SEVENTY-FOURTH SESSION

In re KURUKULANATHA

Judgment 1247

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Tissa Kurukulanatha against the International Labour Organisation (ILO) on 10 April 1992, the ILO's reply of 27 July, the complainant's rejoinder of 20 August and the Organisation's surrejoinder of 26 October 1992;

Considering Articles II, paragraph 4, VII and VIII 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 Sri Lankan born in 1935, served the ILO in 1991 in his own country as a senior counsellor under a project for giving aid to workers who had to go back to Sri Lanka from the Middle East because of events in the Gulf States. He had been appointed for six months, from 2 May to 31 October 1991, and was assigned to the district of Kalutara. He was answerable to the national director and chief technical adviser of the project.

Paragraph 25 of a service agreement he concluded with the Organisation on 6 June 1991 stipulated that any "claim or dispute relating to the interruption or execution of the present Agreement which cannot be settled amicably will be referred to the Administrative Tribunal of the ILO".

On 25 June 1991 the complainant wrote a letter of explanation to the project's chief technical adviser setting out his views on an incident they had discussed the day before and earlier that day. He referred to a "fabricated allegation" against him made at the police station at Moratuwa, another district in Sri Lanka, by a girl whose companion had been dismissed from the employ of an organisation the complainant had founded and directed. By a memorandum of 27 June the chief technical adviser told the director of the ILO's office at Colombo that "it appears that there is an ongoing inquiry at the Moratuwa police station on an attempted rape charge" against the complainant; referred to a recommendation of 20 June by the project director that the ILO "withdraw" the complainant's appointment; and asked the director of the office to serve him notice.

By a letter of 28 June the director of the office informed the complainant that his services were "not required" from 8 July 1991 and he would be paid any sums due under the service agreement.

On 16 September the complainant wrote to the Director of the Organisation's Personnel Department at headquarters in Geneva expressing surprise at the termination of his appointment in the absence of serious misconduct or any other circumstance warranting termination. He objected to the ILO's meting out punishment without stating charges or holding a proper inquiry. He claimed reinstatement and damages for wrongful termination and moral injury.

In a letter of 24 October 1991 the Director of the Personnel Department told him that there would be an investigation and that he would get a decision "in due course". By a letter of 8 January 1992 he asked her for a decision. After talking over the terms of a possible settlement with the director of the Colombo office on 23 January, he stated his agreement to them in a letter of 25 January; further recalling the unanswered claim to moral damages he had made on 16 September 1991, he suggested that "at least three months' salary" would suffice. By a letter dated 5 February 1992 the director in Colombo refused his terms but offered to have his claim to salary for part of the remaining period of his contract put to "higher authorities" on compassionate grounds and asked him to say how much he had spent on two trips to Colombo.

By a letter of 7 February 1992 the complainant informed the Director of the Personnel Department of terms the director of the Colombo office had agreed to at their meeting and said that those terms, along with an offer of "suitable employment" and compensation, would satisfy him. In a message of 16 March he told the Director of the Personnel Department that the director of the Colombo office had withdrawn his offer and, fearing that the settlement would fall through, he asked for a prompt decision.

He lodged his complaint on 10 April 1992.

By a letter of 17 April the Director of the Personnel Department informed him that the charge of attempted rape had made it "impracticable" to keep him on and warranted termination under paragraph 14(a) of the service agreement. But as compensation for giving only ten days' notice instead of the "reasonable period of notice" required by the agreement the Organisation owed him four days' salary, over and above the four weeks' salary he was entitled to under paragraph 16 of the agreement in compensation for termination, reckoned at the rate of one week for every month remaining under his contract.

B. The complainant submits that the termination of his appointment was in breach of the terms of the service agreement. Though the agreement provides for summary dismissal without compensation for serious misconduct he was guilty of no such thing nor indeed was he ever charged with misconduct. The other conditions of termination under the agreement were not met either. The ILO left him to surmise that it had heeded spiteful, baseless rumours against him. At all events it denied him the right to reply to whatever charges led to his dismissal.

He seeks payment of 600 United States dollars in salary due for the remainder of his contract, $66 in travel expenses, $15,000 in moral damages and $250 in costs.

C. In its reply the ILO submits that the complaint is irreceivable. Article VII(3) of the Tribunal's Statute requires the filing of a complaint within ninety days of the expiry of a sixty-day period during which the Administration fails to take a decision on a claim. The ILO received his claim of 16 September 1991 on 25 September. Since the sixty days therefore ran out on 24 November he should have lodged his complaint by 22 February 1992.

Having been filed on 10 April 1992, his complaint is premature if he is purporting to challenge the express decision of 17 April 1992. In any event, as he acknowledged in his message of 16 March 1992, the Administration promised on 24 October 1991 to make an investigation. Discussions between him and the director of the Colombo office took place in January and February 1992. By asking for a quick decision on 16 March he re-opened the matter and so had to let another sixty days' silence go by before inferring rejection.

The ILO's pleas on the merits are subsidiary. It submits that the complainant is wrong to assume that it dismissed him for serious misconduct. As it made plain in its letter of 17 April 1992, it terminated his appointment under paragraph 14(a) of the agreement, which provides for termination when "the necessities of the service render impracticable the use of the signatory in the duties or at the duty station assigned to him". The charge of attempted rape made it "impracticable" to keep him on since most of the people the project was supposed to help were women.

The ILO acknowledges that it failed to give him proper notice and should have granted him four weeks' compensation under paragraph 16 of the agreement. That paragraph provides for payment of "not less than one week's remuneration for each unexpired month of the Agreement, subject to the maximum of three months". The director of the Colombo office actually offered him the maximum of three months' salary in compensation.

As to the redress he seeks, the ILO submits that its offer of three months' salary, which he has not yet answered, takes due account of the $600 he claims in unpaid emoluments. His claim to $66 in travel expenses incurred during six visits to the ILO office in Colombo is irreceivable under Article VII(1) of the Statute since it was not mentioned in his letter of 16 September 1991 and he has therefore failed to exhaust the internal means of redress. The ILO is aware of only two visits anyway and offered to pay the amounts due upon receipt of proper evidence.

The claim to moral damages is irreceivable and out of proportion to the alleged injury. In his letter of 16 September he claimed damages for "mental worry and pain of mind and subjecting me to humiliation": there was no mention of loss of reputation or employment prospects. The case law does not allow wider claims than those put forward in the internal proceedings. Besides, if his reputation did suffer, it was not the ILO's fault since it ended his contract most discreetly.

D. In his rejoinder the complainant presses his own pleas and answers the defendant's. He points out that in his letter of 25 January 1992 he accepted the offer made by the director of the Colombo office at their meeting on 23 January 1992 only to learn from the director's letter of 5 February that he had changed his mind. There being not so much as an interim reply to his message of 16 March, all he could do was go to the Tribunal. He cites the case law in support of his contention that his complaint is not time-barred.

He enlarges on his pleas on the merits. He observes in particular that the letter of 28 June 1991 gave no reason for his dismissal: not until he got the Director of the Personnel Department's letter of 17 April 1992 did he know the legal basis for the decision. To dismiss him allegedly for the sake of the "necessities of the service" was wrongful and arbitrary when the charges against him were unfounded.

Since he could have stayed on until the end of November 1991, when the counselling phase of the project ended, he enlarges his claim to $750 to cover the period from July to November 1991. He gives details of six trips to Colombo and maintains that the amount he seeks in moral damages is reasonable.

E. In its surrejoinder the ILO contends that the Tribunal is not competent to consider the case under Article II(4) of the Statute because it has never had a "dispute" with the complainant: it made him an offer on 17 April 1992 to which it is still awaiting his reply.

He knew full well why his services were being discontinued since he had taken part in three meetings on the matter. Since the Organisation's offer in its letter of 17 April covers reasonable compensation for lost salary, his claim to $750 should fail. His claims to travel expenses and moral damages are irreceivable.

CONSIDERATIONS:

1. The ILO appointed the complainant under a service agreement for six months, from 2 May to 31 October 1991, as a senior counsellor to a project in Sri Lanka for the rehabilitation of Sri Lankan workers, mostly women, returning home after the crisis in 1991 in the Gulf States. The appointment was made in consultation with the Sri Lankan Government agency that was in charge of the project, the Bureau of Foreign Employment. The Staff Regulations of the International Labour Office were not to apply.

Paragraph 14 of the agreement allowed the Organisation to terminate it on the grounds that "(a) the necessities of the service render impracticable the use of the signatory in the duties or at the duty station assigned to him", and also for reasons of health or on the grounds of unsatisfactory performance.

Paragraph 15 of the agreement prescribed "A reasonable period of notice of such termination", or payment in lieu, and paragraph 16 "not less than one week's remuneration for each unexpired month of the agreement, subject to the maximum of three months". Paragraph 17 provided that "In case of serious misconduct, the signatory may be summarily dismissed upon written notice", no compensation being payable.

2. On 28 May 1991 he was posted to the district of Kalutara. He was the founder and secretary-general of a body known as the "Educational, Social and Cultural Organisation", or ESCO, which maintained a hostel for disabled children. The hostel was not at Kalutara, but at Moratuwa, and had no connection either with the people returning from the Gulf States or with the complainant's ILO duties. According to his own account, on 29 May he summarily dismissed an ESCO employee for misconduct, in particular for taking out a 16 year-old "hostel girl" without permission and for intimidating other female employees of ESCO to support him on that issue.

On 30 May the girl addressed to the police at Moratuwa, a complaint, the text of which has not been produced, alleging attempted rape by the complainant.

3. On 31 May the police asked the complainant to report to the police station to make a statement. He did so. He was not detained. The girl's allegation received some publicity in the press on 8 June. The Bureau of Foreign Employment also received a written complaint against the complainant, but the writer failed to attend an inquiry held by the chairman of the Bureau. The complainant explained his position to the chairman on 18 June. On 19 June officers of the Bureau made inquiries from the police. The chairman was of the opinion that the complainant should not be allowed to continue as the Kalutara district counsellor and that until his name was cleared and he regained public confidence his employment with the ILO should temporarily cease. That view was communicated on 20 June to the manager of counselling at the Bureau and to the ILO's Colombo office. The manager of counselling made a similar report. The Colombo office gave no intimation to the complainant of any proposal to terminate his appointment, or of the reasons therefor, and made no attempt to obtain copies of the girl's complaint of 30 May to the police or of the complainant's statement recorded on 31 May. It wrote to him on 28 June:

"After consultation with Sri Lanka Bureau of Foreign Employment, I have to communicate to you that your services are not required as Senior Counsellor with effect from 8 July 1991.

The emoluments due to you under the ... contract will be released to you shortly."

He was paid for his services up to 8 July 1991 but at no time before 17 April 1992 was he offered any additional payment on account of insufficient notice under paragraph 15 of the agreement or by way of compensation under paragraph 16.

4. By a letter dated 16 September 1991 the complainant submitted his claims to ILO headquarters in Geneva: he sought reinstatement, with all emoluments, and compensation "for violation of the agreement by wrongful discontinuation and thereby causing [him] mental worry and pain of mind and subjecting [him] to humiliation".

By a letter of 24 October 1991 the Director of the Personnel Department informed him that there was to be an investigation into the matter and that he would get a decision "in due course".

Having had no further response, he sent another letter on 8 January 1992, which the Organisation got on 24 January, demanding "a just decision on the matter and ... redress without further delay". On 25 January he wrote to the director of the Colombo office to state his acceptance, among other matters, of the terms of settlement he said they had reached in talks on 23 January. After further discussion on 5 February the director of the Colombo office wrote to him the same day saying that it was not possible to accept those terms but offering "to request higher authorities to consider [his] case on compassionate grounds".

In a letter of 7 February to the Director of the Personnel Department he said that those terms had been agreed to by the director of the Colombo office and he was willing to accept them. He again asked for "a just decision regarding the question of suitable compensation, to make an end for the damage done to me by the ILO, Colombo". Again getting no answer from the Director in Geneva, he wrote on 16 March to say that, the director of the Colombo office having changed his mind, he had no hope of settlement and was seeking "a quick decision".

Receivability

5. The Organisation contends that his complaint is time-barred. He did not file it within the ninety-day time limit in Article VII(2) of the Statute of the Tribunal for challenging implied rejection, under Article VII(3), where the Administration has failed to act within sixty days of the notification of a claim. The ILO having had notice of the complainant's claims on 25 September 1991, the sixty days ran to 24 November and so, it maintains, he had another ninety, until 22 February 1992, to lodge the complaint.

At the same time the ILO argues that his complaint is premature because he filed it on 10 April 1992 but did not get its final decision until 30 April.

Lastly, it submits that he "re-opened" the matter with his reminder of 16 March 1992 and thereby set off a new period of sixty days within which he was not free to infer rejection.

6. In its original reply to his claims on 24 October 1991 the ILO assured him that it would investigate the matter and take a decision "in due course". In January 1992, having no news from headquarters, he again asked for a decision, discussed terms of settlement with the director of the Colombo office and gave his written agreement to the terms they had discussed. But the director of the office informed him by a letter of 5 February 1992 that it "would not be possible" to accept the terms the complainant had agreed to.

After submitting his claims to headquarters the complainant had good reason to believe that they were still under review, and the evidence shows that he did his utmost to reach a settlement. But the letter of 5 February convinced him that he was unlikely to get one.

Paragraph 25 of his service agreement says that "any claim or dispute relating to the ... present Agreement which cannot be settled amicably will be referred to the Administrative Tribunal". By virtue of that paragraph the ninety-day time limit in Article VII(2) of the Tribunal's Statute must be deemed to have run from the time at which it became plain that no settlement could be reached "amicably". That condition was met by the date at which the complainant received the letter of 5 February 1992. So his complaint is timely.

Being bound by the terms of the contract, which indeed it drew up itself, the Organisation may not plead that he missed a deadline when he was still seeking a settlement under para-graph 25. As the Tribunal has held, for

example in Judgment 607 (in re Verron), though proper administration requires the setting of time limits "they are not supposed to be a trap or a means of catching out a staff member who acts in good faith".

To the ILO's contention that the complaint is premature the answer is that the decision under challenge is neither the one dated 17 April 1992 and notified to him on 30 April nor the implied rejection of his further request of 16 March 1992 for a decision, but the rejection he was entitled by February 1992 to infer.

The objections to receivability fail.

The merits

7. The complainant argues that the ILO stated no grounds for the termination of his appointment in its letter of 28 June 1991; that by implication the termination was for "serious misconduct"; and that, if so, he should have been informed of the charges against him and given an opportunity of defending himself.

The ILO replies that the agreement was terminated under paragraph 14(a) of the agreement; that the director of the Colombo office "received a written complaint from the [chief technical adviser] of the project concerning the filing of a charge against the complainant of attempted rape"; that the Organisation made no assumption of the complainant's guilt; that it referred to the possibility of reinstatement if the charge against him was withdrawn; that it considered the written explanation dated 25 June 1991 submitted by the complainant; that its sole concern was the interests of the project; and that the complainant's duties were such as to require the trust of the people returning from the Gulf States.

8. The Organisation committed two mistakes.

First, at 28 June 1991, the date of the ILO's letter terminating the complainant's appointment, there was no evidence of the filing of charges. The manager of counselling at the Bureau of Foreign Employment had reported only that the police were investigating the matter and that "a case could be filed". Even after the complainant had submitted his claim in his letter of 16 September 1991 to headquarters, the Organisation did not obtain copies of the original complaint to the police or of evidence of any criminal proceedings instituted against him. The only suggestion of any loss of confidence was in the opinion expressed by an officer of the Moratuwa police that the people of that area had lost confidence in him. There was nothing to suggest that that was true of the people at his duty station, which was Kalutara.

Secondly, as the Organisation has conceded, it did not give him sufficient notice under paragraph 15. But neither did it give him any explanation as to why it could not assign him to some other duty station, as paragraph 14(a) would have required. Nor did it pay him immediately the compensation due under paragraph 16. In fact it treated his case not as termination under paragraph 14(a) but as summary dismissal for "serious misconduct" under paragraph 17.

The decision to terminate the complainant's services was thus seriously flawed and must be quashed.

9. The ILO seeks to restrict compensation to what is allowed under paragraph 16. That paragraph prescribes only the amount payable in the case of termination under paragraph 14. The Organisation argues that in its letter of 17 April 1992 it made him an offer of the equivalent of three months' salary, that he has made no response, and that that amount should be considered reasonable compensation.

His termination has been justified neither on the grounds of serious misconduct under paragraph 17 nor as coming under paragraph 14. Reinstatement is no longer possible. The Tribunal therefore awards him, in accordance with Article VIII of its Statute, compensation in a sum of 600 dollars, the full amount of remuneration due for the rest of his contract.

10. He claims travelling expenses for six visits to the Colombo office. Four of them were prior to his claim of 16 September 1991 but were not the subject of that claim. The other two were in 1992, but despite the ILO's express offer of reimbursement on 5 February 1992 he has failed to indicate the amounts due. The claim is rejected.

11. The complainant claims $15,000 in damages for injury to his reputation and prospects of employment and for the pain, suffering and humiliation the termination caused him.

As the Organisation contends, the primary causes of loss of reputation, pain, suffering and humiliation were not the termination but the complaint lodged against him by others and the attendant press publicity. There is no evidence to suggest that the termination in itself impaired his prospects of further employment. Yet he was dismissed in breach of his contract and in circumstances which to some extent aggravated the humiliation and loss of reputation caused by the charge of attempted rape and the press publicity. As was said above, officers of the Bureau of Foreign Employment made inquiries about him from the police. They also summoned the dismissed ESCO employee for questioning.

In the circumstances the Tribunal awards him damages for moral injury and sets the amount at $400.

It also awards him $250 in costs.

DECISION:

For the above reasons,

1. The Organisation shall pay the complainant a total of 1,000 United States dollars in damages for wrongful termination and moral injury.

2. It shall pay him $250 in costs.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

William Douglas
E. Razafindralambo
Mark Fernando
A.B. Gardner

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