swiss nor French and had not been resident within a radius of 25 kilometres from Geneva at the time of appointment, it was wrong to treat him as locally recruited under Article 4.3(b) of the Staff Regulations as in force up to 1967. The continuous period of his residence in Switzerland did not begin until July 1963, when he joined the ILO, i.e. less than a year before June 1964, when he first came under the Staff Regulations, and less than two before April 1965, when he got an indefinite appointment. The only reason why his home was not recognised as being in Portugal was the then political situation in that country. He could not go home without being conscripted for military service in warfare to which he had conscientious objections. That was why he asked to be treated as locally recruited.

In 1976 the Administrative Committee laid down the criteria which warrant review under Article 4.4(a) of the Staff Regulations of the determination of a staff member's home, and one of them is the existence of strong ties with the country of which he is a national. He submits that he can show sufficient grounds to warrant a change in that determination in his case: since the change of government he has resumed links with Portugal; he goes to Lisbon often for family reasons, and he has bought a flat there to retire to.

Citing decisions of the ILO's on three officials who were either in like case or in the same category of staff, he suggests that his staff union work may be the real reason for turning down his claim and says that, if so, it would be discriminatory.

He seeks the quashing of the decision of 24 June 1991, the change of his home from Geneva to Lisbon, and costs.

C. In its reply the ILO points out that in his minute of 13 January 1964 the complainant declared that he had been resident at Geneva for three years and said nothing of political motives for wanting local status. His only motive for seeking local status was to get a job. He neither submitted a 13.2 "complaint" against his local recruitment in April 1965 nor appealed against the denial in 1985 of his request for review. The political situation in Portugal was not the reason for the original decision and in any event the change of government came about long before 1989. There has been a time bar for years. To allow the complainant's case would impair the stability of legal relations since it would mean that denial of an entitlement might be challenged for ever afterwards on the pretext that at the time "it was unlawful".

On the merits the ILO submits that its refusal to change his home - the only decision he is impugning - rests on Article 4.4(b), which says that the duty station of a locally recruited General Service official shall be treated as his home. He cites no principle of law that would entail displacing a decision that has stood for years and a term of his appointment. So his complaint is devoid of merit.

The Organisation's answers to his other two pleas are subsidiary.

Even if what he said in 1964 about the period of his residence in Geneva was false he may not now go back on it: *nemo auditur propriam turpitudinem allegans*. There is no evidence to support his contention that he had political motives for not wanting his home to be in his own country.

He offers not a jot of evidence to bear out his charge of discrimination on grounds of union activity. In her letter of 24 June 1991 the Director of the Personnel Department actually says she appreciates his difficulty. In answer to his contention that three others fared better the ILO submits that none of them was in like case. One is in the Professional category and so in a different position in law: Article 4.4(b) applies only to General Service staff. The other two sought review of their local status, a matter not at issue here.

D. As to receivability, the complainant points out in his rejoinder that the ILO itself entertained his internal appeal in 1990, five years after his request for review on compassionate grounds.

He produces a certificate from the cantonal residence bureau of Geneva ("Contrôle de l'habitant") and another from the Portuguese Consulate in Geneva declaring that he was resident in Geneva from 1 June 1964. Citing the job application form he submitted on 8 January 1963 he denies that his statement was untruthful and says that the Administration knew full well he had not been a resident of Geneva for the three years it took to qualify for local recruitment: it was an official in the Personnel Office who told him what to put.

He observes that, notwithstanding the rule in Article 4.3(b) that General Service staff shall be recruited locally as far as possible, 238 out of 637 General Service officials have non-local status.

E. In its surrejoinder the ILO answers each of the pleas in the complainant's rejoinder. It observes that though the Staff Regulations set an ample time limit of six months for internal appeal he did not act in time, or even after the political situation in his country had altered. The Administration gave him an opportunity of challenging the refusal, not of his application in 1985 for review of local status, but of his request in 1990 for change of home.

As to the statement he made on 13 January 1964 about his place of residence - which he says someone in the Personnel Office unofficially suggested - the ILO submits that the reason why he complied was that he would otherwise have had trouble in obtaining a G.2 post as clerk for which there was no shortage of qualified candidates in Geneva, not that non-local status might have exposed him to the danger of going back to Portugal.

CONSIDERATIONS:

1. By an internal "complaint" of 22 April 1991 the complainant, a Portuguese citizen employed since 1963 by the International Labour Office in Geneva, asked that his recognised "home" for the purpose of home leave be changed from Geneva to Lisbon. He seeks the quashing of a decision that the Director-General of the Office took on 24 June 1991 to reject that claim.

Relying on Article 4.4(a) of the Staff Regulations of the Office, which is reproduced in A above, the complainant argues that the decision he is challenging is unlawful. He contends that, although under the article the Director-General's authority to change the determination of an official's home is discretionary, his exercise of it is subject to review: according to precedent the Tribunal will set the decision aside if it finds any of the flaws it ordinarily holds to be fatal. The complainant goes on to plead two such flaws in this case: first, that the Director-General drew clearly mistaken conclusions from the evidence in that, in the words of Article 4.4(a), there were "compelling reasons" for changing the determination of his home; and, secondly, that there was abuse of authority in that the Director-General discriminated against him.

2. Besides maintaining that his complaint is irreceivable, the Organisation answers that it is devoid of merit: his home continues to be at his duty station, which is Geneva, in accordance with Article 4.4(b) of the Staff Regulations:

"Notwithstanding (a) above, the home of an official of the General Service category who has been locally recruited as defined in Article 4.3 (General Service Category) shall be deemed to be at the duty station."

The plea that wrong conclusions were drawn

3. At the outset of his period of service, which began in July 1963 the complainant held short-term appointments to which the Staff Regulations did not apply. It was in June 1964 that the Staff Regulations first became applicable to him, including Article 4.3(b) as then in force. That provision too is reproduced in A above. He argues that it was wrong to grant him local status on recruitment since he had not at the time yet resided "for at least three years in Switzerland or in French territory within a radius of 25 [kilometres] from Geneva".

4. He observes that from November 1960 to July 1963, when he took up duty with the ILO, he spent several months in Portugal. With his rejoinder he files certificates from the Geneva cantonal authorities and from the Portuguese consulate in Geneva stating that he was resident in the canton only from 1 June 1964.

The two certificates are irrelevant to the determination of the complainant's home since they were not in his records at the time when the Director-General took the original decision.

5. In his internal "complaint" of 22 April 1991 the complainant states that he spent several months in Portugal at different times between 1960 and 1963 and he offers to submit evidence if required. But in his minute of 13 January 1964 he said that, having been resident in Geneva for three years, he believed that under any future appointment he should "naturally" have local status. He added that the place of his residence could be checked against his job application of 8 January 1963. One question in the job application form - No. 10 - read: "Since what date have you resided in the town or locality given in question 7"? The complainant's answer to question 7 was "Geneva" and his answer to question 10 "November 1960". In signing the application he certified that his replies were "true, complete and correct".

Having thus declared to the Organisation at the time that he had resided in Geneva since November 1960, the complainant is now estopped from contending that he was wrongly given such status in 1964.

6. He argues that the reason for the request for local status in his minute of 13 January 1964 was that he was unable to go back to Portugal because of the political situation and, more particularly, because he would be at risk of being conscripted as a combatant in colonial warfare to which he had conscientious objections and of being prevented from returning to work at the ILO.

His argument fails.

In his minute of 8 March 1985 applying under Article 4.3 of the Staff Regulations for a change to non-local status he pleaded family reasons and "compassionate grounds": he said nothing of the political changes that had taken place in 1974 in Portugal. He offers no plausible explanation as to why he waited so long to apply for a change of status, and indeed even longer - until 1989 - to apply under Article 4.4(a) for a change in the determination of his home. Not until 19 October 1989 did he first say, in a minute to the Director of the Personnel Department, that the political situation in Portugal in 1963 had precluded return to his own country. It is difficult to treat the events of 1974 as a "compelling reason" within the meaning of 4.4(a) when he did not cite them until fifteen years later: had the reason been truly "compelling" he ought to have spoken of it at the time.

7. The complainant submits in his rejoinder that he wrote his minute of 13 January 1964 at the suggestion of a personnel officer and that at the time he had an understanding with the Administration that the ILO would give him local status so as not to expose him to the risk of return to Portugal.

The argument fails. For one thing, he offers no evidence of any such understanding. For another, the ILO could never have forced him to go to Portugal, the taking of home leave being a right, not a duty.

In sum the Director-General did not draw any wrong conclusion from the evidence in finding no "compelling reasons" for changing the determination of the complainant's home.

The alleged abuse of authority

8. The complainant further pleads abuse of authority: first, there has been breach of the principle of equal treatment, and he cites three cases in which the ILO agreed to change the determination of home; secondly, he has been discriminated against because of staff union work.

9. The principle of equal treatment applies only where staff in the same position both in law and in fact are shown not to have been treated alike. The complainant fails to show any breach of the principle. One of the three officials he mentions belongs to the Professional category of staff and therefore Article 4.4(b) does not apply to him. And the other two, though they are in the General Service category, applied for review of their local status, not for a change in the determination of home under 4.4(a).

10. Lastly, the complainant offers not a shred of evidence to suggest that he was discriminated against on the grounds of staff union work.

Receivability

11. Since the complaint is devoid of merit there is no need to take up the issue of receivability.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Jacques Ducoux
Mella Carroll

José Maria Ruda
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.