

## NINETIETH SESSION

*In re* Dormond Vega and González Vega

Judgment No. 2011

The Administrative Tribunal,

Considering the complaints filed by Miss Denia Dormond Vega and Miss Yadira González Vega against the International Labour Organization (ILO) on 8 October 1999 and corrected on 25 January 2000, the ILO's reply of 3 May, the complainants' rejoinder of 10 August and the Organization's surrejoinder of 13 September 2000;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The complainants are both citizens of Costa Rica. Miss González Vega took up employment with the International Labour Office, secretariat of the ILO, in March 1986 as a secretary on a technical cooperation project at grade L.4. On 1 December 1992 her position was regraded at L.5. On 1 January 1994 she was assigned through a temporary transfer to a position of secretary in the newly established ILO Multidisciplinary Team (MDT) in the ILO's Area Office in San José, Costa Rica. She was offered the position at grade L.5 on the basis of a three-month contract which was subsequently extended. Miss Dormond Vega was recruited in April 1994 for a similar position as a secretary within the MDT on a special short-term appointment, also at grade L.5. Since the MDT formed a new part of the ILO's structure and came within the ILO's regular budget, positions within it had to be graded according to existing standard procedures and put up for competition: that was the case for the positions occupied by the complainants.

Later in 1994 job descriptions for those positions were drawn up. In November 1994 the ILO's Regional Office for Latin America and the Caribbean, in Lima, Peru, assessed both positions at grade L.4, and a competition was opened to fill them at the beginning of 1995. The complainants applied and were subsequently appointed. At its meeting of 4 July 1995 the Regional Selection Board, taking account of the financial uncertainty within the Organization, recommended that the complainants' contracts be extended only to the end of the year and that their grades be set at L.4, step 2. Having adopted that recommendation the Director of the Regional Office notified his decision to the Director of the Area Office on 10 July. The complainants protested about that lower grade on 17 July 1995 and in August 1995 their contracts were extended at grade L.5, pending further reconsideration. The Director of the Regional Office wrote again to the Director of the Area Office on 29 September 1995 confirming the complainants' appointments from 1 October to 31 December 1995, at grade L.4, but at step 5. The complainants signed the corresponding contracts on 4 October 1995. Their contracts were again extended in 1996.

On 16 July 1996 the complainants wrote to the Director of the Area Office, asking him to initiate proceedings with the Regional Office for the reclassification of their positions. The matter was taken up in correspondence between the Area Office and the Regional Office in early 1997. In October 1997 the complainants wrote to the Deputy Regional Director mentioning that they had never filled out any classification review forms. In an e-mail to the complainants on 27 November 1997 the Personnel Officer in Lima told the complainants that the matter had been submitted to ILO headquarters.

On 17 April 1998 the complainants wrote to the Regional Director indicating their intention to file an internal complaint under Article 13.2 of the Staff Regulations. In letters of 29 April the Regional Director asked both complainants to specify the nature of their "concerns and expectations in relation with [their] present labour conditions". They responded on 4 May 1998 specifying that they wished to be granted grade L.5 as from October 1995. On 18 June the complainants confirmed to the Regional Director their intention to submit an internal complaint. After obtaining views from headquarters the Regional Director replied to their letters on 30 October

1998 saying that their positions had been formally classified on 3 November 1994, and that no elements had been found that would make the Regional Office alter its decision of 29 September 1995 by which they were assigned grade L.4, step 5.

On 12 April 1999 they filed a joint internal complaint under Article 13.2 against the decision of 30 October 1998. The Director of the Personnel Department replied to each complainant on behalf of the Director-General on 9 July 1999. She pointed out that ILO headquarters had agreed "voluntarily" to examine the complainants' situation and had concluded that the decision taken on 29 September 1995 was "in accordance with existing regulations". She said that the decision of 30 October 1998 did not constitute a "new decision" setting off new time limits and that their claims were, therefore, irreceivable under Article 13.2 - which imposes a six-month time limit for challenging a decision - since their claims were made against a measure that had been applied to them from September 1995. That is the decision now impugned.

B. The complainants submit that the Director of Personnel erred in determining that the communication of 30 October 1998 did not constitute a "new decision" against which they could appeal. They state that when the Regional Director wrote to them on 29 April 1998 he asked for a "written communication" setting out their concerns which would help him to take a "final and formal decision". It is clear from the wording of his letter that he did not think a formal decision had yet been taken. They had therefore assumed that a review would take place and that a formal decision would follow. They contest the Organization's assertion that the review it carried out at headquarters was purely "voluntary". Contrary to what the Director of Personnel affirmed, it is clear that the letter of 30 October 1998 constituted a formal decision within the meaning of Article 13.2, and their internal complaint was thus lodged within the required time limit.

The complainants also contend that the Regional Director erred in his decision of 30 October 1998 and he was wrong to affirm that no elements had been found to make the Regional Office alter its decision of 29 September 1995 by which their positions were graded at L.4. They contest his view that their positions were "formally" classified on 3 November 1994 and seek documentary evidence in support of that assertion. Indeed, the decision of 29 September 1995 was itself only "temporary in character" and involved matters that were, in part, irrelevant to the grading issue. They submit that the view of the Regional Office was "tainted by incoherence", and that the Organization was "unjustifiably dilatory" and made the process drag on for five years.

On the merits, the complainants point out that their positions were initially offered to them at grade L.5. Upon recruitment their grades were fixed at L.5 by the Director of the Multidisciplinary Team. They did not doubt his "ostensible authority" to offer them appointments at that level. They signed their contracts in good faith with the legitimate expectation that their employment would continue at that grade.

There was failure to follow proper procedures in determining the level of their positions. Details of the methodology applied have never been provided, the usual procedure for classifying a position was not followed and they did not fill in a "post description questionnaire". The classification of their positions at L.4 was arbitrary. The contracts they signed on 4 October 1995, which set the grade at L.4, were offered to them on "ambiguous terms" and they had no alternative but to sign. They did so under protest, which cannot be construed as acceptance of the grade.

They want the Organization to confirm their grades at L.5 and pay them the difference in salary on that basis from 1995. They also ask for costs.

C. The Organization, in its reply, argues that their internal complaint was irreceivable as are their complaints to the Tribunal. While the complainants impugned the decision of 30 October 1998 in their internal complaint, that appeal was in fact lodged against the classification of their positions at L.4. A decision as to the grade of their positions was taken by the Regional Director on 29 September 1995 and reference was made to it in the contract extension signed by them a few days later on 4 October. They did not challenge that decision within the six-month time limit imposed by Article 13.2. The Regional Office took action at various levels to see if a solution to their problems could be found. It did not react to a specific claim from the complainants but rather in response to their concerns. Their first formal claim was dated 4 May 1998. The Organization contends that in his letter of 29 April 1998 the Regional Director did not state that he would take a "final" formal decision: the complainants inserted the word "final" as an afterthought in the translation given in their pleadings. The original Spanish text does not contain such a notion.

Citing the Tribunal's case law, the Organization says that although discussion may take place after a final decision is taken, that does not necessarily mean that there will be a new final decision. The decision of 30 October 1998 was but confirmation of the decision taken in September 1995. Any "temporary nature" of the decision of 29 September 1995 arose in relation to another secretarial position, mentioned in the letter but which is not at issue in this case. When the complainants signed their contracts on 4 October 1995 they were well aware of the grading issue and any expectation they might still have had of obtaining grade L.5 could not be construed as providing a right to that grade.

Subsidiarily, the ILO argues that the complainants' pleas are devoid of merit. It explains that, pending the evaluation of long-term staffing needs, some officials, including the complainants, were assigned on a temporary basis to assist in the setting up of the MDT. In Miss González Vega's case, she kept grade L.5 which she had held when she worked on the technical cooperation project. Staff on such projects are not subject to ILO grading standards and procedures. Miss Dormond Vega was initially put on the same grade as her colleague because the tasks assigned to them were the same. The secretarial positions in the MDT were to be financed through the ILO's regular budget, which meant that the statutory selection procedure eventually had to take place. Appointment had to be made at the grade pertaining to the posts. Job descriptions were drawn up for the complainants' positions and they were classified in accordance with ILO standards. The defendant points out that the grading of vacant positions is not open to challenge, and no member of staff can initiate the reclassification of his or her job until a year after being appointed. Even thereafter the complainants did not initiate a formal reclassification procedure.

D. In their rejoinder the complainants press their pleas. Even had there been a "valid" decision on the grading of their positions in 1995 or 1996 they would not have been able to challenge it since in view of the financial crisis the Organization was facing, the Director-General had "frozen" all reclassification proceedings. They adhere to their view that the positions were never "classified". If they had been, the relevant files would show on what basis such grading was carried out. They note that the Organization produced no document in the reply to clarify the matter. For that reason the "grading" decision communicated to them in September 1995 was procedurally flawed. It was, therefore, a tainted decision which was "confirmed" by the Regional Director's letter of 30 October 1998.

In their summary of the chronology of their case they say that, in 1994, the then Director of the MDT told them that if they won the competition he would have their positions regraded to L.5. They take the view that the Organization did not handle the grading issue "properly, transparently or fairly".

E. In its surrejoinder the ILO argues that even if they considered that the 1995 decision to fix their grades at L.4 was procedurally flawed, the complainants failed to appeal against it within the six-month time limit imposed by Article 13.2. Only in May 1998 did they clarify that they wished to obtain grade L.5 on a retroactive basis.

It says that the complainants' argument regarding the freezing of the classification review process is inconsistent with the facts since it did not apply in their case. A classification review is still open to them.

The Organization notes that the complainants do not challenge the accuracy of the job descriptions prepared by their responsible chief in 1994 which formed the basis for the grading decision. These were studied in conjunction with the "Global classification standard for the General Service at non-headquarters duty stations" which contains a benchmark standard for a secretary at G.4 level - equivalent to grade L.4 for field positions. There is no basis for the complainants' claim that the 1994 procedure was tainted with irregularity. Their new plea relating to an alleged promise by the former Director of the MDT also fails. It is unsubstantiated and conflicts with earlier arguments.

## CONSIDERATIONS

1. The complainants, who are both secretaries with the ILO Area Office in San José, Costa Rica, are contesting a decision of the Director-General of the ILO dated 9 July 1999 confirming the grading of their positions at grade L.4.
2. In 1994 both complainants were offered short-term contracts at grade L.5 with the ILO's newly formed Multidisciplinary Team (MDT) in San José. Miss González Vega had worked for the ILO since 1986 as a secretary on a technical cooperation project and Miss Dormond Vega was appointed directly to the MDT in April 1994.
3. The then Director of the MDT, who was new to the ILO, was unaware that he had to follow certain procedures

for filling vacancies and classifying positions. He later attempted to rectify the situation by requesting the classification of the complainants' positions, suggesting grade L.5, but on 29 September 1995 the L.4 grade was assigned to both positions by the Regional Office in Lima (Peru).

4. A competition for filling the positions was carried out in 1995 and the complainants were selected. On 4 October 1995 they accepted the appointments at grade L.4 and were granted step 5 in that grade.

5. In July 1996 the complainants wrote to the Director of the Area Office asking for a formal request to be made to the Regional Office for the reclassification of their positions.

6. In July 1997 the Regional Personnel Officer visited the Area Office to discuss, inter alia, the classification issue with the complainants. He suggested that if they could achieve certification in English through language training, which the complainants undertook, this would make it possible to change their grade back to L.5. The proposed reclassification never materialised but in their pleadings the complainants have not pressed the fact that they took the suggested English course as a ground upon which they should now receive the requested reclassification.

7. In a letter of 18 June 1998 to the Regional Director the complainants confirmed their intention to submit an internal complaint.

8. On 30 October 1998 the Regional Director replied on the substance of the case, maintaining the classification of the positions at the L.4 level. He found that the complainants had submitted their applications in a competition opened to fill the positions described in the published vacancy announcement, which specified that they were classified at grade L.4. The complainants were therefore entirely aware of the consequences of their applications. He pointed out that, in spite of having objected to the Regional Office's decision of 29 September 1995, the complainants had eventually accepted the offer of the positions at grade L.4 on 4 October 1995.

9. On 12 April 1999 the complainants submitted an internal complaint pursuant to Article 13.2 of the Staff Regulations, challenging the letter of the Regional Director dated 30 October 1998.

10. On 9 July 1999 the complainants received a reply from the Director of the Personnel Department on behalf of the Director-General refusing their internal complaint on the grounds that the Regional Director's communication could not be considered as a "new decision" and was not appealable under Article 13.2 and that consequently their complaint was not receivable.

11. The issue to be determined in the present case is whether their internal complaint was receivable under Article 13.2 of the Staff Regulations, and in consequence, whether the complaints before this Tribunal are receivable. Article 13.2 states that:

"Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations, or with the terms of his contract of employment, or that has been subjected to unjustifiable or unfair treatment by a superior official shall, except as may be otherwise provided in these Regulations, be addressed to the Director-General through the official's responsible chief and through the Personnel Department, within six-months of the treatment complained of. ..."

12. It is quite clear that in the present case, a final decision on the question of the classification of the complainants' positions was made on 29 September 1995, as the memorandum sent by the Regional Office to the Director of the Area Office shows:

"Further to your letter of 9.8.95 ... I wish to make the following, final, clarification regarding the recent competition for ... secretaries for the San José MDT.

...

I should like to receive a proposal from the San José office on how to resolve the question of which candidate should be secretary to the Director [of the MDT]. Until the criteria for selection of who will be secretary to the Director is clarified, all three candidates [the complainants and one other] should receive the same grade: L4. As a concession to the confusion that has existed in this competition, and the fact that all three secretaries have relevant ILO experience ... they may be granted a step of "5" (therefore their grade will be L4 / step 5). ..."

13. The Regional Director, referring to the early stages of the grading issue, stated in a letter to Miss González Vega on 30 October 1998:

"First of all, I would like to indicate the circumstances under which the level L5 was initially assigned to the MDT secretarial jobs. As you know, during that time, the MDT was being established in San José, and it required secretarial support to assist the Director and the specialists. Your transfer from the [technical cooperation project] in which you worked ... to the MDT in San José was accepted, and you were hired temporarily to carry out secretarial duties. Under these circumstances, it was decided that you would maintain the L5 grade, which you had at the moment of the transfer. In spite of the fact that you had not obtained such grade as a result of an exercise in classification, it was assigned based on classification procedures that are usually applied to projects which are substantially different from those applied to positions that are financed with the regular budget. Therefore, I would like to emphasize that the L5 grade was not assigned in accordance with the duties related to your secretarial job at MDT, but rather taking into consideration your personal situation. As a consequence, the results of a subsequent exercise in classification, carried out in accordance with the established regulations for positions financed with the regular budget, have to prevail. The MDT secretarial positions were formally classified as L4 grade on November 3, 1994."

The Regional Director expressed the same views in a letter sent to Miss Dormond Vega on the same date.

14. Except as regards the position of secretary to the Director of the MDT (not held by either complainant) the grading decision was clearly not a temporary one.

15. The Regional Director's decision of 29 September 1995 was implemented on 4 October 1995, when each complainant was offered and signed a contract extension at grade L.4, step 5. The contracts show no sign of any reservation or protest on the part of the complainants. In their pleadings to the Tribunal they say they signed "under protest". They did not, however, lodge an internal complaint under Article 13.2 with respect to that decision. In fact, it was not until 16 July 1996 that the complainants wrote to the Director of the Area Office asking for a formal request to be made to the Regional Office for the reclassification of their positions. That letter was sent long after the time for filing an internal complaint against the decision contained in the 29 September 1995 memorandum had elapsed.

16. The complainants contend that the Regional Director, in his letter dated 29 April 1998, committed himself to making a decision on the complainants' claims. The relevant part of that letter reads: <sup>(1)</sup>

"Concerning your request, we have not been officially seized of the petitions that you are demanding. Unofficially, we know about the aspects that you want to have solved, but these communications have not been transmitted in full, and sometimes they are contradictory. Therefore, I would appreciate it very much if you sent me a written communication with your concerns and expectations in relation with your present labor conditions. Said communication would allow us to complete your personal file, which is very complex, and at the same time it would be one of the instruments required to take a formal decision (*para adoptar alguna decisión formal*)."

17. On 4 May 1998 the complainants wrote to the Regional Director to specify their proposal, which was that they should be accorded grade L.5 as of October 1995, including retroactive payment of the difference in salary together with reinstatement in all their rights as if their grade had been L.5 since that date. This letter led to the Regional Director's reply of 30 October 1998. He wrote to each complainant in similar terms as follows: <sup>(1)</sup>

"In reference to your communication from last May 4 1998, in which you request to be reinstated in the L5 grade, which you held before being designated in your present position, classified as grade L4.

....

You submitted your application in [a] competition to fill the position according to the published vacancy announcement, which specified that said position was classified as L4 grade. You were entirely aware of the consequences of your application; in particular, with respect to the lower grade and salary that you would receive. However, these terms of the contract did not discourage you from applying, nor from accepting the position. In spite of having objected to this Regional Office's decision on [sic] September 29, 1995, you eventually accepted the offer of the position with the L4 grade on October 4, 1995.

....

Considering the circumstances mentioned before, I regret to inform you that elements that make it possible to change this Office's decision from [sic] September 29 1995 - by which you were assigned grade L4, step 5 - have not been found."

18. The issue of receivability hinges on whether or not the Regional Director's letter dated 30 October 1998 constitutes a new decision. According to the case law of the Tribunal, for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) the following conditions are to be met. The new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and must relate to different issues from the previous one or be based on new grounds (see Judgments 660, *in re de Louw* No. 2 and 759, *in re Benze* No. 3). It must not be a mere confirmation of the original decision (see Judgment 1304, *in re Coe*). The fact that discussions take place after a final decision is reached does not mean that the Organization has taken a new and final decision. A decision made in different terms, but with the same meaning and purport as a previous one, does not constitute a new decision giving rise to new time limits (see Judgment 586, *in re de Villegas* No. 6), nor does a reply to requests for reconsideration made after a final decision has been taken (see Judgment 1528, *in re Saunders* No. 16).

19. The letter dated 30 October 1998 simply cannot be construed as being a "new decision". It is, and is stated to be, merely a confirmation of the initial decision made on 29 September 1995. The terms are explicit. Whatever the correct construction may be of the Regional Director's letter of 29 April 1998, it cannot change the nature and content of his subsequent letter of 30 October 1998 which refused to vary the 29 September 1995 decision. The time limit for contesting the latter had by that time long since expired and the complainants' internal complaint was accordingly not receivable. That being the case, it is likewise with their recourse before the Tribunal.

## DECISION

For the above reasons,

The complaints are dismissed as irreceivable.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

1. Complainants' translation from Spanish.