Registry's translation, the French text alone being authoritative.

SEVENTY-FIRST SESSION

In re OULDAMAR (Nos. 1 and 2)

Judgment 1109

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Mokhtar Ouldamar against the International Labour Organisation (ILO) on 15 March 1990 and corrected on 9 August and the ILO's reply of 5 November 1990;

Considering the second complaint filed by Mr. Ouldamar against the ILO on 5 September 1990 and the ILO's reply, also of 5 November 1990;

Considering the complainant's single rejoinder of 10 January 1991 on both complaints and the Organisation's single surrejoinder of 28 March 1991;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal, Articles 7(4) and 18 of the Rules of Court, Article 13.1 and .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 and disallowed the complainant's applications for oral proceedings;

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

A. As was said in Judgment 870 (in Giusti Bertolotti), the ILO put out in July 1985 a staff circular, No. 334 in Series 6, about a new scheme for "personal promotion". Though brought in for a trial period of only two years, the scheme has been extended and is still in force. It offers hope 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 cannot make headway otherwise. To qualify the official must have, according to paragraph 7 of the circular, at least 13 years' service in the grade he is promoted from. Paragraph 9 further requires "a clear demonstration that the official regularly performed at a level above the normal requirements of the job" and says that the three main criteria are "quality of work, quantity of work and personal attributes applied to the job".

The complainant, a Moroccan who was born in 1935, joined ILO headquarters in Geneva in 1975 at grade P.4. He served in the Labour Administration Branch (ADMITRA). In 1981 he was made Director of the ILO Office in Yaoundé and promoted to P.5. While he was in Cameroon there occurred in the office events which are narrated in Judgment 671 (in re Bonneau) under A. For him the upshot was that, in circumstances on which the parties do not agree, he went back to headquarters and to ADMITRA in August 1983. He resumed his old grade, P.4, in April 1984.

According to paragraph 7(a) of circular 334 service away from Geneva counts at one-and-a-half times the normal rate and according to 7(d) temporary service at a higher grade counts the same as service in the lower one. By the end of 1987 the complainant had the required 13 years' service at P.4 and the Personnel Department put his and 40 other names to the Selection Board that was to recommend personal promotions to the Director-General for that year.

The Board reported on 10 May 1989. The complainant's was the only case it was not of one mind on: three members were for promoting him and one was against. The Deputy Director-General in charge of the General Administration Sector, to whom the report went in the first instance, asked the Board to think again. It did so and made a supplementary report on 13 July 1989, this time two members recommending in favour and two against.

By a minute of 3 October 1989 the Chief of the Personnel Development Branch told the complainant that the Director-General had decided against him on the grounds that he failed by the criteria in paragraph 9 of the

circular.

In a minute of 17 October to the Director of the Personnel Department the complainant pointed out that paragraph 14 required the Board to give him and his chief "a brief statement of the reasons" for the refusal and that the Board had not done so; he made a request for review under Article 13(1) of the Staff Regulations. He sent a reminder on 17 November.

In a minute of 24 November the Director answered that the procedure had been properly followed and repeated that the Director-General had refused him promotion because he failed to meet the criteria. In a minute of 1 December 1989 he asked the Director-General, in accordance with paragraph 15 of the circular, to review the decision. He wrote a reminder on 16 February 1990. Having got no reply, he filed his first complaint on 15 March 1990 challenging the implied rejection of his claim.

On 2 April 1990 he submitted to the Director-General a "complaint" under Article 13.2 of the Staff Regulations. The Deputy Director-General rejected it in a minute of 8 June, the decision impugned in his second complaint, which he filed on 5 September 1990.

B. The complainant puts forward the same pleas in support of both complaints.

He alleges breach of of the circular. He has never been "furnished by the Selection Board with a brief statement of the reasons" for the decision, as paragraph 14 requires. That omission has prevented him from knowing by what criteria he failed to get personal promotion. He does not even know whether his request for review was referred to the Board for advice under paragraph 15. So the ILO has not complied with its own rules.

He submits that the decision shows errors of fact and of judgment. His supervisors have been unanimous in regarding his work as above average in both quantity and quality, as performance appraisal reports which he supplies show. Those reports are borne out by the "assessment of merit" which his supervisor, the chief of ADMITRA, made on 23 November 1988 for the purpose of the personal promotion scheme and in keeping with paragraph 8(a) of the circular, and also by what his chief said in evidence to the Board and in a further minute of 22 December 1989. What happened in Yaoundé should not count against him since at the time he held a higher grade anyway. The Board did not treat his case objectively or act independently, as is clear from the change of tack in its supplementary report of 13 July 1989.

He accuses the ILO of acting arbitrarily by granting personal promotion to officials of no greater merit and setting at nought his legitimate expectations of promotion.

He seeks promotion to grade P.5 as from 1 January 1989 in his first complaint and as from 1 September 1987 in his second complaint. He also claims costs.

C. In its reply to the first complaint the ILO submits that it is irreceivable.

First, the complainant has failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires. His minute of 17 October 1989 was a request for review under Article 13.1 of the Staff Regulations, and he got an answer in the minute of 24 November from the Director of the Personnel Department. He thereupon sent his minute of 1 December 1989 asking for review under paragraph 15 of circular 334 and on getting no answer should have filed a "complaint" under Article 13.2. Instead he went straight to the Tribunal.

Secondly, according to information supplied by the Registrar he failed to respect a time limit set under Articles 7(4) and 18 of the Rules of Court for the correction of his papers.

As for the merits of his first complaint, the ILO refers to its reply to his second one, which it does not deny is receivable. In that reply it explains that the personal promotion scheme requires comparison of the merits of all who qualify. Since in such matters the Selection Board and the Director-General have discretionary authority, the Tribunal's power of review is limited.

(1) Although, as the complainant says, it was not the Board that gave the complainant a brief statement of the reasons for the refusal of personal promotion, the omission is not actionable.

First, notwithstanding the wording of paragraph 14 of the circular the practice has always been for the Personnel

Department to write to the official since all that the Board can explain is its own recommendation, not the Director-General's decision. The reason why the circular has not been amended on that small point is that the scheme is still on trial and will be subject to comprehensive amendment if it becomes permanent.

Secondly, if the complainant wanted an explanation from the Board he should not have written to the Personnel Department; and the Director-General, who has discretion in the matter under paragraph 15, had no duty to refer his request to the Board.

Thirdly, the absence of a statement by the Board does him no injury. The decision of 8 June 1990, the one impugned in his second complaint, gives him all the information he needs.

(2) There are no other fatal flaws in the exercise of the Director-General's discretion.

The complainant sees a mistake of fact in the conclusion that he was not up to standard. He is just asking the Tribunal to substitute its own assessment of him for the Director-

General's, and that is something it does not do.

The Board gave his case objective study. There was nothing wrong with asking it to take the matter up again since his was the only case on which it was not unanimous, and there was no abuse of authority in the Director-General's deciding against personal promotion when there was neither unanimity nor even a majority in his favour.

No essential fact was overlooked and no wrong conclusion drawn from the facts. What is required is regular performance at a level above average, and that meant rating the complainant's performance from 1975. The chief of ADMITRA, who gave evidence to the Board in the complainant's favour, had been his supervisor for less than a year out of the material period. The Board always looks at the whole period, and it would be unfair to other candidates for personal promotion to disregard in the complainant's case the very period - his spell in Yaoundé - when his work was plainly not above normal requirements. That period is relevant because it counts towards the 13 years' service he needs under paragraph 7 of the circular to qualify for personal promotion. Since the circular does not say how to assess merit during a period of service at a higher grade the matter must be left to the Board. Besides, it would be wrong to promote someone to a grade of which he had already shown himself unworthy and so the quality of performance at that grade does have relevance.

Lastly, the purpose of the scheme is to offer advancement to an official whose career is blocked, and someone who has already had a higher grade for at least a part of the material period has suffered less from blocking than others.

D. In his single rejoinder on both complaints the complainant observes that the reason why he filed the first one was the ILO's stubborn refusal to answer his request of 1 December 1989 for review of the decision. It ill befits the Organisation, having acted so tardily itself, to object to his failure to abide by a time limit for correcting his papers.

He develops his contention that the impugned decision shows several flaws.

The ILO admits to breach of paragraph 14 of circular 334, which its allegedly consistent practice cannot justify: the text is clear and the staff are entitled to demand that the ILO comply with it: patere legem quam ipse fecisti.

The complainant dwells on several issues of fact, particularly what happened while he was in Yaoundé, and observes that in the Bonneau case (Judgments 671 and 757) there was never any question of imputing liability to himself. It was indeed he who discovered, while at headquarters, that something was amiss in the accounts of the Yaoundé office and who pointed out the swindle. He discusses the circumstances of his return to headquarters and the terms on which he later agreed to revert to P.4. At the time the Director-General made him an oral promise in the presence of several senior officers - whom he wishes to call to give oral evidence - that he would go back to P.5 at the earliest opportunity: the failure to keep that promise is an actionable breach of good faith.

He enlarges on his objections to the Selection Board procedure, submitting that the Board was prevailed upon not to recommend in his favour. There is no requirement that its recommendation be unanimous. The Deputy Director-General's sending his case back was unlawful. He was the victim of prejudice. The Deputy Director-General, who had chaired the body that looked into the Yaoundé affair, was dead set against promoting him. It was the Deputy Director-General who really took the decision although authority had not been delegated to him for the purpose. The decision overlooks the essential fact that all his performance reports were very good, even the ones on his

service in Yaoundé.

He presses his claims, save that he seeks promotion not just from 1 January 1989 but from 1 September 1987.

E. In its single surrejoinder the Organisation observes that the drift of the complainant's largely iterative and inconsistent rejoinder is that he fell foul of a plot masterminded by the Deputy Director-General. But his allegations of personal hostility are belied by the fact that the Reports Board, which the Deputy Director-General also chairs, approved the grant to him of a merit increment in 1988.

The Organisation submits that on many points his narrative is mistaken, tendentious or wanting. It describes how he came to return to headquarters and to resume grade P.4. It denies that the Director-General promised him early reinstatement in P.5: all that the evidence shows is that he was promised a permanent appointment, and the ILO cites a minute to him of 24 April 1984 from the Chief of the Personnel Development Branch to that effect.

The Organisation develops its pleas in answer to his charges of breach of the circular, abuse of authority and other flaws in the impugned decision. It rejects as unsound - and offensive to the Board - his plea that it was wrong to ask the Board to reconsider: indeed in view of its original comments it would have been wrong not to do so. Three members out of four described his case as "somewhat doubtful" and, even discounting his time in Yaoundé, the Director-General was free to conclude that his performance the rest of the time had not been so outstanding as to warrant the promotion.

CONSIDERATIONS:

Joinder

1. Though one complaint impugns a decision of 3 October 1989 and the other one of 8 June 1990, both put forward the same claims and rest on the same facts. Both object to the refusal by the Director-General to grant the complainant personal promotion and seek to have it set aside. They are therefore joined to form the subject of a single ruling.

The background

2. The ILO recruited the complainant in July 1975 at grade P.4. On 1 October 1981 he was made Director of the ILO Office in Yaoundé and promoted to P.5. There was misappropriation of ILO funds in his office early in 1983. He was sent back to headquarters in August 1983 and went back to his former grade, P.4, in April 1984. A Property Survey Committee was set up to inquire into what had happened and it reported on 21 July 1986.

Circular 334 of 20 July 1985 brought in a scheme for personal promotion. The complainant's name was on the list of candidates for 1987 and was put to the Selection Board. The Board reported on 10 May 1989 and filed a supplementary report on 13 July. The Director-General decided on 3 October against granting him personal promotion. On 1 December 1989 he asked the Director-General to review that decision but without awaiting an answer filed his first complaint on 15 March 1990 impugning the decision of 3 October 1989. On 2 April 1990 he lodged a "complaint" under Article 13.2 of the Staff Regulations, the Director-General rejected it on 8 June 1990, and that is the decision under challenge in his second complaint.

The receivability of the first complaint

3. The Organisation submits that his first complaint is irreceivable. It is right. By the date of filing, 15 March 1990, the complainant had lodged with the Organisation one request for review under Article 13.1 of the Staff Regulations and another under paragraph 15 of circular 334. Only afterwards, on 2 April, did he file an internal "complaint" under Article 13.2. So he has failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's States requires him to do.

The merits of the second complaint

4. The second complaint, which does challenge a final decision within the meaning of Article VII(1), is receivable, and the issue it raises is whether the complainant is entitled to personal promotion.

Though the scheme in circular 334 of 1985 was to be on trial for two years it was extended in 1987 and again in

1989. It applies to "officials whose grade is not above that of the post occupied and who meet a specified long-service requirement", which is 13 years' seniority in the grade. The Selection Board rates the official's merit according to the criteria stated in paragraph 9 of the circular and then makes a recommendation to the Director-General.

So promotion is at the Director-General's discretion, his decision is subject only to limited review, and it may not ordinarily be set aside unless there is some particular fatal flaw. Breach of a procedural rule is such a flaw.

The complainant pleads two procedural flaws in the impugned decision.

5. One is that the Selection Board acted in breach of paragraph 14 of circular 334 by failing to let him have a statement of the reasons for the Director-General's refusal.

Paragraph 14 says that if the Director-General's decision goes against him the official "shall be furnished by the Selection Board with a brief statement of the reasons", the purpose being to let him know why he is refused promotion and so appeal if he wants to.

That the explanation came in this case from the Director-General himself is not, however, a procedural flaw. Paragraph 14 is unenforceable because the Board can explain only its own recommendation and because the text might require it to explain even a decision that ran counter to that recommendation. So the complainant's first objection fails.

6. His other objection is that in the Board's first report, the one of 10 May 1989, a majority of its members recommended granting him personal promotion but it met again on 30 June 1989, at the instance of the Deputy Director-General in charge of General Administration, and shifted ground in its supplementary report of 13 July.

The responsible officer may not ask an advisory body to think again on the pretext that its recommendation is unclear. It is up to the Director-General himself to decide whether or not he should act on it.

To warrant reconsidering its recommendation the Board itself said that a new item of evidence that not all of its members had yet seen had been brought to its notice, namely the Property Survey Committee's report. But in only two cases may an internal body be asked to think again. One is where something unforeseeable and of decisive moment occurs after it has reported, and the other is where there comes to light some fact or evidence, again of cardinal importance, that it did not know of or could not have known of before it reported.

The Property Survey Committee's report, which went back to 21 July 1986, was not an unforeseeable new fact. Nor is it arguable that the Board's members could have been unaware of it before they first met since their first report actually spoke of the complainant's troubled directorship in Yaoundé.

The conclusion is that there was no sound reason in law for the Board to meet again. Being the outcome of an unlawful process of consultation the impugned decision is tainted for that reason alone and cannot stand.

DECISION:

For the above reasons,

1. The first complaint is dismissed.

2. The Director-General's decision of 8 June 1990 is set aside.

3. The case is sent back to the ILO for review.

4. The Organisation shall pay the complainant 2,500 Swiss francs in costs.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.