

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

FIFTY-FIRST ORDINARY SESSION

In re ALI KHAN (No. 2)

Judgment No. 565

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the International Labour Organisation (ILO) by Mr. Bahauddin Ali Khan on 22 October 1982 and the ILO's reply of 17 December 1982;

Considering Judgment No. 557;

Considering the complainant's rejoinder of 14 July, corrected on 1 November, and the ILO's surrejoinder of 8 August 1983;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 6.7.2 and 13 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. From 1975 the complainant held a P.4 post in the Industrial Activities Branch of the International Labour Office as an industrial specialist. On 1 September 1981 the branch was split into two, he was assigned to the Manufacturing Industries Branch, the head of which was Mr. Abate. On 18 June 1982 he was given an appraisal for the period from 1 October 1980 to 30 September 1981. In a minute of 28 June to Mr. Abate, to Mr. Milne - his higher-level chief, the head of the Sectoral Activities Department - and to the Reports Board, he objected to the contents and late and hurried writing of the report. Mr. Abate rejected his objections in a minute of 29 June to Mr. Milne and the Board, and so did Mr. Milne in one of 12 July to the Board. These minutes were not sent to him at the time. On 28 July the Board recommended approving the report. The Director-General did so on 9 August and Mr. Abate initialled it on 23 September. It went back to the complainant on 4 October, with the two minutes and the Board's comments. In a minute of 8 October he observed that before the Board took up his report he ought to have seen the minutes, as required by Article 6.7.2 of the Staff Regulations. On 22 September he filed his complaint impugning the Director-General's decision of 9 August. On 28 October the Secretary of the Board invited him to comment on the two minutes, but he declined, saying the matter was sub judice.

B. The complainant says he ought to have had a chance to comment on the two minutes and the Board's observations of 28 July 1982 before the Director-General approved the report. There was breach of Article 6.7.2 of the Staff Regulations: "The appraisal ... shall ... be transmitted to the official to whom the responsible chief reports, who may add his observations to it, in which case it shall be returned to the responsible chief and to the official for initialling. It shall then be transmitted to the Secretary of the Reports Board..." Nor was the inordinate delay, which the Board recognised, ever explained: ILO guidelines say a report should be returned to Personnel within two months. There was no proper consultation. According to the guidelines the supervisor should give the official the opportunity to express his views on the supervisor's evaluation and these should be discussed before the final appraisal is made. Mr. Abate refused to discuss anything. Nor did Mr. Milne consult him. It was mistaken to rate his performance as "fully satisfactory": he "generally exceeded the major requirements of the job" and should therefore have been rated "outstanding". Some entries were too thin. He invites the Tribunal to order (1) that the appraisal be processed in keeping with the Staff Regulations and guidelines; (2) that his rating be changed to "outstanding" and (3) that the injury to him be undone and all harassment and discrimination ended; (4) to award him damages for material and moral injury; and (5) to order that similar "high-handedness" not recur.

C. The ILO replies that the Tribunal is competent to hear only the claim for compensation for procedural defects. But this is irreceivable because the internal means of redress have not been exhausted. Personnel tried to make up

for the disregard of Article 6.7.2 by inviting the complainant to comment on the two minutes, but his own refusal prevented that. Besides, he has shown no injury. Nothing in the report harms his interests. Though brief - mainly because Mr. Abate had been his chief for only a month - the appraisal was fair. His real purpose is to get his own opinion of himself endorsed, but under the rules only his chief may make the appraisal.

D. The complainant rejoins that the complaint is receivable. The irregularities are evidence of refusal to treat him fairly; besides, disputes over the Reports Board's recommendations may not be referred to a Joint Committee under Article 13, and he had no choice but to go to the Tribunal. Discrimination and intimidation there are, of which the unfair appraisals he has had over many years are only one aspect and which he believes would be proved by material kept in secret records. Though the ILO admits his supervisors' comments ought to have been notified to him earlier, many other irregularities have caused him serious moral and material injury, which warrants exemplary damages. It is insulting to rate his fine record no better than "fully satisfactory", and discriminatory, too, since others with no better a record have won generous praise. Despite the irregularities the Reports Board had the appraisal report filed in his records. For refusing to sign it he has been harassed further: for example, he has not yet got his appraisal for 1981-82, though the Board approved it in May 1983. He alters his claims for relief and invites the Tribunal (1) to declare the appraisal for 1980-81 the result of irregularities and manifest prejudice; (2) to order the ILO (a) to stop penalising him; (b) to report on his performance from February to July 1961, which has never been done; (c) to remove prejudicial papers from the secret files about him and expunge others from the records, including the two minutes; and (3) to award him damages. He adds that "the other items of reliefs in the complaint ... remain unchanged". He appends a brief which he submitted on 2 March 1983 in support of his application for a provisional order and which the Tribunal did not then admit.

E. In its surrejoinder the ILO submits that the complainant's modified claims are either outside the scope of the complaint or the Tribunal's competence or time-barred or too vague. Although the Director-General's decision on the contents of an appraisal is final, this is not a matter within the Tribunal's competence anyway. Procedural irregularities can form the subject of a 13.2 complaint, but the complainant failed to submit one and his complaint is irreceivable. The ILO refuses to disclose the papers he asks for: for one thing, the appraisals of other officials would afford no evidence of discrimination against him. His allegations of prejudice and victimisation are unproved: though he has had a perfectly honourable career, he has simply become blind to his own limitations.

CONSIDERATIONS:

Disclosure of evidence

1. In submissions dated 14 January 1983, which he confirmed on 2 March, the complainant asked the ILO to produce several items of evidence, including reports on the performance of other officials. The Tribunal dismissed his application in Judgment No. 557. He repeats it in his rejoinder in so far as it refers to the performance reports, and the Tribunal again rejects it, for the reasons stated in the previous judgment.

Receivability and competence

2. The complaint contains five claims and asks the Tribunal to order the ILO:

(1) to prepare the complainant's annual appraisal report for 1980-81 in accordance with Article 6.7 of the Staff Regulations and the relevant guidelines and "in all freedom, honesty and with due face to face dialogue between the complainant and his supervisor";

(2) to change the rating in Part III.5 of his appraisal report to "outstanding performance";

(3) to "undo all the harm" done to him and "put an end to all harassment and discriminatory practices against him";

(4) to award him damages for material and moral injury;

(5) to stop treating him with "high-handedness and rancour, contrary to the Constitution, international norms established by the ILO and its Staff Regulations".

3. In his rejoinder he replaces claim (1) with the following:

(a) to declare the 1980-81 appraisal a product of irregularities and manifest prejudice;

(b) to order the ILO to put an end forthwith to victimisation, the existence and continuation of which have been demonstrated beyond doubt;

(c) to order the ILO to make amends for all the irregularities and victimisation inflicted on the complainant in his 23 years of service, and in particular take various measures of relief set out under five heads.

4. The first question is whether the new claims are receivable. The rule is that a claim made in a rejoinder will be receivable only if it comes within the scope of a claim made in the complaint.

Claim (a) replaces an application for a new report with one for a declaration that the old report is a product of irregularities and prejudice. It may be treated as coming within the scope of claim (1) and as a valid alteration thereof.

Claim (b) states claim (3) in different terms. Since it cannot stand as an independent claim it will not be considered.

Claim (c) either repeats claims contained in the complaint or else falls outside their scope. It is therefore irreceivable.

5. The next question is whether claims (1) to (5) - with the alteration of (1) by the rejoinder - are receivable and whether the Tribunal is competent to hear them.

(a) As to claim (1), the ILO submits that the complainant has not exhausted the internal means of redress as required by Article VII(1) of the Statute of the Tribunal, having failed to address a "complaint" to the Director-General under Article 13.2 of the Staff Regulations. But as the ILO by implication concedes, a decision taken by the Director-General himself is not subject to the Article 13.2 complaint procedure. The performance report referred to in claim (1) was approved by the Director-General and so he accepted responsibility for it. The complainant was therefore entitled to take the view that he need not address a complaint to the Director-General before submitting claim (1) to the Tribunal. Whether or not the Director-General would have entertained such a complaint - the point is irrelevant - Article VII(1) of the Statute constitutes no bar to a complainant who, like Mr. Ali Khan, rightly concluded that he was not required to follow one of the internal appeal procedures.

It is immaterial that after the complaint was filed the Reports Board invited and the complainant refused his comments. He was bound neither to comment, nor indeed to withdraw his complaint unless the ILO agreed to all his claims, including compensation, which it did not.

For these reasons claim (1) is receivable.

(b) Claim (2) is for rating his performance, not "fully satisfactory", but "outstanding". The Tribunal cannot make any general assessment of performance and this is a matter outside its own competence and exclusively within the ILO's.

(c) The obligations which the complainant seeks to lay on the Organisation in claim (3) are in part stipulated in the Staff Regulations and are stated in such general terms that performance would not be enforceable. In so far as it is not invalid the claim is too imprecise and therefore irreceivable.

(d) According to the Tribunal's case law claims to compensation are receivable if linked with a claim for breach of a contract of appointment or of the Staff Regulations. Claim (4) is therefore receivable.

(e) Claim (5) is irreceivable for the same reasons as is claim (3).

The merits

6. For the reasons stated above the Tribunal will take up only the points raised by claims (1) and (4) in the complaint, viz. the irregularities and prejudice which the complainant says vitiate his performance report, and the matter of compensation for material and moral injury.

7. The Tribunal will first deal with the allegations of irregularities and prejudice.

(a) ILO guidelines say that a performance report must be prepared and returned to the Personnel Department within two months. Despite the complainant's insistence the time limit was not respected in his case. The report on the period from 1 October 1980 to 30 September 1981 was not signed by his responsible chief until 18 June 1982. It was reviewed by the Reports Board on 28 July, approved by the Director-General on 9 August and notified to the complainant on 4 October 1982.

It was in breach of Article 6.7 of the Staff Regulations and of the guidelines that the Director-General approved the report before three appended papers had been communicated to the complainant, namely a minute by his immediate supervisor, a minute by the chief of department, and comments by the Reports Board.

On account of that breach claim (1) is sound in so far as it is based on the existence of irregularities. There is therefore no need to consider whether the brevity of some parts of the report, the absence of entries in others and the way in which it was notified to the complainant constitute further irregularities.

(b) Although the irregularities led the complainant to believe that he was the victim of prejudice, he has failed to establish that in fact he was.

First, his present supervisors appraise his performance in terms identical or similar to those used by his earlier supervisors. This is one reason for supposing that they are not prejudiced against him.

Secondly, the lateness of the report is partly accounted for by the changes in the complainant's department. For the first 11 months of the year covered by the report he had a supervisor who on leaving said he could not "make any valid assessment of Mr. Ali Khan's performance". This makes it understandable that the complainant's new supervisor wanted to see him at work for some time before appraising his performance during the last month of the year.

Thirdly, the papers which were not properly communicated to the complainant are in any event unlikely to have been wilfully concealed from him. Their authors were bound to have known that they would be notified to him at some time.

The plea of prejudice therefore fails.

8. The complainant is claiming compensation for material and moral injury, and the Tribunal will rule separately on each of these claims.

(a) There are no grounds for supposing that if the report had been made properly the complainant would have derived financial benefit from appointment to a higher post. Since the start of his career he has been entering competitions and has been able to cite performance reports which were neither more nor less favourable than the one he is now objecting to. He has been unsuccessful every single time. It is therefore unlikely that he would have fared any better in the most recent competitions he entered even if he had been able to refer to his report for the period from 1 October 1980 to 30 September 1981. The Tribunal therefore rejects his claim to compensation for material injury.

(b) But the claim to compensation for moral injury succeeds. Of course it is not enough to allege emotional distress to obtain financial compensation. What the Tribunal will require is that in the circumstances the effect on his feelings should have been appreciably greater than that of the ordinary fortunes of everyday life. This requirement is fulfilled.

The complainant joined the staff of the ILO in 1960. Although he has changed posts several times he has never had promotion in the true sense. His advancements in grade have been due either to a reorganisation of the department or to review of his duties. For years he has been seeking, in vain, a more senior post. He has never been awarded any special salary increment. He has seen several younger officials with less seniority reach a grade which he has been refused. Accordingly, life being what it is, even though he has misconstrued the reasons for the irregularities in his report for 1980-81, he was particularly affected by them. For the moral injury he has suffered he is entitled to compensation which the Tribunal sets *ex aequo et bono* at 2,000 Swiss francs.

The Tribunal's decision

9. For the foregoing reasons the report for 1980-81 was improperly processed and the complainant is awarded

compensation for moral injury amounting to 2,000 Swiss francs.

Since he is partly successful he is entitled to costs, and the Tribunal awards him 1,000 Swiss francs under this head.

10. In its surrejoinder the ILO says it is willing to delete from the report the comments made without the complainant's knowledge and to put a copy of the present judgment in his personal file. The Tribunal takes note of that statement.

DECISION:

For the above reasons,

1. The complainant's performance report for 1980-81 was improperly processed.
2. The ILO shall pay the complainant 2,000 Swiss francs as compensation for moral injury.
3. The ILO shall pay him 1,000 Swiss francs as costs.
4. The other claims are dismissed.

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

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner