

## SIXTY-THIRD SESSION

### ***In re* GIUSTI BERTOLOTTI**

#### **Judgment 870**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jorge Giusti Bertolotti against the International Labour Organisation (ILO) on 5 March 1987, the ILO's reply of 5 June, the complainant's rejoinder of 3 July and the ILO's surrejoinder of 31 July 1987;

Considering Articles II, paragraph 1, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Article 13.2 of the Staff Regulations of the International Labour Office and Office Circular No. 334 (Series 6 - Personnel) of 20 July 1985;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. On 20 July 1985 the International Labour Office put out a staff circular, No. 334 in Series 6, setting out a new procedure for "personal promotion". The purpose was to give a chance of promotion to "long-serving officials whose contribution to the Organisation goes beyond that normally associated with the level of the position they occupy, as evidenced by their performance over the years", and who could not get ahead otherwise. To qualify the official must have, besides a good work record, at least thirteen years' service in his present grade.

The complainant, a citizen of the Argentine, has been an ILO employee since May 1972. He began at grade P.5 as an expert in the education of rural workers under a technical assistance project in Panama. From October 1974 to December 1981 he was chief technical adviser at grade D.1 to a project in Costa Rica; from January 1982 until June 1984 a regional expert in rural workers' organisations at P.5, still in Costa Rica; and from July 1984 a P.4 official in the Workers' Education Branch at headquarters in Geneva.

Paragraph 3 of the circular states that the new procedure does not apply to "technical co-operation project personnel". Paragraph 7(a) says that in reckoning seniority up to six years' "service on transfer away from Geneva or between different duty stations other than Geneva, including service on detachment to technical assistance projects", will count, at the rate of one-and-a-half, to give a possible maximum of nine years. And 7(d) says that service at a higher grade "will count as service in the official's original (lower) grade".

On 27 March 1986 the chief of the Workers' Education Branch asked the Personnel Department whether the complainant's service under technical assistance projects would count. A personnel officer answered on 15 April that since he had been financed under the regular budget only since 1984 there was "no way of considering him for a personal promotion". On 23 September the complainant appealed against that ruling under Article 13.2 of the Staff Regulations but the Director of the Department replied on 12 December 1986 that the Director-General had rejected his appeal. That is the decision under challenge.

B. The complainant submits that the ILO's construction is untenable. All the circular says, in paragraph 3, is that project staff may not get personal promotion: it does not say that an expert who later becomes an official at headquarters may not have his service as expert counted. The ILO says that there is just one exception to the rule, in 7(a): where a headquarters official is transferred to the field or to an assistance project. But why should such service count if it comes after, but not if it comes before, the employee becomes an official? Serving experts may be excluded, it is true, but there is no reason to exclude former ones. If the ILO did intend such a distinction it ought to have said so. The complainant asks the Tribunal to quash the impugned decision, order the reckoning of his service as an expert for the purpose of personal promotion, and award him damages and costs.

C. The ILO replies that the complaint is devoid of merit. Project staff are excluded for two reasons. The first is that technical assistance is supposed to end as soon as possible: experts are therefore temporary staff and do not come within the career structure at headquarters. Secondly, they have different conditions of service. Though their employment is less sure, nationality quotas are applied to them less strictly and they often get higher grades, as indeed did the complainant, than they would at headquarters.

The personal promotion system has applied to the complainant only since July 1984, when he became an official. It is absurd to argue that the exclusion of project staff, which he does not challenge, was in July 1984 retroactively done away with in his case. Because of the differences in status between expert and official there is nothing unfair or odd about distinguishing between project service before and after appointment as an official. An official's contractual status remains the same throughout - and he is not to be put off project service by having it discounted - whereas the expert's changes when he becomes an official.

D. The complainant presses his claims in his rejoinder. He enlarges on his pleas that it is wrong to count project service only for officials on secondment to projects, that the ILO's specious interpretation of the circular makes for unfair discrimination against former experts and that the circular, being a long and detailed text, would have spelled out the distinction had it been intended.

E. In its surrejoinder the ILO contends that the rejoinder adds nothing of substance to the complainant's original brief. It is mistaken to put on a par headquarters or field staff who are seconded to technical assistance projects and experts who have been recruited for such projects. The construction he puts on paragraph 3 of the circular rests on a misconception of the system of personal promotion. Service in technical assistance is excluded under paragraph 3 except for seconded officials. The complainant was not a seconded official when employed in technical assistance but had been directly recruited for it. His claims should therefore fail.

## CONSIDERATIONS:

### Competence

1. The complainant submits that the impugned decision rests on misinterpretation of an administrative circular about the procedure for personal promotion. His case being about the application of the rules on such promotion, a matter that relates to the terms of appointment of ILO staff, the Tribunal is competent under Article II(1) of its Statute.

### Receivability

2. What the complainant is challenging is a final decision rejecting an internal appeal he made under Article 13.2 of the Staff Regulations. He has therefore satisfied the requirement in Article VII(1) of the Statute.

He has also respected the time limit in VII(2). The impugned decision of 12 December 1986 was notified to him on 15 December and he filed on 5 March 1987.

### The Merits

3. The issue is whether periods of service of an ILO technical assistance expert who later becomes a staff member at headquarters will count for the purpose of applying the criteria for personal promotion in circular 334, Series 6, of 20 July 1985.

The procedure applies, says paragraph 3 of the circular, to "staff on without limit of time or fixed-term contracts in the Professional and General Service categories at headquarters and established external offices", but not to "Professional or General Service technical co-operation project personnel".

4. The complainant submits that there is nothing in the circular to prevent the reckoning of prior service in technical assistance where, like himself, the employee was a member of the ILO staff when the circular came into force.

The plea fails. Such service may not count for the purpose of personal promotion unless there is an express rule to that effect. There is not. In fact the text implies that the complainant does not come within its scope. Since according to paragraph 3 the staff of technical co-operation projects are not covered by the new procedure their periods of service do not count, not even when, like the complainant, they are later appointed to the staff at

headquarters.

5. The complainant is further mistaken in alleging discrimination against him.

There is no breach of the principle of equal treatment in counting the technical assistance service of those mentioned in paragraph 7(a) of the circular but not the complainant's: 7(a) covers staff at headquarters or in an external office who have been temporarily assigned to technical assistance work.

To show discrimination the staff member must have been in the same position as someone else yet been treated less well. There will be no breach of equality where different cases are differently treated.

It would be in breach of an official's rights as such and a denial of his entitlements under the procedure for personal promotion to discount any of his service, including periods he may have spent on secondment to technical assistance projects. But the complainant is in a quite different case since he was not yet an official when employed on such projects. DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux  
Mella Carroll  
H. Gros Espiell  
A.B. Gardner