

FORTY-SEVENTH ORDINARY SESSION

***In re* TARRAB (No. 5)**

Judgment No. 466

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Labour Organisation (ILO) on 26 October 1980 by Mr. Nazmi Tarrab and brought into conformity with the Rules of Court on 8 December 1980, the ILO's reply dated 20 March 1981, the complainant's rejoinder dated 12 May and further statement dated 22 May, and the ILO's surrejoinder dated 30 July 1981;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 6.5, 6.7, 11.5 and 13.2 of the ILO Staff Regulations;

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. The complainant, who is of Syrian nationality, is an ILO official, and his earlier career with the ILO is summarised in paragraph A of Judgment No. 395. The United States having left the ILO in November 1977, savings had to be made and, along with others, the post of ILO representative in Aden for Yemen and Democratic Yemen, which the complainant held, was abolished. In accordance with Article 11.5 of the ILO Staff Regulations (Termination on reduction of staff) a joint subcommittee of the Administrative Committee was set up to consider the possibility of redeploying the officials made redundant. The Director of the ILO Office in Cairo having been replaced by Mr. Abualam, the regional adviser on workers, education, the subcommittee unanimously agreed that the funds thus released should be used to finance the employment of the complainant in Cairo with effect from 1 July 1978. Mr. Abualam was so informed by the Chief of Personnel and at once objected on both administrative and political grounds. He asked headquarters to reconsider its decision. The complainant, who had meanwhile taken up duty in Cairo, was given nothing to do and recorded his protests in three telegrams and in a letter of 12 September 1978 addressed to headquarters. On 20 November he filed a "complaint" under Article 13.2 of the Staff Regulations, alleging that he had been given no work to do and claiming compensation on the grounds that he had been caused difficulties with the Egyptian authorities because Mr. Abualam refused to give him a certificate of employment by the ILO in Cairo. In a minute written at headquarters on 15 February 1979 Mr. Abualam confirmed the political and administrative objections to the transfer and denied that he had made it difficult for the complainant to sort out his position with the Egyptian authorities. In a letter he wrote to the complainant on 22 February 1979 the Chief of the Personnel Department said that the Director-General felt that he needed more information before "remedying, in fairness to all concerned, what he considers in any event a most unsatisfactory situation", but had instructed Mr. Abualam to give the complainant a certificate stating that he was an ILO official stationed in Cairo. On 21 April, however, the complainant wrote to headquarters saying that Mr. Abualam persisted in his hostile attitude and "confirming" his complaint of 20 November 1978. He made the same allegation against Mr. Abualam in a letter dated 7 May 1979 and received at headquarters on 24 May. On 16 May the Chief of Personnel replied to his letter of 21 April saying that in the Administration's view the "complaint" was settled because a certificate of employment had been issued to him and his difficulties with the Egyptian authorities, the subject of his complaint, had been resolved; and that the Director-General was considering the question of transferring him. In September 1979 the complainant was transferred to the International Labour Standards Department at headquarters. On 28 May he filed a new "complaint", again under Article 13.2 of the Staff Regulations, objecting to the non-reception of reports appraising his performance, one for the period from 1 October 1977 to 30 September 1978, and the other for the period from 1 October 1978 to 30 September 1979. On 29 July 1980 his supervisor gave him the two reports. The first - a five-yearly report - related to a period during most of which the complainant was stationed in Aden. For the period up to 30 June 1978 it included (a) a memorandum by the acting Director of the ILO Office in Beirut, to whom the complainant had been responsible while serving in Aden, and (b) a memorandum signed by the Director-General on 25 July 1980 and explaining that for the reasons set out above there was no basis for appraisal of the complainant's performance after his transfer to

Cairo and that the absence of appraisal should not be interpreted to his detriment. The second report (1 October 1978 - 30 September 1979) contained only the Director-General's memorandum. On 7 August the complainant acknowledged receipt of the first report and appended a minute in which he observed that the appraisal for the period from 1 July 1978 had not been carried out by his responsible chief, as Article 6.7 of the Staff Regulations required, and that he therefore considered Article 6.7(2), which required the official to initial the report, to be inapplicable. On 18 August he appended comments to the second report acknowledging the truth of what was said in the Director-General's memorandum and explaining again that he did not regard the report as requiring any action on his part in accordance with Article 6.7. The Reports Board, to which the two reports had been referred, observed that the complainant did not challenge the facts and it concluded that the report forms, together with the Director-General's and the complainant's observations were "the only form of evaluation which was possible under these unusual circumstances". Meanwhile, on 26 October 1979, the complainant sent his complaint from the Syrian Arab Republic, where he was on leave at the time.

B. The complainant objects that he has never received any reply to the "complaint" which he filed on 28 August 1980 under Article 13.2 of the Staff Regulations. He observes that the report for the period from 1 October 1977 to 30 September 1978, given to him on 29 July 1980, contained no appraisal of his performance by his responsible chief. It merely referred to the comments of the acting Director of the Beirut Office and to the Director-General's observations, which were appended. He accordingly invites the Tribunal to order the Director-General to apply Article 6.5 (Five-yearly review of reports) and 6.7 (Performance appraisals) of the Staff Regulations.

C. In its reply the Organisation observes that the complainant puts forward no legal argument in support of his allegation of breach of Articles 5 and 6.7. He did not pursue his first "complaint" claiming compensation for Mr. Abualam's refusal to give effect to his transfer, and he cannot use the present complaint as a pretext for raising that matter again. The Organisation contends that the complaint is irreceivable. If what he is challenging is the two appraisal reports, not only has he failed to exhaust the internal means of redress, but there is no substance to the complaint since he has suffered no moral or material prejudice. Indeed the Director-General was at pains to prevent any such prejudice, as the complainant himself acknowledges. He did not have his yearly salary increments withheld. If he is implying that, since the first of the reports was a five-yearly one, which might have warranted grant of an additional increment on the grounds of "specially meritorious" service, he is quite mistaken: the grant of an additional increment falls within the discretion of the Reports Board, which decides, in any event, on the basis of the five annual reports, not the last of the five. Withholding of such an increment cannot constitute failure to apply Article 6.5. As to the merits, the ILO points out that a responsible chief cannot be obliged to carry out an appraisal where there is no work to be appraised, and the complainant himself maintains that in Cairo he was given nothing to do. To allege that there has been no appraisal of his performance is not a valid way of again objecting to the failure to give him work - a matter which is now settled, both because he did not exhaust the internal means of redress and because any such objection is time-barred. Nor can he object that the report was written by the Director-General: since Mr. Abualam never acted as responsible chief, there was no reason for him to carry out an appraisal. In any event the solution found is the most truthful and the most favourable to him. Instead of hiding the facts the Director-General stated them frankly and in such a way as to preclude any interpretation adverse to the complainant.

D. In his rejoinder the complainant challenges in detail the ILO's account of the facts surrounding his transfer, which he regards as proof of hostility towards him and as refuted by the Director-General's memorandum of 25 July 1980. He has filed his complaint with the Tribunal because no decision was taken on his claim within sixty days of the date on which it was notified to the Organisation, and may therefore appeal to the Tribunal in the same way as against a final decision dismissing that claim. It is not true to say that he suffered no prejudice. The report was neither written nor signed by his responsible chief and therefore could not constitute a valid report within the meaning of Article 6.7. The consequent absence of a report was contrary to his legitimate interests, as was recognised by the Director-General himself, who said that his purpose in appending a memorandum was to preclude any interpretation of the facts adverse to the complainant. Nor is it true to say that there was no work for the report to appraise: for most of the period covered by the report - up to 30 June 1978 - he was serving as the ILO's representative in Aden, and his responsible chief could have made an appraisal on that basis, thereby following the example of a previous chief of the complainant's who had found himself in a similar position. Besides, Mr. Abualam ought to have been instructed, like any other official, to respect the Director-General's decision to transfer the complainant to Cairo. The Reports Board's comments on the report were concocted to suit the occasion because the Organisation knew that the complainant had filed a complaint with the Tribunal.

E. In its surrejoinder the Organisation repeats its version of the facts as set out in its reply and answers the

objections raised by the complainant in his rejoinder. In his letter of 16 May 1979 to the complainant the Chief of Personnel observed that he had been given "full satisfaction" in respect of his complaint of 20 November 1978 and asked him what redress he was seeking by pursuing that complaint. The complainant did not respond for over a year, and in the meantime agreed to a transfer to headquarters in Geneva. In other words, he no longer wished to challenge Mr. Abualam's refusal to give him work in Cairo. He cannot now indirectly challenge that refusal by bringing a complaint about failure to appraise his performance. The only material question is whether the form and content of the two reports were in conformity with the Staff Regulations. Since Mr. Abualam never acted as responsible chief, he had no basis for carrying out any appraisal, whereas the Director-General, as chief of the whole Office, had the authority to append his own observations. As to the contents, the complainant himself has acknowledged the truth and fairness of the Director-General's observations. He cannot object that he has suffered prejudice on the grounds that he has been denied an additional salary increment, since the grant of such increment is, as the Organisation has already said, purely discretionary. The Organisation accordingly invites the Tribunal to declare the complaint as irreceivable in so far as it challenges decisions which are no longer open to challenge or which have caused him no wrong and, subsidiarily, to dismiss the complaint as unfounded.

CONSIDERATIONS:

The complainant's transfer

1. For several years the complainant served as the ILO's representative in Aden. That post having been abolished, he was transferred, on 1 July 1978, to the ILO Office in Cairo. But the Director of that Office refused to work with him and on 20 November 1978 he addressed to the Organisation a "complaint" under Article 13.2 of the Staff Regulations asking to have his position put right. After an exchange of letters and several interviews he was transferred in September 1979 to the International Labour Standards Department in Geneva.

In his pleadings the complainant dwells at some length on his difficulties with the Director of the Cairo Office. In his claims for relief, however, he does not even refer to them. All he is seeking is that the Director-General should be ordered to apply Articles 6.5 and 6.7 of the Staff Regulations, which relate to five-yearly review of annual reports and the appraisal of performance. The Tribunal will therefore take no account of the reasons why after his transfer to Cairo he was transferred again to Geneva.

Appraisal of the complainant's performance

2. According to Article 6.7 of the Staff Regulations each official's performance shall be appraised by his responsible chief. The appraisal shall be communicated to the official, who shall initial it and may attach his observations. Together with any observations, it shall then be transmitted to the official to whom the responsible chief reports.

The complainant alleges that, not having been made by his responsible chief, the Director of the Cairo Office, the reports on his performance from 1 October 1977 to 30 September 1978 and from 1 October 1978 to 30 September 1979 failed to comply with Article 6.7.

3. Contrary to what the Organisation contends, the complaint is receivable in so far as it relies on that article.

First, although there was no internal appeal, there has been no breach of Article VII(1) of the Statute of the Tribunal, which the Organisation itself believes to be inapplicable to this case.

Secondly, having been filed within ninety days from the date on which the challenged reports were notified, the complaint was filed within the time limit set in Article VII(2) of the Statute.

Thirdly, it is open to the complainant to challenge the decision, since every official has an interest in the proper establishment of reports on his performance, on which his career will depend. It is immaterial that the reports he challenges are not harmful to the complainant.

4. Though receivable, the complaint is unfounded.

(a) For the sake of clarity the Tribunal will divide the period from 1 October 1977 to 30 September 1978 into two.

For the first part, from 1 October 1977 to 30 June 1978, when the complainant was the ILO's representative in

Aden, the report was made on 5 April 1979 by the Director of the Beirut Office, his responsible chief at the time. For that part, therefore, Article 6.7 of the Staff Regulations was respected. The Director of the Cairo Office, who was not yet the complainant's chief, was not competent to pass judgment on his performance.

During the remainder of the period in question, from 1 July to 30 September 1978, the complainant did no work, and the Director-General wrote a minute saying that appraisal was impossible. However, so that the absence of a report should not be interpreted to the complainant's detriment, the minute said that he had shown a "spirit of moderation and conciliation ... in an unusual and certainly trying situation". The complainant is mistaken in objecting to the replacement of the report - none being possible in the circumstances - with a minute which was not to his detriment, which was intended to protect his interests and which indeed did so. He cannot require the Director of the Cairo Office, who was his chief only in name, to appraise his work when he never did any.

(b) From 1 October 1978 to 30 September 1979 the complainant was in the same position as from 1 July to 30 September 1978; he had no work to do. The minute written by the Director-General for the period from 1 July to 30 September 1978 therefore applies also to the period from 1 October 1978 to 30 September 1979, and again the complainant's objections to the irregularity of the performance reports fail.

Five-yearly review of annual reports

5. According to Article 6.5 of the Staff Regulations the Reports Board shall review every five years the reports made during that period. It may recommend either the grant of two additional salary increments to officials whose service has been especially meritorious, or action against officials whose service has been unsatisfactory.

In inviting the Tribunal to order the application of Article 6.5 the complainant implies that it has not been observed.

6. On 17 October 1980 the Reports Board reviewed the five reports on his performance from 1974 to 1979, or the minutes written in lieu thereof. Its comments were approved by the Director-General on 29 October 1980 and visaed by the responsible chief on 4 November 1980. The complainant cannot therefore rely on any breach of Article 6.5.

Moreover, on the written evidence the Reports Board did not misuse its discretionary authority in abstaining from proposing the grant of additional increments to the complainant.

DECISION:

For the above reasons,

The complaint is 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 28 January 1982.

(Signed)

André Grisel
J. Ducoux
Devlin

A.B. Gardner