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

SEVENTY-FOURTH SESSION

In re EL MAHJOUB

Judgment 1213

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Mohamed El Mahjoub against the International Labour Organisation (ILO) on 17 January 1992, the ILO's reply of 13 April, the complainant's rejoinder of 15 July and the Organisation's surrejoinder of 30 September 1992;

Considering Articles II, paragraph 1, VII, paragraph 1, and VIII of the Statute of the Tribunal and Articles 3.7, 4.6 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Libyan who was born in 1936, joined the ILO on 1 January 1985 under a one-year fixed-term contract at grade P.4. He was assigned to the Labour Law and Labour Relations Branch of the Office, in Geneva. He was granted several extensions of contract and worked there until 31 December 1989. On 1 January 1990 he was transferred to the Social Security Department and got further extensions, the last of them up to 31 December 1991.

At a meeting with him on 28 June 1991 the Director of the Personnel Department proposed seconding him to the Regional Arab Programme for Labour Administration, known as RAPLA, at Tunis, where he was to serve as regional adviser on labour administration for the Arab States. The Organisation made him the formal offer of transfer on 30 July: he was to have a one-year appointment as from 1 July 1991 and take up duty at Tunis by 1 September. The terms of service were set out and included the grant of a special allowance at step 1 in grade P.5. In a minute of 5 July, which the Director answered on 23 July, and in another of 11 September he objected to the transfer and asked what were the reasons for it. As he saw it the post on offer was a temporary one and he was getting only a six-month extension. He asked for an appointment without limit of time at P.5 in Geneva. In its reply of 25 September the ILO changed its offer of 30 July to let him have a two-year appointment as from 1 July 1991 and hold over to 1 November 1991 the date at which he was to report for duty at Tunis.

In a minute of 3 October he pressed his demands, pointing out that the ILO ordinarily posted staff either at headquarters or in a country where it had an office. Since it had no office in Tunis sending him there was, he said, tantamount to putting him temporarily on a vacancy at headquarters and was therefore discriminatory. In its reply of 22 October the ILO told him that the transfer to Tunis would not change his status a whit; it was treating him no differently from anyone else in reassigning him; he did not yet qualify for a appointment without limit of time; and if he failed to report for duty by 1 November 1991 it would take it he had turned down the assignment.

By a minute of 31 October the Director informed him that his appointment would end at 31 December 1991.

On 4 October 1991 he had submitted an internal "complaint" to the Director-General under Article 13.2 of the Staff Regulations on the grounds of treatment incompatible with the Regulations. By a letter of 23 October 1991, the decision he is impugning, the Director rejected his "complaint" on the Director-General's behalf.

B. The complainant puts forward several pleas.

He observes that since joining the ILO he has had his contract extended by periods of less than one year at a time. In 1991 alone he had four extensions, three of them two months each. That was in breach of the requirement in Article 4.6 of the Staff Regulations that "Appointments for a fixed term shall be of not less than one year and of not more than five years". It was also at odds with ILO usage and denied him entitlements he would have had

under an appointment without limit of time.

The post the ILO decided to put him on at Tunis is a temporary one and it failed to explain to him the reasons for the transfer.

He was not put on a par with others: the official who used to be on the post he was offered got promotion to P.5 and three others were granted fixed-term appointments as regional advisers on labour administration in Africa and the Arab States.

He asks the Tribunal to order his assignment to the post of regional adviser on labour administration for the Arab States at grade P.5 under an appointment without limit of time in accordance with Article 4.6(c) of the Staff Regulations or, failing that, to the post of regional adviser on international labour standards for the Arab States, which was put up for competition on 20 November 1991.

C. In its reply the ILO submits that Article VIII of the Tribunal's Statute limits its competence to ordering "the rescinding of the decision impugned or the performance of the obligation relied upon". So the Tribunal may not entertain the complainant's claim to a particular post. As to the short extensions of his contract, it is too late for him to challenge any he got before March 1991 because he never lodged an internal appeal. Besides, far from causing him injury they enabled him to stay in the ILO until 1991.

On the merits the ILO submits that the short extensions were lawful and warranted. Article 4.6, which he cites, merely provides that a fixed-term appointment shall be for not less than one year but does not fetter the Organisation's discretion to grant extensions and does not say how long an extension should be. The ILO has no established practice on extensions. The complainant had his appointment constantly renewed and the Staff Regulations continued to apply to him as the holder of a fixed-term appointment. It was because his output fell short - as his appraisal reports show - that his appointment was extended by less than a year at a time.

In answer to his charge that in transferring him to Tunis the ILO treated him less well than others it observes that, as the Tribunal has often held, the principle of equal treatment does not mean that everyone must needs fare alike. What it does mean is that where officials are in like case the treatment of them must be the same, but where they are not it need not be. The decision to transfer the complainant to Tunis was in line with Article 3.7(b) of the Regulations, the Reports Board having recommended that the Director-General should not renew his contract in the Social Security Department. It would have been odd to give him promotion when his performance was unsatisfactory and termination was being mooted. The transfer would have caused him neither material nor moral injury since he was to get a special P.5 allowance anyway while still in grade P.4. The other officials he mentions, who were promoted to P.5 as soon as they were appointed to the post or transferred, were not in like case: they all had the necessary qualifications and skills, and one of them had already taken on P.5 duties and won a competition.

The ILO invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant maintains that he is still an ILO staff member: he is reporting for work and his name is in the 17 January 1992 edition of the telephone directory.

He submits that, contrary to what the ILO says, he accepted the post of regional adviser on labour administration for the Arab States. He was merely expressing objections to the ILO's treatment of him in general and to the particular status it was giving him.

What he wants the Tribunal to do is to order the ILO to perform an obligation in keeping with Article VIII of the Statute. He is not actually challenging the extensions of less than one year that the ILO gave him, but he does not find them any the less objectionable for that since they denied him his rights under circular 180, series 6, of 22 May 1980 about transfer to the field.

E. In its surrejoinder the ILO maintains that what the complainant is challenging is the rejection of his internal "complaint" against the short extensions of his appointment and the terms of the transfer it offered him. The claims and pleas in his rejoinder take a different tack and therefore raise the issue of receivability. Though he says he wants the Tribunal to order the performance of an obligation under Article VIII of its Statute he fails to say what the obligation is.

The ILO stopped employing him on 31 December 1991, when his contract expired. It is irrelevant to his status that he kept on going to the office of his own accord or that there was delay in removing his name from the telephone list.

His failure to report in time for duty at Tunis shows that he did reject the offer of transfer and was not just stating objections to it. The conditions he set were in themselves tantamount to refusal.

The extensions of less than one year did not deprive him of his rights under circular 180 since his transfer to the field would have complied with the requirements of that circular. He was not to be temporarily seconded to a project but put on a post under the regular budget.

CONSIDERATIONS:

1. The complainant joined the ILO in January 1985 and held a fixed-term appointment which was extended to 31 December 1991. On 4 October 1991 he lodged an internal "complaint" against a decision by the Director-General to transfer him to a post at Tunis as regional adviser on labour administration under the Regional Arab Programme for Labour Administration, known as RAPLA. On 23 October the Director of the Personnel Department rejected that "complaint" and confirmed the transfer on the Director-General's behalf. That is the decision he is now impugning. His chief claim is that the Tribunal order his assignment to the post of regional adviser on labour administration for the Arab States at grade P.5 under a contract without limit of time. Failing that, he wants an order of assignment to a post, put up for competition on 20 November 1991, as regional adviser on international labour standards for the Arab States.

2. The impugned decision of 23 October 1991 rejected other grievances of the complainant's, and indeed in their submissions the parties debate the receivability and merits of his challenge to decisions extending his contract by less than one year at a time. But he expressly confines his claims to the above and says in his rejoinder that he "has never sought to challenge ... the many decisions, contrary to Article 4.6(d) of the Staff Regulations, to renew his appointment for periods of less than one year". So the Tribunal will not rule on the Organisation's pleas on that score.

3. The receivability of his claim to a particular post is another matter. Article VIII of the Tribunal's Statute reads:

"In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him."

What that article means, as the case law has construed it, is that the Tribunal may not order an organisation to put a staff member on any particular post. All it may do is set aside an unlawful decision putting someone on a post or refusing to do so or order specific performance where the Organisation has failed to discharge an obligation.

In this case the ILO is plainly under no duty to give the staff member the post he wants, and on the terms he sets. The complainant's claim under this head fails because it is irreceivable.

4. He has another claim, to the quashing of his transfer to Tunis on terms he sees as unlawful and discriminatory. Though receivable, that claim is devoid of merit.

5. In the complainant's submission the extension of his appointment by periods of under a year denied him safeguards that staff are granted on transfer. As was said in 2 above, he does not seek the quashing of the renewals but pleads the Organisation's supposedly unlawful action in support of his contention that he was wrongfully deprived of the safeguards prescribed in circular 180, series 6, of 22 May 1980 on the transfer of staff between headquarters and the field.

The plea fails. According to paragraph 2 of the circular: "... the Staff Regulations provide that all staff of the Professional and higher categories may be transferred from one duty station to another. They may also be transferred, with their consent, for temporary duty on field projects or service with another organisation of the UN family."

The ILO did not act in breach of the paragraph in this case. There is no general rule requiring a staff member's

consent to transfer; all that the circular says is that such consent is required where a staff member is temporarily transferred to a field project or to another organisation in the United Nations system. The post the complainant was offered was that of regional adviser on labour administration for the Arab States. It came under the regular budget and was neither temporary nor part of any field project.

The complainant makes out that it was a temporary post because it came under RAPLA and so was financed for only a finite period by the United Nations Development Programme. But it is plain on the evidence that the complainant would not have been put on a RAPLA post had he consented to the transfer but on an ILO one financed out of the Organisation's own budget. Even supposing that the circular might have helped his case it would not have required the Organisation to get his prior consent to the transfer - which it asked for anyway several times - since the Director-General has discretion to order transfer in the Organisation's interests and with due regard to the staff member's qualifications.

6. The complainant further contends that the decision to offer him the assignment without giving him grade P.5 and a contract without limit of time was discriminatory in that four other staff members appointed regional advisers have P.5 posts.

But none of the four is in like case. Either they have served longer than he or have different qualifications or have won a competition or have a much better record of performance. He adduces no evidence to show unlawful discrimination, and his plea is dismissed because it is devoid of merit.

7. Lastly, he had no right to an appointment without limit of time and offers no evidence to cast any doubt on the Organisation's stand on that issue. His contention that he would not consent to transfer unless he got such an appointment was properly treated as refusal of the offer.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot
A.B. Gardner

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