

FORTY-FIRST ORDINARY SESSION

***In re* LANDI**

Judgment No. 358

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Centre for Advanced Technical and Vocational Training (ILO) by Mr. Pietro Landi on 24 November 1977, which is postmarked 2 December 1977, the Centre's reply of 15 March 1978, the complainant's rejoinder of 13 April and the Centre's surrejoinder of 22 June 1978;

Considering Article II, paragraph 1, of the Statute of the Tribunal and the Staff Regulations of the Centre, particularly Articles 9.2, 12.1, 13.1 and 13.3;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, an Italian born on 6 October 1915, was appointed to the staff of the International Centre for Advanced Technical and Vocational Training on 26 January 1967 under a contract which stipulated that he should teach gymnastics for one month to the students of the Centre as an "external collaborator". On 28 March his appointment was extended to cover the period from 1 March to 31 May 1967. On 14 June 1967 the Centre appointed him, mainly as a physical training instructor, for the period from 5 May 1967 to 31 May 1968. His contract of employment provided that he should be a member of the National Institute of Social Welfare (INPS) but not of the United Nations Joint Staff Pension Fund. His contract was renewed for one year at a time on 16 May 1968, 13 May 1969 and 2 June 1970. On 3 July 1970, in accordance with a new policy for giving Centre staff stable employment, he was given a contract of indefinite duration, all other terms of the contract being the same as before.

B. On 6 October 1975 the complainant reached the retirement age of 60. At the time the Board of the Centre had before it a proposal for raising the retirement age to 62. As a provisional measure, therefore, the complainant was offered, by letter of 16 October 1975, and accepted, an extension of appointment to 30 November 1975 on the same contractual terms as before. The Board of the Centre approved the proposal put to it and on 21 November 1975 the complainant's appointment was extended to 31 October 1977, still on the same terms.

C. On 10 May 1977 the complainant went to his immediate supervisor and asked for a transitional extension of appointment to 30 October 1980 on the grounds that he had no pension from the INPS. On 11 May his supervisor commended his request to the Chief of Personnel, pointing out that the INPS required 15 years' membership for payment of a pension whereas the complainant had paid contributions for only just more than ten years. The Staff Relations Committee recommended that the complainant's appointment should not be extended and on 6 September the Chief of Personnel told him that the Director had decided not to waive the provision of the Staff Regulations setting the retirement age at 62 and that his appointment would therefore end on 31 October. On 9 September the complainant appealed to the Director, who upheld his decision on 23 September. On 12 October the complainant appealed again and on 14 November the Director once again upheld his decision. The decision of 6 September is the one impugned in the complaint, which was filed on 2 December.

D. The complainant finds fault with the Centre for having made him a member of the INPS and not, as in his view it could and ought to have done, of the United Nations Joint Staff Pension Fund. He joined the staff at the age of 52 and needed 15 years' membership of the INPS to qualify for a pension. Thus the Centre's negligence caused him to lose that pension. By refusing to extend his appointment beyond the normal age of retirement the Centre also barred him from qualifying for a pension.

E. The complainant states his claims for relief as follows: "Further to the complainant's statement of the facts and in view of the adverse consequences, both financial and in respect of social assistance, to him and his dependants,

the Administrative Tribunal is invited:

(1) Urgently, with immediate effect and by order: to instruct the Centre to make provisional payment to the complainant of a monthly contribution which might consist of about 60 per cent of the amount of the United Nations pension which the complainant would have obtained, and to provide insurance cover for risks to the health of the complainant and his dependants, up to the date on which the Tribunal gives judgment and apart from compensation.

(2) Principally: to order the Centre to take the earliest possible action to have the complainant admitted to membership of the United Nations Joint Staff Pension Fund with effect from 5 May 1966.

(3) In any event, and so as to ensure execution of the principal claim for relief: to revoke the decision to retire the complainant until the United Nations Pension Fund has admitted him to membership and validated in full the earlier period of service.

(4) Subsidiarily: (a) each month until the date of his death to pay the complainant the pension which the United Nations Joint Staff Pension Fund would have paid had he been a member of the Fund with effect from 5 May 1966; (b) to guarantee to the complainant and his dependants the same benefits that he would have obtained from the Sickness Fund had he been a member of the United Nations Joint Staff Pension Fund; (c) to pay the complainant's widow the widow's pension and the benefits from the Sickness Fund which would have been payable had he been a member of the United Nations Joint Staff Pension Fund.

(5) Further subsidiarily: to order the Centre to pay to the INPS both the employer's and the staff member's contributions up to 5 May 1982 on the basis of the salary which the complainant would receive if he remained on the staff up to that date, together with yearly increments; and in any event: to pay the complainant forthwith the pension which he would receive from the United Nations Pension Fund up to the date on which he receives the first payment of the INPS pension; to pay him or his widow the difference between the United Nations pension and the INPS pension; to insure the complainant against risks to the health both of himself and of his dependants, in accordance with the benefits of the United Nations system, and to ensure payment of benefits from the Italian sickness fund from the date on which he receives the INPS pension; to pay interest on the sums due at a rate corresponding to that of the devaluation of the lira."

F. In its reply the Centre observes that the decision of 6 September 1977 was taken in accordance with Article 13.3 of the Centre Staff Regulations, which gives the Director discretionary authority to extend an appointment beyond the age of retirement. In taking the decision in the present case the Director neither exceeded nor abused his authority, and that is the only question before the Tribunal. Whether the complainant should be a member of the INPS rather than the United Nations Joint Staff Pension Fund is not a question before the Tribunal because it was not the subject of the decision of 6 September 1977. "Besides", says the Centre, "at no time between 1967 and 1977 did the complainant make any claim in that regard", and "any complaint which made such a claim would be irreceivable both because it would be time-barred and because the internal means of redress would not have been exhausted".

G. The Centre asks the Tribunal: principally: (a) to declare the complaint unfounded in so far as it impugns the decision of 6 September 1977 not to extend the complainant's appointment beyond the normal retirement age; (b) to declare the complaint irreceivable in so far as it impugns the decision to admit the complainant to membership of the INPS rather than to that of the United Nations fund; subsidiarily: to order an exchange of memoranda on the merits should the Tribunal declare the complaint receivable as to (b).

H. The complainant concludes his rejoinder: "I therefore invite the Tribunal: (a) to dismiss all the Centre's objections as unfounded; (b) to declare unlawful and to quash the Director's decisions of 6 September, 23 September and 14 November 1977; and (c) to order the Centre to take the action sought in the claims for relief. So as to make it easier to find a solution, however, I submit the following further claims for relief: (2) principally: to order the Centre to take the earliest possible action to have the complainant admitted to membership of the United Nations Joint Staff Pension Fund with effect from 5 May 1967, or to extend his appointment to 31 October 1980 and continue to pay the INPS contributions up to that date. (4) Further subsidiarily: to order the Centre to pay to the INPS both the employer's and the staff member's contributions up to 5 May 1982 on the basis of the salary which the complainant would receive if he remained on the staff up to that date, together with yearly increments; or to repay to me the contributions payable by me and by the Centre which were paid to the INPS from May 1967

until October 1977, plus interest at a rate corresponding to that of the devaluation of the lira."

I. In its surrejoinder the Centre makes the following comments on the purpose of the complaint: "There appears to be a basic difference of opinion between the complainant and the Centre as to what may be the precise purpose of his complaint. The complainant considers that that purpose is to secure a declaration that his admission to membership of the INPS in 1967 and consequent non-membership of the United Nations Joint Staff Pension Fund were illegal and that he is therefore entitled to compensation in the form of an extension of appointment which would guarantee him 15 years' membership of the INPS (the minimum period conferring entitlement to a retirement pension), whatever the Centre's rules may say about the age of retirement. The Centre takes the view that the only question at stake is whether the Director abused his discretionary authority in refusing to extend the complainant's appointment to the age of 65, i.e. beyond the normal age of retirement at the Centre, which is 62. In the Centre's opinion the question of the lawfulness of the complainant's admission to membership of the INPS cannot now be referred to the Tribunal since the matter is time-barred and the internal means of redress have not been exhausted...". The Centre adds that, in so far as they alter the claims in the original complaint, the complainant's further claims in his rejoinder are obviously irreceivable because they have been lodged after expiry of the time limit. The Centre fully abides by the arguments it puts forward in its reply.

CONSIDERATIONS:

By a contract dated 14 June 1967, which was later renewed, the complainant was appointed to the staff of the Turin Centre as an assistant in the trainees' activities section and physical training instructor. The contract expressly provided that he should be a member of the National Institute of Social Welfare (INPS) in respect of invalidity and old age and stated: "Under the present contract you are specifically excluded from membership of the United Nations Joint Staff Pension Fund". His final contract stated: "(a) your employment is automatically extended up to 31 October 1977, under the same terms and conditions of service...".

By a letter of 6 September 1977 the complainant was informed that the Director had decided that no exception should be made in his favour in respect of the age limit and that his appointment would therefore expire on 31 October 1977.

He lodged internal appeals on 9 September, 12 October and 4 November 1977. His appeals were dismissed on 23 September and 14 November.

A decision by the Director of the Centre to extend a staff member's appointment beyond the age limit set in the Staff Regulations is purely discretionary, and the Administrative Tribunal may interfere with such a decision only if it was taken without authority, or if it violated a rule of form or of procedure, or if it was based on an error of fact or of law, or if essential facts were overlooked, or if clearly mistaken conclusions were drawn from the facts, or if the decision is tainted with abuse of authority.

First, the decision of 6 September 1977 was signed, not by the Director of the Centre, but by the Chief of Personnel, and that of 23 September by a representative of the Director and on the Director's behalf. But both those officials were qualified to take the decision in the place of the Director. Hence the complainant cannot properly contend that the decisions were taken without authority. Besides, the decision of 14 November to dismiss the complainant's second internal appeal, which conforms with the two earlier decisions, was signed by the Director himself. Secondly, in the text of the impugned decisions it was stated merely that the complainant had reached the age limit on 31 October 1977 and that there were no grounds for making an exception to the rules by extending his appointment beyond that date. In other words, the decisions merely contained a correct statement of fact and constituted a refusal to exercise discretionary authority, and there was therefore no need to give reasons for them.

Thirdly, contrary to what the complainant alleges, the Staff Relations Committee was consulted and even sought further information from the complainant before the decision was taken on 6 September 1977. In the absence of any new fact or consideration the Director was not required to consult the Committee again before taking a decision on the appeals.

Fourthly, the complainant contends that at the time of his appointment he was made a member of the INPS without having been consulted beforehand. It appears from the written evidence, however, that the contract dated 14 June 1967, which appointed the complainant to the staff of the Centre and was later renewed on several occasions without change, expressly provided that he should be a member of the INPS and explicitly excluded him from

membership of the United Nations Joint Staff Pension Fund. He signed the contract without comment and neither when he signed it nor when it was renewed did he ever object to any of its terms. Indeed he did not contest his admission to membership of the INPS until he wrote a letter on 24 April 1975, by which time the deadline for appealing against the terms of his original appointment had long expired. In any event, he has not properly referred that letter to the Tribunal.

Fifthly, the complainant contends that the Director of the Centre was bound to keep him on the staff until he was 65, i.e. beyond the normal age limit of 62, so that he could obtain et pension from the INPS.

Although the Director is empowered to extend a staff member's appointment to the age of 65, he is in no case bound to do so. He may exercise that authority to allow an exception only in the interests of the Centre, not in the exclusive interests of the staff member. In deciding on the complainant's case he would have to bear in mind the possibility that the complainant might obtain a pension, but that was only one fact to be taken into account among others.

Even if the complainant's request for an extension of appointment to the age of 65 had been allowed he would not have obtained a pension. Even with such an extension he would not have met the minimum qualification of 15 years' membership, and he may not rely on the cases of other staff members of the Centre who were not in the same or a similar position.

It follows from the foregoing that the complaint is quite without foundation and should therefore be dismissed.

DECISION:

For the above reasons,

The complaint is dismissed.

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 13 November 1978.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet