

## THIRTIETH ORDINARY SESSION

### ***In re* FERRECCHIA**

#### **Judgment No. 203**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Centre for Advanced Technical and Vocational Training (International Labour Organisation) drawn up by Mr. Antonio Ferrecchia on 24 July 1972, the Centre's reply of 12 October 1972, the complainant's rejoinder of 11 November 1972 and the Centre's surrejoinder of 23 January 1973;

Considering Article II, paragraph 1, of the Statute of the Tribunal, articles 10.2, 11.1, 11.2, 11.4, 11.5, 11.6, 11.7, 11.8 and 11.9 of the Staff Regulations of the Centre, and Article V, paragraph 5, of the Resolution concerning the Statute of the International Centre for Advanced Technical and Vocational Training;

Having examined the documents in the dossier, oral proceedings having been neither requested by the complainant nor ordered by the Tribunal;

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

A. On 14 July 1971 Mr. Ferrecchia received a reprimand under article 11.4 of the Staff Regulations after being found asleep at work when he was supposed to be in charge, with another worker, of the heating plant in the Centre building. He contested the facts on the grounds that he was not asleep but unwell. According to a report signed by three witnesses, during the night of 7-8 March 1972 Mr. Ferrecchia was once again found sleeping on duty shortly after midnight and was still asleep several hours later, while the other watchman was looking after the heating plant. On 23 January 1972 he was informed that the Director intended to impose the sanction of summary dismissal prescribed in article 11.8 of the Staff Regulations.

B. On appeal the Staff Relations Committee, the internal appeals body, recommended the Director not to impose the sanction of summary dismissal. The two members appointed by the Director recommended discharge under article 11.7 of the Staff Regulations, one of the two members appointed by the Staff Union, salary reduction, demotion and transfer under article 11.6, and the other a mere censure under article 11.5. On 16 June 1972 the Director informed Mr. Ferrecchia of his decision to discharge him under article 11.7 of the Staff Regulations (discharge with notice) and to grant him the maximum indemnity provided for under that article (three months' salary and pensionable allowances).

C. In his complaint Mr. Ferrecchia does not deny that he was asleep during the night of 7-8 March 1972, but contends that the other watchman was just as well qualified and that since only one watchman was needed the usual practice was for the two watchmen to take short naps in turn. The inspection was the first one ever to have been made at night and its sole purpose was to catch him out because of his personal differences with his supervisor. He asks for the quashing of the decision to discharge him on the grounds:

(a) that it is out of proportion to his offence;

(b) that it is based on the recommendation of the Staff Relations Committee:

1. which comprised, in addition to the representatives appointed by the Staff Union Committee, two representatives appointed by the Director, one being a direct subordinate of the Chief of the Administration and Finance Department and Assistant Director of the Centre who had proposed imposing the sanction on the complainant, while the other was the Chief of Personnel, who had signed the letter suspending him and the letter discharging him;

2. which was chaired by the Assistant Director who had decided to suspend him from his functions;

3. whose members, including the Staff Union representatives, were all bound by secrecy, and to which he was not allowed to appoint his own representative; nor was he allowed to attend the oral proceedings or hearings, nor to have access to the records of written inquiries, nor to receive through his representative a copy of its final report;

4. which did not afford him the minimum safe- guards provided by the Joint Committee prescribe under ILO Staff Regulations, on which the Staff Regulations of the Centre should be based as laid down by the Resolution concerning the Statute of the International Centre for Advanced Technical and Vocational Training adopted unanimously by the Governing Body of the International Labour Office on 31 May 1963 and amended on 13 June 1964 and 16 November 1967. The complainant accordingly prays that the Tribunal order his reinstatement end payment of his salary and allowances from the date of his dismissal and of adequate compensation for the moral damage and material distress created by his discharge.

D. In its reply the Centre maintains that the sanction is not out of proportion to the complainant's offence. The two watchmen in the heating plant were required to perform their duties jointly and not in turn, because of the size of the plant. The complainant's offence was all the more serious because he had committed a similar offence before. The Director's decision to discharge him closely respected the procedure prescribe in article 11.2 of the Staff Regulations, was not based on incorrect facts and was taken in the organisation's interests and in the exercise of the Director's discretion. As regards the membership of the Staff Relations Committee, the Centre maintains that there were no reasonable grounds for objecting to the two representatives appointed by the Director. They were not specially appointed to decide the present case, but had sat on the Committee since 1970. Moreover, they had taken no direct part in the impugned decision. Nor was there any reason to question the impartiality of the Chairman of the Committee, who in any case, according to article 10.2(b) of the Staff Regulations, had no vote. As regards the Committee's procedure, the Centre points out that according to its case law the Tribunal recognises rulings made by a Director which do not exceed the powers conferred upon him by the general rules of the organisation. According to Article V, paragraph 5, of the Resolution concerning the Statute of the International Centre for Advanced Technical and Vocational Training in Turin:

"The staff of the Centre shall be subject to the authority of the Director of the Centre and shall be responsible to him. in the exercise of their functions. The terms and conditions of service of the staff of the Centre shall be established on the basis of those of ILO officials and of the particular requirements of the Centre, and shall be approved by the Board." The Staff Regulations of the Centre were adopted in accordance with that article by the Board of the Centre on the recommendation of a joint working party - consisting of members of the Board and of the ILO Governing Body - and on that of the Staff Union representatives. The Staff Relations Committee of the Centre differs from the Joint Committee of the International Labour Office largely because of the need for greater simplicity, the Centre having only 114 officials as against nearly 3,000 ILO officials. Finally, the Centre rejects the complainant's allegations concerning the Committee's proceedings: the Staff Relations Committee performs the functions of both the Administrative Committee and the Joint Committee of the ILO. Moreover, the facts of the present case were not contested and the complainant saw all the material documents. He gave evidence before the Committee, and the Chairman of the Staff Union Committee, sitting as a member of the Staff Relations Committee, personally took care of his interests.

E. In his rejoinder the complainant contests all these arguments. In accordance with the case law of the Tribunal (Judgment No. 179: Varnet v. UNESCO), the two representatives of the administration ought to have withdrawn even if they felt personally able to be impartial. He had no opportunity to defend himself in the Committee, which conducted its proceedings in his absence, except when it heard him give evidence. Although one of its members was the Chairman of the Staff Union Committee he was in the same position as any other member of the Staff Relations Committee and was not there to defend the complainant. Moreover, he could not communicate with the complainant because of the rule of secrecy laid down by article 10.2(c) of the Staff Regulations. Attempts to simplify the proceedings therefore have seriously impaired the rights of defence. The complainant had no chance to comment on the evidence nor to call his own witnesses. Moreover, the Committee did not carry out a thorough inquiry: in particular, it did not investigate the possibility that a deliberate intention to harm him inspired the sudden and unprecedented inspection during the night of 7-8 March 1972.

F. In its surrejoinder, while supplying further factual information, the Centre repeats the account of the facts, arguments and conclusions set out in its reply and prays that the Tribunal dismiss the complaint.

CONSIDERATIONS:

1. As to the right to be heard:

A staff member against whom disciplinary proceedings are taken has the right to be heard before a sanction is imposed on him. This right includes inter alia the opportunity to participate in the examination of the evidence. Deriving as it does from a general principle, it must be respected even where contrary provisions exist or in the absence of any explicit text.

In the case at issue the complainant was duly questioned by the Staff Relations Committee. He was not, however, allowed to be present during the hearing of witnesses or to participate in the examination of the evidence. Although the statements made by the witnesses were communicated to him he was not in a position, during the hearing, to rebut the charges against him, to put questions, or to ask for clarification. Consequently, his claim that, because his right to be heard was not respected, the decision impugned is tainted by a procedural irregularity is valid.

2. As to the principle of proportionality:

The Tribunal quashes a decision if it is founded inter alia upon an error of law. Cases in which a disciplinary sanction imposed on a staff member appears out of all proportion to the objective and subjective circumstances in which the misbehaviour was committed should be assimilated to cases of error of law.

Chapter II of the Staff Regulations of the Centre provides for the imposition of the disciplinary sanctions of warning, reprimand, censure, reduction of salary and demotion, discharge, and summary dismissal. By depriving him of his employment the two latter measures may cause serious harm to the staff member concerned and to his family. In accordance with the principle that the penalty should be proportionate to the fault, they should, therefore, as a general rule be imposed only on a staff member whose conduct appears to be incompatible with the performance of his duties.

That condition is not fulfilled in the present case. In spite of the potential risks it involved, the seriousness of the complainant's misconduct cannot be evaluated without taking into account the extenuating circumstances. In the course of six years' employment the complainant had incurred only one mild penalty, and although his spirit of initiative and sense of responsibility may have left something to be desired, he had given proof of qualities which were appreciated by his supervisors, as is proved by a note of 21 June 1972. In these circumstances the complainant did not appear to be unfit for employment with the Centre, and therefore in discharging him the Director did not observe the principle of proportionality.

3. As to the consequences of the laws in the decision impugned:

It follows from the foregoing considerations that the decision impugned is tainted by a procedural irregularity and by error of law, both of these being grounds requiring it to be quashed. It is therefore not necessary to consider whether, as the complainant alleges, certain members of the Staff Relations Committee failed in their duty to withdraw from the hearing of the case.

Under Article VIII of its Statute, "the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him." In the present case the Centre considers, for plausible reasons, that the complainant's reinstatement would be inadvisable. Having regard to all the circumstances, therefore, in particular to the seriousness of his misbehaviour, the length of his employment, and the amount of his salary and termination benefits, the Tribunal awards the complainant compensation in the amount of one million Italian lire.

DECISION:

For the above reasons,

1. The decision impugned is quashed.
2. The International Centre for Advanced Technical and Vocational Training shall pay the complainant compensation in the amount of one million Italian lire.

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 14 May 1973.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet

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