

SIXTY-EIGHTH SESSION

In re ZOGANAS (No. 2)

Judgment 994

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Athanase Zoganas against the International Labour Organisation (ILO) on 22 September 1988, the ILO's reply of 16 December, the complainant's rejoinder of 28 March 1989 and the ILO's surrejoinder of 30 May 1989;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 3.4.4 (as in force up to 31 December 1987), 4.2(f) and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written evidence;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who has served on the Office staff since 1955, was granted three concurrent promotions in 1986 and 1987. The first was promotion by direct selection for a P.3 post to which he was transferred from a G.6 one on 9 June 1986 with effect from 1 July 1986. The second was personal promotion from G.6 to G.7 and was granted on 22 August 1986 with effect from 1 January 1985. The third was the outcome of a procedure begun in 1982: as he was informed by a minute of 6 February 1987, he was promoted by virtue of the regrading of his post from G.6 to P.3 as from 1 February 1984.

A personnel action form dated 5 June 1987 recorded his new administrative status. But a minute of 19 June told him that the third promotion had the effect of cancelling the first two. On 9 July he wrote to the head of the Personnel Development Branch asking for the withdrawal of the form of 5 June, which entailed a one-third reduction in his pensionable remuneration and so, he maintained, impaired his accrued rights. The head of the Personnel Policy Branch answered on 23 December offering him two options: either his promotion to P.3 as from 1 February 1984 would be deemed to have cancelled the two earlier ones and, in keeping with Article 3.4.4, his pensionable remuneration would stay at the level it had reached at that date; or else he might keep the personal promotion and his pensionable remuneration would be at the level it had reached at 1 July 1986. The Director of the Personnel Department confirmed by a minute of 19 February 1988 that those were the only two options on offer and explained that according to the second one the promotion to P.3 as from 1 February 1984 would lapse. The complainant having refused to make any choice at all, the Director informed him by a letter of 28 June 1988 - the decision now impugned - that the second option was to be applied.

B. The complainant contends that the Director had no authority to reverse the Director-General's decision of 1987 to promote him to P.3 because of the regrading. In his submission the slowness of the grading procedure denied him opportunities for promotion and in particular for succeeding the former head of his unit, whose duties had been graded P.4.

He asks the Tribunal (1) to quash the decision of 28 June 1988 insofar as it cancelled his promotion from G.6 to P.3 as from 1 February 1984 on the regrading of his post; (2) to order the ILO to produce a statement of the arrears of salary and allowances that have accrued to him since 1 February 1984, pay him those sums and refund the expenses of his home leave in 1986. He claims costs.

C. The Organisation replies that the decision under challenge was taken in exercise of authority delegated for the purpose of day-to-day personnel management. The complainant's allegations that the dilatoriness of the regrading procedure cost him opportunities for advancement are mere conjecture unsupported by a shred of evidence.

His personal promotion was unlawful. According to paragraph 19 of circular No. 334, Series 6, of 20 July 1985, if the official receives promotion by other means before the effective date of the personal promotion, it shall

"supersede the personal promotion". If the material date is that at which the decision was taken, then the first promotion - which took effect at 1 July 1986 - must supersede the later personal promotion. If the material date is that at which the decision took effect, then again the regrading - which took effect at 1 February 1984 - must supersede the personal promotion. By either reasoning the personal promotion is invalid. That being so, the complainant's pensionable remuneration, which he is entitled to keep under Article 3.4.4 of the Staff Regulations, must remain at the level corresponding to grade G.6, step 13, at 1 February 1984, the earliest date at which any of his three promotions took effect. To protect his pension entitlements, however, the ILO made him an offer he is in no position to object to and let him choose between that solution and keeping his pensionable remuneration at grade G.7 and his promotion to P.3 as from 1 July 1986. Having rejected that choice he demanded both the application of Article 3.4.4, even though the validity of the personal promotion was questionable, and the retroactive regrading. He may not rely on a mistake of law that was to his advantage in support of a claim to the accrual of benefits that are incompatible.

D. In his rejoinder the complainant maintains that the Director of the Personnel Department was not competent to reverse a decision of the Director-General's. Any delegation of authority for the purpose ought to have been explicit, and it was not. The decision of 28 June 1988 was in breach of Article 4.2(f) of the Staff Regulations, which requires consultation of the Selection Board, and of several general principles of law such as the rule against retroactivity and the safeguarding of rights that accrue to a staff member by virtue of an administrative decision.

Even supposing that the ILO was right to take the view that the personal promotion was unlawful and that letting him keep pensionable remuneration at G.7 was wrong, the error was not a sound reason for denying him the benefits of another promotion which it does not say was unlawful. Its pleas on the matter of the personal promotion of 22 August 1986 are, besides, out of time because it may not plead the unlawfulness of that promotion after expiry of the time limit for appeal against the decision. The pleas are devoid of merit anyway since it was the competent authority that took the decision, and on the recommendation of the prescribed advisory body.

The ILO is mistaken in alleging inconsistency between the third promotion and Article 3.4.4 of the Staff Regulations. The purpose of that clause was not to allow reduction of pensionable remuneration because of promotion. Although the third promotion may make the first two pointless it cannot cancel the accrued rights that 3.4.4 expressly safeguards.

The complainant presses his claims.

E. The Organisation submits in its surrejoinder that the arrangements for determining the complainant's status, which are the corollary of his promotion to the Professional category and of his right to keep his pensionable remuneration at the level before promotion, must be consistent, even if they are fictitious. The ILO enlarges on its pleas about the level of pensionable remuneration he is entitled to under Article 3.4.4 and the unlawfulness of his personal promotion.

CONSIDERATIONS:

1. The complainant, who is in charge of the archives of the International Labour Office and holds grade P.3, is in dispute with the ILO over the consequences of three successive and inconsistent decisions by the Director-General to promote him. The decision actually impugned is one which the Director of the Personnel Department took on 28 June 1988 and which in the complainant's submission imposed a solution in breach of his accrued rights.

2. Though he has applied for oral proceedings and for the hearing of witnesses they are unnecessary because the papers afford all the evidence a ruling requires.

The issues of fact

3. There being three successive decisions to promote the complainant, two of them retroactive from different dates, a chronological summary of events is required to explain how the dispute arose.

From 1970 the complainant was assistant to the official in charge of the archives and his grade was G.6. In 1982 he and his first-level supervisor asked the Personnel Policy Branch whether his post should be reclassified in the Professional category of staff.

To begin with the Branch disagreed, as its chief said in a minute of 16 April 1984 that confirmed the grade of his

post at G.6. He appealed to the competent grading appeals committee, the committee found in his favour, and the Director-General agreed to classify his post in the Professional category. The head of the Personnel Policy Branch so informed him in a minute of 2 August 1985. That did not put an end to the matter, however, since there was still dispute over the grade the post should be given in the new category.

Before that matter of grading had been sorted out the head of the Personnel Development Branch wrote to the complainant on 15 October 1985 saying that the Personnel Department had found him to qualify by 31 December 1984 for "personal promotion" and asking him to fill up an application form for the purpose. The ILO has arrangements, set out in circular 334 of 20 July 1985, for the grant of personal promotion to a "meritorious" official whose advancement is "blocked" by lack of scope for any other sort.

The first promotion

An overhaul of the archives unit having been completed in January 1986, the head of the Internal Administration Branch, of which it is a part, proposed in a minute of 15 April 1986 appointing the complainant by direct selection to head the unit at grade P.3. A minute of 9 June 1986 informed him that the Director-General had decided to put him in charge of the archives and to promote him to P.3 as from 1 July 1986.

The second promotion

By a minute of 22 August 1986 the Director of the Personnel Department informed the complainant that he was granted "personal promotion" to G.7 as from 1 January 1985 and up to 30 June 1986, the day before his promotion to P.3. The complainant answered in a minute of 16 October 1986 that he wanted, as Article 3.4.4 of the Staff Regulations prescribed, to keep his pensionable remuneration at the level it had reached before his promotion to P.3 and have it correspond to grade G.7, at which it was higher than at P.3. The grant of his request was recorded on a "personnel action form", No. 38518 of 17 October 1986, and both he and the ILO paid the corresponding additional contributions to the United Nations Joint Staff Pension Fund for the period from 1 January 1985 to 30 June 1986.

The third promotion

By a minute of 6 February 1987 the head of the Personnel Policy Branch told the complainant that his appeal about the grading of the post he had held in 1983 had gone through and the Director-General had decided to regrade him at P.3 as from 1 February 1984. Another personnel action form, No. 38799 of 5 June 1987, showed the status which, according to the ILO, the third promotion gave him and put his promotion from G.6 to P.3 at 1 February 1984. It bore two comments. One was: "In accordance with Article 3.4.4 of the Staff Regulations Mr. Zoganas wants to keep his pensionable remuneration at the level it reached before promotion", and the other: "This form amends No. 38518, Mr. Zoganas being promoted as from 1 February 1984 not as from 1 July 1986". The ILO accordingly made over 23,000 Swiss francs to him on 9 June 1987 towards arrears of pay.

4. The complainant asked the Organisation to explain his status as resulting from the three decisions. In a minute to him of 19 June 1987 a personnel officer said that since the third promotion to P.3 dated from 1 February 1984 it had "the effect of cancelling" the two earlier ones. The complainant objected in a minute of 9 July 1987 on the grounds that that impaired pension rights that had properly accrued to him by virtue of the earlier decisions. He asked that form 38799 be withdrawn.

5. The gist of the answer from the head of the Personnel Policy Branch was that the ILO was treating the second promotion, the "personal" one, as void since the complainant had already been granted promotion by direct selection; since the promotion due to the regrading was retroactive the two earlier ones were really void; but instead of pressing that view to its logical conclusion the ILO would resort to the expedient it thought "the most logical and fair" and let him choose between two options. One was to accept that his promotion as from 1 February 1984 had cancelled the others and under Article 3.4.4 of the Staff Regulations his pensionable remuneration would be at the level it had reached by that date. The other option was to allow him the personal promotion, but on the understanding that his pensionable remuneration would be at the level it had reached by 1 July 1986, the date at which his promotion by direct selection had taken effect.

6. In a minute of 4 January 1988 the complainant turned down the offer altogether and again demanded that the pension rights determined as a result of his personal promotion be left alone. In a further explanation of 19 February 1988 the Director of the Personnel Department enlarged on the earlier minute, which he said set out "the

only two options" on offer.

If the complainant chose the first one he would get 23,393.80 Swiss francs in arrears of salary, of which he had already been paid 23,000. But his pensionable remuneration for the period prior to the regrading would be at G.6, and since the Pension Fund would not disgorge the additional contributions, which it had already used to meet its liabilities in the event of death and disability, the ILO was willing to pay him back 2,185.15 francs, the amount of his own additional contributions.

If he preferred the second option he would have to pay back the 23,000 francs. His pension rights would hold good though he would have to pay another 656 francs in arrears of contributions.

7. The Director asked him to make up his mind by 26 February so that things could be sorted out quickly. In his reply of 25 February, besides objecting to being allowed little time in which to decide, he refused both options on the grounds that they impaired his accrued rights. He submitted an internal "complaint" to the Director-General and asked for referral to the Joint Committee under Article 13.2 of the Staff Regulations.

8. In his reply of 26 April 1988 the Director of the Personnel Department told the complainant that the Director-General saw no need to refer the case to the Joint Committee. He confirmed the ILO's earlier stance and blamed the complainant for causing "all the complications" in that he had not dropped his grading appeal even after being promoted to P.3 under another procedure. The Director dwelled further on the Organisation's case and remarked that the offer went beyond what the complainant was strictly entitled to; if he did not reply by 31 May he would be deemed to have chosen the second option. In a minute of 27 May the complainant again refused to be limited to the two options and asked that form 38799 be cancelled outright.

9. By a letter of 28 June 1988 the Director informed the complainant:

"... I have decided to apply the second option offered to you: personal promotion from G.6, step 13, to G.7, step 11, as from 1 January 1985 and promotion to P.3 as from 1 July 1986."

That is the decision impugned.

10. The complainant explains that he is challenging the decision only "insofar as it cancels the Director-General's decision to promote him to P.3 as from 1 February 1984". That point is the only one the Tribunal is asked to review and it will look no further.

Receivability

11. Though the ILO enters no formal plea of irreceivability it does raise the issue in its surrejoinder. It observes that the complainant failed to challenge in time the Director's decision of 26 April 1988 rejecting his internal "complaint" and it suggests that the Tribunal may wish to take the point.

12. The point is unsound. What the Director said in his minute of 26 April 1988 was that the Director-General refused to put the case to the Joint Committee, and he told the complainant to make up his mind by 31 May 1988. That was no final decision: only when the complainant had rejected both options did the Director make the choice in his stead in the form of the impugned decision in the letter of 28 June 1988. So only then did the time limit for filing a complaint begin, and the suggestion that the complaint may be time-barred is misconceived.

The merits

13. The complainant's claims being worded as they are, the only material issue is whether the decision of 28 June 1988 properly reversed the effects of the regrading of his post so as to determine his rights as from 1 July 1986 and not from 1 February 1984.

14. The above account of the dispute shows that the impugned decision did reverse the regrading, of which he was told on 6 February 1987 and which the payment of arrears of salary thereupon confirmed. The complainant accepted the decision about the regrading, it came about in a proper way and it shows no flaw. It became final on the expiry of the time limit for challenge, that is to say before the end of 1987, and the ILO may not seek to go back on it.

15. Insofar as the decision of 28 June 1988, by alluding to promotion as from 1 July 1986, conflicts with the decision to grade the complainant's post P.3 as from 1 February 1984 it cannot stand.

16. He is awarded 2,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The decision of 28 June 1988 is quashed insofar as it conflicts with the decision to regrade the complainant's post P.3 as from 1 February 1984.

2. The Organisation shall pay him 2,000 Swiss francs in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner