

Registry's translation, the French text alone being authoritative.

FORTY-EIGHTH ORDINARY SESSION

In re de VILLEGAS (No. 5)

Judgment No. 509

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Labour Organisation (ILO) by Mrs. Maria Adriana de Villegas on 25 September 1980 and brought into conformity with the Rules of Court on 24 January 1981, the ILO's reply of 6 May, the complainant's rejoinder of 11 September, the ILO's surrejoinder of 15 October, the complainant's further memorandum of 23 December 1981 and the ILO's observations thereon of 22 and 26 January 1982;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal and Articles 11.17 and 13.2 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 material facts of the case are as follows:

A. After leaving the International Labour Office the complainant wrote a letter on 27 December 1978 asking for a certificate of service. Her request remained unanswered for some time. She raised the matter, and made a claim, in an additional memorandum she filed in the proceedings relating to her second complaint. In paragraph 11 of Judgment No. 404, delivered on 24 April 1980, the Tribunal held that since there was no mention of the certificate of service in the claims for relief in any of her first three complaints, it was not required to pass judgment on the text of the certificate asked for. On 28 April the complainant wrote the Director-General a letter entitled "Complaint" and asking, among other things, for referral of the matter of her certificate to the Joint Committee in accordance with Article 13.2 of the Staff Regulations and for the elimination of a letter which Mr. Pochman, of the Personnel Development Branch, had written her on 1 November 1979 and of certain passages in the summary in Judgment No. 404 which she regarded as mistaken. On 27 June 1980 the Chief of the Personnel Department answered that the Director-General had nothing to add to the comments addressed by his representative to the Tribunal. That is the decision now impugned.

B. The complainant submits that the ILO has failed to respect Article 11.17 of the Staff Regulations⁽¹⁾ because it refused to state the nature of her duties on the grounds stated in Mr. Pochman's letter of 1 November 1979, namely that "the list of duties, if not accompanied by an equally detailed assessment of performance, may give a distorted picture". In the complainant's opinion she is entitled under Article 11.17 to a certificate relating solely to the nature of her duties or else to that and to her competence as well. She needs several certificates, including one which should reflect the excellent work she did, her annual reports, which are in many respects favourable, and the frequent praise she says she received over the years, for example from the Director-General. The decision not to convene the Joint Committee deprived her of her right to a hearing. In her claims for relief she asks the Tribunal, preliminarily, to order the ILO to disclose all the documents relating to her competence and conduct, including the items cited in her memoranda. As to the merits, she invites the Tribunal, among other things, to "sanction the breach" of Article 11.17 of the Staff Regulations and order the ILO to complete the text of a certificate provided on 28 January 1980 with references to her professional competence, as required by the Staff Regulations. Such references should reflect the nature of her duties and be strictly based on the work she actually did, her annual reports and other irrefutable items of evidence, and the certificate should cover the whole period of her service. She further invites the Tribunal to ask the ILO to "put an end to the campaign of defamation against [her] and to remedy the wrong", in particular by withdrawing Mr. Pochman's letter of 1 November 1979, by eliminating a "secret minute" signed by Mr. Zoetewey on 19 April 1977 and all allusions to that minute and by deleting the passage in the summary of facts in Judgment No. 404 which relates to the certificate of service, since that passage is, in her opinion, mistaken. She asks that the ILO remedy the professional and moral prejudice she has suffered by doing its utmost to rehabilitate her with a view to reinstatement. For the professional prejudice she claims

compensation equivalent to the full amount of her earnings had her employment continued (including continuing membership of the pension fund) from 1 October 1978 up to the date when she finds alternative employment or 30 May 1982, the date of her retirement, whichever is the later. She claims compensation, which she sets at 70,000 Swiss francs, for moral prejudice due to the failure to give her a valid certificate of service and to defamation and calumny. Lastly, she claims 6,000 Swiss francs in costs.

C. In its reply the ILO observes that the complainant is making play with various legal concepts without heed for their real meaning and trying to reopen matters of no relevance to the present dispute. The ILO first rejects the claims for withdrawal of the letter of 1 November 1979 and the deletion of a passage in Judgment No. 404. The letter merely sets out the guiding principles for ILO policy on certificates of service, and the passage in the judgment merely sums up the arguments of one of the parties. Her plea based on her right to a hearing is of no relevance since the certificate of service is a matter for the Director-General's discretion. As to receivability, the ILO points out that the complainant made a claim relating to the certificate in her additional memorandum in the proceedings which culminated in Judgment No. 404. She thereby tacitly conceded that the ILO had taken a final decision. The ninety-day time limit therefore began on the date of the ILO's final memorandum, namely 5 March 1980. Since she did not file her complaint until 25 September 1980 it is time-barred. She did appeal again to the Director-General, but the reply merely confirmed the earlier decision and was not a new decision giving rise to any new time limit. As to the merits the ILO contends that the certificates given to the complainant in no way disregarded Article 11.17 of the Staff Regulations. She got several certificates, and the ILO discusses their contents in detail. Giving in to exhortations from the complainant, Mr. Pochman finally agreed to append to the certificate provided on 28 January 1980 an exhaustive list of her duties which she had drafted herself. That was a considerable concession: it is not usual to append such a list without any assessment of performance since it may give a false impression. The complainant therefore has at her disposal a certificate relating to the nature of her duties and the length of her service in the very terms she herself wanted. As for the second certificate she is asking for, and which should relate also to her "competence, efficiency and official conduct", it was supplied in the text dated 1 November 1979. Such a certificate implies a large degree of discretion. In this case the ILO did its utmost to make the text as favourable as possible. Although the complainant's reports contained reservations very early on, particularly about her relations with other staff, the certificate reflects only the best side of her performance. If the ILO made any more favourable assessment it would be in danger of giving her a certificate to order.

D. In her rejoinder the complainant categorically rejects the ILO's objections to receivability. After she made her claim concerning the certificate in the proceedings which culminated in Judgment No. 404 the ILO invited her by a letter of 12 October 1979 to discuss the wording of the certificate, but it refused to give her a full and accurate certificate. She therefore appealed on 28 April 1980 so as to exhaust the internal means of redress. The final decision was notified to her on 28 June 1980, and she has therefore respected the time limits in the Staff Regulations and in the Statute of the Tribunal. As to the merits, she also rejects all the ILO's arguments, which she believes to be based on mistakes of fact. She explains these mistakes in detail. She contends that not to delete passages from Judgment No. 404 would render invalid any certificate she may obtain.

E. In its surrejoinder the ILO enlarges on its arguments in favour of declaring the complaint time-barred. As to the merits it points out that on 1 February 1980 the complainant was sent a certificate relating solely to the nature of her duties and the length of her service. It recounts how this certificate came to be drafted and states again that it met her wishes. She says nothing of the certificate which was appended to the letter of 1 November 1979 and which sought to give as favourable a picture as possible of her performance. In pretending to know nothing of that certificate the complainant is again trying to have a certificate made to order.

F. In a further memorandum the complainant refers to an interview she had with the Director-General on 27 July 1981. She contends, among other things, that the views expressed by the ILO's representative are not the Director-General's. She also refers to a performance appraisal form which she argues should be used in her case.

G. In its observations on her further memorandum the ILO explains the meaning of the appraisal form and points out that in any case it cannot ignore the express provisions of Article 11.17 and that the term "official conduct" in the article covers working relations. A letter addressed to the Registry on 22 January 1982 on behalf of the Director-General states that the Director-General fully approved the memoranda submitted in this case as in all previous cases.

CONSIDERATIONS:

1. The complainant was employed at the International Labour Office from 1969 to 30 September 1978. When she left there began a series of disputes, and three of her complaints the Tribunal has already dealt with in the judgment it rendered on 24 April 1980.

The main purpose of the present complaint is to challenge a decision of 27 June 1980 whereby a representative of the Director-General refused her claim relating to the certificate of service she believes she is entitled to under Article 11.17 of the Staff Regulations.

Receivability

2. The ILO's principal plea is that the complaint is irreceivable.

3. The Tribunal need not dwell on its first argument, which is that according to Article 13.2 of the Staff Regulations the Tribunal may hear complaints filed only by serving officials. The argument fails. When someone leaves the staff he is entitled, then as indeed throughout his career, to compliance with the Staff Regulations. A tribunal is competent in regard to every aspect of the official's service, and the grant of a certificate is a necessary incident of his employment.

4. The other argument - that the complaint is time-barred - is stronger.

5. In considering it the Tribunal will look into the circumstances of the case, which are not simple and which fall into three phases.

The first was discussion. The complainant sought a certificate so worded as to meet her own wishes. The ILO undertook to treat with her. The upshot was that administrative action was taken in that the Chief of the Personnel Development Branch gave her in turn four certificates. The first was dated 25 October 1979, the second 1 November, the third 28 December and the fourth 28 January 1980. The complainant was not satisfied with any of them.

The last one, a slight alteration of the third, was notified to her on 1 February 1980 by a letter from the Chief of the Personnel Development Branch saying that, though not in agreement, he had made a change she had suggested and proposing that the third certificate should be cancelled.

By a registered letter of 3 February 1980 the complainant acknowledged receipt of his letter of 1 February and stated her disagreement, but did not really make any claim. So ended the "discussion" phase.

6. The next phase was one of dispute. In November 1979 the complainant stated in a memorandum filed with the Tribunal which at the time had before it three complaints from her about other matters - that she had asked for the certificate. After receiving the letter of 1 February 1980 she filed an additional memorandum dated 7 February 1980, which went into greater detail than the earlier one. Giving judgment on 24 April 1980, the Tribunal stated: "There is no mention of the certificate of service ... in the claims for relief in any of her three complaints. It is only on the matter of those claims that the Tribunal is required to pass judgment and it will therefore not give any decision on the text of the certificate asked for".

7. This was the beginning of the third phase. No sooner had the Tribunal given its judgment than she submitted a formal claim, on 28 April 1980, to the Director-General. The claim was rejected by a decision of 27 June 1980, and this complaint was filed with the Registry of the Tribunal on 25 September 1980.

8. The ILO puts forward several arguments in support of its plea that the complaint is time-barred.

The first is that its position was clear by 1 November 1979. From that date the complainant could not expect to get any further on the essential points of her claim. Subsequent changes could relate, and in fact did relate, only to incidental matters.

The second argument - if the first one fails - is that it is the claim in the complainant's additional memorandum of 7 February 1980 that constituted her appeal against the certificate of 28 January 1980, and that the ILO's reply in the memorandum it filed with the Tribunal on 5 March 1980 was the conclusion of this phase.

A third, and subsidiary, argument is based on the Tribunal's judgment of 24 April 1980. This is that, whatever the

material date may be - 1 November 1979, 5 March 1980 or 24 April 1980 - the ninety-day limit set in Article VII of the Statute of the Tribunal for filing a complaint had in any case expired by 25 September 1980, the date on which the complaint was filed. The claim submitted to the Director-General on 28 April 1980 was a new internal appeal and did not have the effect of extending the time limit or give rise to a new one.

9. The complainant's main argument in reply is that what she is objecting to is not an improper certificate of service, but the lack of a certificate covering an essential point. The final refusal of this certificate is the decision of 27 June 1980, which was taken after the internal means of redress had been exhausted. In the complainant's view the certificates dated from 25 October 1979 to 28 January 1980 have no bearing on the complaint.

10. Article VII(1) of the Statute of the Tribunal reads: "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations." Article VII(2) states: "To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned..."

11. The position as alleged by the complainant requires some qualification. A decision exists even if it is incomplete. The certificates she received may be unlawful, but they exist, and the complainant acknowledges that she received them.

12. That being so, the crucial point is the date on which the ninety-day limit for filing the complaint began.

The date cannot be 1 November 1979, since the ILO continued thereafter to discuss the matter with the complainant and indeed further certificates were drafted. That they differ only in detail from the earlier ones is immaterial. So long as the ILO continued to discuss and to seek agreement, it cannot be said that the internal means of redress had been exhausted.

The Tribunal further holds that the memoranda filed in the proceedings which culminated in its judgment of 24 April 1980 have no bearing on the application of Article VII of its Statute. A complaint may be duly filed only after the internal procedure has been completed. In this instance it had clearly not been completed by November 1979. The complainant's additional memorandum of 7 February 1980 may be more detailed, but it does no more than supplement her earlier one.

The Tribunal would have taken a different view if in its earlier judgment it had gone into the merits of the claim relating to the certificate. The principle of *res judicata* would then come into play. But in fact the Tribunal declined to decide the point because no valid claim was before it. Its earlier judgment - in which it declined to consider whether the certificate was valid - is therefore immaterial, and so are the memoranda filed in the earlier proceedings, since by their very nature such memoranda do not constitute internal means of redress within the meaning of Article VII of the Statute.

13. The Tribunal will accordingly take into account only the certificate which was signed on 28 January 1980 and which the complainant received not later than 3 February 1980. She had ninety days from that date in which to appeal to the Director-General. She did so within the time limit, on 28 April 1980, and her appeal was rejected on 27 June. Her complaint was filed with the Tribunal on 25 September 1980 and is therefore not time-barred.

The validity of the certificate

14. Article 11.17 of the Staff Regulations reads: "A certificate relating to the nature of his duties and the length of his service shall be given, at his request, to any official who leaves the service. At his request the certificate shall also refer to the official's competence, efficiency and official conduct."

There is only one text which the Tribunal will consider, and that is the certificate given on 28 January 1980. The Tribunal holds that each certificate supersedes the one before. There cannot be a series of such certificates; otherwise prospective employers would be quite unable to form any precise opinion of the terminated staff member.

15. According to the Staff Regulations the certificate of service should relate, if the staff member so requests, to his competence, efficiency and official conduct. The complainant has constantly asked for compliance with this requirement. The certificate of 28 January 1980 refers merely to reports which prospective employers may consult provided the complainant so agrees.

This expedient does not comply with the actual wording of the article. Nor can prospective employers be referred to annual reports on performance. The certificate of service should be a text which is complete in itself. The Director-General enjoys discretion in the matter, but the Tribunal is still competent to determine whether all the information set out in Article 11.17 has been supplied. In this case it has not. There is therefore no need for the Tribunal to consider the other pleas nor to grant the complainant's application for oral proceedings. The certificate should be cancelled so that the Director-General may, if the complainant so requests, provide a new and complete one.

The other claims

16. The complainant's other claims for relief fail.

Her claims for compensation are irreceivable because there is no previous decision.

She also seeks protection against defamation. There is, however, nothing in the written evidence to suggest that aspersions have been cast on her honour at any point in the proceedings.

DECISION:

For the above reasons,

1. The Director-General's decision of 27 June 1980 is quashed and the certificate of service dated 28 January 1980 is cancelled.
2. The Organisation shall pay the complainant 1,000 Swiss francs as costs.
3. The other claims for relief are dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 3 June 1982.

(Signed)

André Grisel

J. Ducoux

Devlin

A.B. Gardner

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