

## SIXTY-SIXTH SESSION

### Judgment 959

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. T. F. B. against the International Labour Organisation (ILO) on 5 July 1988 and corrected on 30 August, the ILO's reply of 5 October, the complainant's rejoinder of 29 November 1988 and the ILO's surrejoinder of 24 January 1989;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal and Articles 1.1, 1.2, 1.5, 11.15 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 facts of the case and the pleadings may be summed up as follows:

A. On 30 July 1986 the complainant, a United States citizen born in 1946, began a one-year appointment with an ILO project in Indonesia as a grade P.4 expert in training for construction management. He arrived in Jakarta on 6 August. Later that month he addressed an undated minute to the ILO office in Jakarta saying that his monthly pay of some 3,500 United States dollars was too low and asking for a higher grade. Headquarters were consulted and answered in a telex of 22 September to the ILO office that the budget of the project agreed to between the ILO and the Indonesian Government did not allow of any increase in his pay. He was so informed.

In minutes of 9 March and 27 April 1987 to headquarters in Geneva he said that he had been given to understand that his appointment might be extended by three months; indeed that was why he had leased a house for 15 months. Headquarters replied in a telex of 13 May that he had been given no official promise of extension. He repeated his claim in a letter of 22 May to the Director of the Personnel Department in which he said he was filing a "grievance" under Article 13 of the Staff Regulations. The Director sent him a cable on 29 June asking him to go to Geneva to discuss the matter, but he answered in a telex of 1 July that because of "other obligations" he could not do so. On 14 July the Director informed him by telex that the only binding text was the contract of appointment and that it would expire on 29 July. He repeated his claim in a letter of 18 July to the Director, again citing Article 13 of the Staff Regulations, but the refusal was confirmed in another telex from headquarters on 12 August.

The complainant had also raised in his minute of 27 April 1987 to headquarters the matter of his lease of a house in Jakarta. He said that since he had taken the lease for 15 months on the strength of expectations of an extension the ILO should compensate him for the payment of several months' rent. The telex of 13 May 1987 from headquarters also observed that he had signed the lease of his own accord and that the Organisation was not liable.

In a letter of 3 June 1987 to the Director of the Personnel Department he asked for "review" of the terms of his contract in respect of "reimbursement of tax that has been withheld from my basic salary plus overseas allowances and paid under my name to the Government" of Indonesia by the Organisation.

He was granted annual leave from 17 to 30 June 1987. On 2 July 1987, several weeks before the expiry of his ILO appointment, he took up an appointment with the United Nations Children's Fund (UNICEF) in Bombay, where he arrived on 4 July. That came to light when the ILO got information from the United Nations Joint Staff Pension Fund which prompted it to make inquiries. On 9 March 1988 the Director of the Personnel Department wrote to him to say that his unauthorised absence from duty, had the ILO known of it, would have warranted his summary dismissal for serious misconduct; he had misled both the ILO and UNICEF and received payments from both of them for most of the month of July 1987; the ILO was entitled to recover the salary and allowances paid to him for that period, amounting to \$3,543; and if he failed to pay within ten days it would ask UNICEF to withhold the amount from his salary on its behalf. The Director sent UNICEF a copy of his letter.

In seven letters to headquarters at dates from 14 March to 11 May 1988 the complainant set out his grievances, which, besides those mentioned above, included claims to the payment of a repatriation grant and to a certificate of service. He observed that he was free to work for anyone he pleased without hindrance from the ILO and that he had been on leave anyway in July 1987.

In a letter of 30 June 1988, the final decision impugned, the Director dismissed all his claims and demanded the amount of four months' rent which the Organisation had advanced him, at the rate of \$1,300 a month, or \$5,200: together with the sum to be recovered in pay for July 1987 his debt to the Organisation came to \$8,743.

B. The complainant contends (1) that he understood from discussions he had on arrival in Jakarta with the Director of the ILO office there and with the team leader of the project that his contract would be extended by three months to make a total of 15 months, the actual duration of the project. In support of that contention he submits attestations: in one, dated 27 August 1986, the team leader affirms that his contract "ends on October 31, 1987"; the other, signed by the Director of the office on 16 September 1986 states: "His contract will expire on October 31, 1987".

(2) He took out a lease for 15 months on the strength of legitimate expectations of extension. He tried but failed to get back from the owner of the house the rent paid in advance.

(3) Soon after taking up duty he found that his pay was not enough, that he had a lower grade and step than other experts, his post having been recently downgraded from P.5 to P.4, and that he was being wrongly denied the privilege of importing goods free of duty.

(4) He is entitled to refund of tax paid on his salary to the Indonesian Government. He never got an answer to his claim on that score.

(5) As he said in his letter of 14 March 1988 to the Director of the Personnel Department, he had finished work on the ILO project and was free to work for anyone else he liked. The project came to an end on 15 July 1987 and the project team had left, so that there would have been nothing for him to do even if he had reported for duty. As his passport shows - he submits a photocopy - he returned to Indonesia in July 1987.

He asks the Tribunal to quash the Director's decision of 30 June 1988; to order the ILO to clear his professional name by giving him a written apology and a certificate of service; and to award him the salary and allowances pertaining to grade P.5, one month's pay in repatriation grant, the equivalent of four months' rent at the rate of \$1,300 a month, full reimbursement of "taxes paid under Project Document", the salary and allowances he would have received had his appointment been extended by three months, and \$1,200 in costs.

C. In its reply the Organisation takes up each of the complainant's claims. (1) It observes that he has not raised since August 1986 the matter of the grading of his post: his claim is irreceivable either because he has failed to exhaust the internal means of redress as required by Article VII(1) of the Statute of the Tribunal, or else because he has not respected the time limits in Article VII(2) and (3). Besides, the claim is devoid of merit: the post he held was the P.4 one he had been offered and had accepted.

(2) His claim to refund of tax is unfounded: the Indonesian Government, though entitled under the project agreement to levy tax on the complainant's income, did not do so. If he can show that he did have to pay tax the Organisation will pay him back the amount.

(3) His claim to compensation for refusal of extension of appointment is irreceivable because he failed to exhaust the internal means of redress. He did not challenge the ILO's telex of 12 August 1987 by lodging within six months a "complaint" under Article 13.2 of the Staff Regulations; indeed he did not raise the matter again until May 1988. In any event the claim is unfounded because the attestations he relies on were not issued by officers with authority to extend his appointment. Besides, they were given at his own request for another purpose and he is in bad faith in relying on them now. Though the duration of the project was indeed 15 months, he took up duty after it had begun.

(4) His claim to repayment of rent is absurd. The ILO made him an advance on salary to pay his rent, he has yet to pay back to it the equivalent of four months' rent, and so it is the ILO that has lost, not he. The Tribunal is not competent to entertain a claim that does not fall within Article II(1) of its Statute, the matter of the lease being distinct from the terms of his appointment. The claim is irreceivable for the same reasons as those set out under (3) above: he failed to exhaust the internal means of redress. In any event it is unsound because he was under no obligation to take out a lease for 15 months.

(5) Repatriation grant may be payable under Article 11.15(a) of the Staff Regulations to an official who has completed one year of service outside the country of his home. Since the complainant took up duty with UNICEF on 2 July 1987, less than a year after he had joined the ILO, he did not complete one year of service and therefore

does not qualify for the grant.

(6) He was sent a certificate of service on 25 September 1988.

(7) He received salaries from two employers for the month of July 1987 and both organisations paid contributions for him to the Pension Fund for that month. Though receivable, his objections to the ILO's demand for recovery of his pay are devoid of merit. It is plain from Articles 1.1, 1.2 and 1.5 of the Staff Regulations, which lay down the duties of staff members, that he had no right to join UNICEF while still under contract with the ILO. Presumably that is why he wrote the ILO a letter which it got on 7 July 1987 - when he was already with UNICEF - and in which he said he would be taking up another job on 1 August. He is in bad faith. He still owes the Organisation a total of \$8,743. Any sums due to him under various heads will be reckoned after the Tribunal has passed judgment.

D. In his rejoinder the complainant observes, as to receivability, that no one in the Organisation ever explained to him that he might put his claims to the Tribunal and how he should do so, and he was therefore unaware of the procedural requirements he had to comply with.

As to the merits, he contends that his post in Jakarta had been wrongly downgraded. Though the Indonesian Government did not levy tax on his income the ILO presumably paid tax amounting to 10 per cent of his gross salary before he received it, and he is entitled to the sum so levied. The attestations from two senior officers in Jakarta constitute a firm promise of extension of appointment. Since he was in Jakarta on or about 24 July 1987 - as the ILO well knew - he was not in dereliction of duty. The ILO never told him what he was to do in the last month of his contract and he had annual leave to cover the period anyway; so there was nothing improper in his taking up duty with UNICEF. He presses his claims.

E. In its surrejoinder the ILO observes that the complainant made many misguided attempts to get satisfaction but never asked whether he could appeal to the Tribunal. If he had accepted its invitation of June 1987 to go to Geneva at its expense, he could have found out about that possibility. Besides, he must have known of the Tribunal's existence from Chapter 13 of the Staff Regulations, which he often cited in correspondence.

The ILO enlarges on its pleas on the merits of each of his claims, which it again submits have either been satisfied or are groundless. It observes that on some issues his rejoinder makes no comment and he presumably accepts its point of view. He does not even refer to its offer to settle, and it sets out the terms of its offer in detail, concluding that there is a balance in its favour of \$3,930.47.

#### CONSIDERATIONS:

The claim to appointment at grade P.5

1. Shortly after 6 August 1986, when he arrived in Jakarta to take up duty on an ILO project at grade P.4, the complainant wrote to the Director of the ILO office there pointing out that he had been given a lower grade and step than other project staff with similar responsibilities, saying that his pay of \$3,500 a month was not enough and claiming appointment at grade P.5 and the corresponding higher salary. His claim was turned down at the time.

The claim is irreceivable because he failed to exhaust the internal means of redress, as Article VII(1) of the Statute of the Tribunal requires.

Besides, it is without merit because the Organisation had offered him appointment to a P.4 post, and that was what he had accepted.

The claim to reimbursement of income tax

2. The complainant maintains that he is entitled to have refunded to him any tax that was levied on his ILO salary and made over to the Indonesian Government.

Although according to the terms of the project agreement it was indeed open to the Government to tax the complainant's income, the ILO paid him the full amount of his salary and allowances, as he well knew from his monthly pay slips, and made over no amount in tax on his behalf to the Government.

The ILO explained to him that if he could satisfy it that he himself had paid tax to the Government it would

reimburse the sum, and indeed that offer holds good. But the complainant has never offered any evidence of such payment, and his claim must therefore fail.

The claim to extension of appointment

3. The ILO offered the complainant an appointment for twelve months, and that is what he accepted. While in Jakarta he made out that his appointment should have been for fifteen months, the duration of the project for which he had been engaged. The Organisation expressly refused his claim in a telex of 14 July 1987.

He was required to challenge that refusal by lodging an internal "complaint" within the time limit, set in Article 13.2 of the Staff Regulations, of six months from the date of receipt of the telex, i.e. by the end of January 1988. In fact he did not take the matter up again until May 1988. The claim is therefore irreceivable under Article VII(1) of the Statute of the Tribunal because he failed to exhaust the internal means of redress, the fact that he did not know about the time limit being immaterial.

The claim to repayment of rent

4. The complainant is claiming the repayment of a sum equivalent to four months' rent for the house in Jakarta which, expecting an extension of his appointment, he leased for fifteen months and which, as things turned out, he had to keep for four months too long.

The Tribunal is not competent under Article II(1) of its Statute to entertain the claim. According to that article the Tribunal may hear only complaints "alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case". The matter of the complainant's lease does not come within the scope of the article.

In any event the ILO made him an advance on salary to pay his rent; he has not yet refunded the sum he owes it, which is equivalent to four months' rent; and so it is he, not the Organisation, that owes that amount.

The claim to repatriation grant

5. Article 11.15(a) of the Staff Regulations reads:

"A repatriation grant shall be payable to any non-locally recruited official who on leaving the Organisation otherwise than by transfer to the United Nations or a specialised agency or summary dismissal has completed one year of service outside the country of his home. ..."

The complainant would be entitled to payment of the grant only if he had completed one year of service in Indonesia. His one-year contract began on 30 July 1986. But since he took up an appointment with the United Nations Children's Fund (UNICEF) in Bombay on 2 July 1987, less than a year after taking up duty with the ILO, he failed to complete the one year of service required. The claim fails.

The claims to a certificate of service and to a written apology

6. The ILO having sent him a certificate of service on 25 September 1988, there is no substance to the claim.

7. Nor is there any call for an "apology" from the Organisation to clear his professional name. His contract was to expire on 29 July 1987. Yet some weeks before that date, and so while he was still on the ILO's payroll, he secretly took up the appointment with UNICEF, on 2 July. He therefore received salaries from two employers for most of the month of July. That amounts to breach of Articles 1.1, 1.2 and 1.5 of the ILO Staff Regulations, which prohibit the carrying out of instructions from any external authority, the acceptance of fees and engaging in outside occupations in general without the consent of the Director-General. What is more, and contrary to the complainant's contention, that prohibition holds good during periods of leave as well. Besides, he must have known that he was in the wrong; else he would not have written the ILO the letter it got on 7 July 1987 - by which date he was already with UNICEF - saying that he would be taking up another job on 1 August. He had something to hide and was acting in bad faith.

The Organisation's offer

8. In its surrejoinder the ILO states that it is willing in the final settlement to give the complainant credit for \$2,000 of the \$5,200 advance it made him towards payment of rent. As the Tribunal stated above in 4, it is not competent to entertain the claim relating to the matter of rent. It will therefore merely record the Organisation's offer.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

Jacques Ducoux  
Mohamed Suffian  
Mella Carroll  
A.B. Gardner