SEVENTY-EIGHTH SESSION

In re BURT

Judgment 1385

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Timothy Lyndon Burt against the International Labour Organization (ILO) on 6 December 1993, the ILO's reply of 4 March 1994, the complainant's rejoinder of 29 March and the Organization's surrejoinder of 6 July 1994;

Considering Article II, paragraph 1, and VII, paragraph 3, of the Statute of the Tribunal;

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 ILO first employed the complainant, who is British, at headquarters in Geneva under a short-term contract for work on one of its regular publications, the International Labour Review, from October to December 1987.

On 19 February 1991 it announced a competition for a post as "supervisory English-language editor/reviser" of another of its publications, the Social and Labour Bulletin. The notice of vacancy said that "if an external candidate is selected, he or she will be offered a fixed-term contract of two years which may be renewed". The complainant was an "external candidate". Pending the outcome of the competition the ILO offered him another short-term contract to serve as English-language editor of the Bulletin at grade P.4 from 4 March to 31 October 1991. On the expiry of that contract he returned to England. In April 1992 the ILO brought him back to Geneva to serve as English-language editor of the Bulletin under consecutive short-term appointments. Having learned that the Selection Board had recommended appointing him the English-language editor, he asked the Director of the Personnel Department in a minute of 16 April 1992 what had become of the competition and the post.

By a minute of 13 May 1992 the Deputy Director-General in charge of the General Administration Sector told the chairman of the Selection Board that the Director-General had decided to "suspend all action" on the competition "pending a review of the Bulletin" and examination of the Organization's programme and budget proposals for 1994-95. At a meeting on 29 September the Director of the Personnel Department told the complainant so.

In a minute of 1 October 1992 to the Director of the Bureau of Programming and Management the Director of the Editorial and Document Services Department said that the Director-General had "opted for" merging the Bulletin with the Review, which would include a new section on subjects the Bulletin had been covering, and that the "tight schedule" could be met only if the staff of the Bulletin were kept on until August 1993.

The complainant's fourth short-term contract since his return in April 1992 expired on 31 March 1993. In a confidential minute of 19 March 1993 an officer of the Personnel Planning and Career Development Branch (P/PLAN) told the acting chief of the Periodicals Branch that the Staffing Committee had approved the extension of his contract after the "appropriate break in service to avoid [his] becoming under Rule 3.5".

The International Labour Office has rules governing conditions of service of short-term officials of the Office, known as the "Short-term Rules". Rule 3.5 says that whenever the appointment of a short-term official is extended by less than one year so as to bring total continuous service to one year or more the terms of a fixed-term appointment under the Staff Regulations of the ILO shall, with several stated exceptions, apply.

From 5 to 30 April 1993 the Organization employed the complainant under an "external collaboration" contract with the same duties as before. He then got three more short-term contracts, the last of which expired on 31 December 1993.

On 17 August 1993 he submitted a "complaint" under Rule 9.1 of the Short-term Rules alleging that the Administration had infringed paragraph 18 of Annex I to the ILO Staff Regulations by failing to announce the results of the competition and that the break in service it had imposed to keep him from coming under Rule 3.5 was

unlawful.

Having got no reply he infers and impugns the rejection of that "complaint".

By a letter of 13 December 1993 P/PLAN told him that the Administration had cancelled the competition.

The Director of the Personnel Department rejected his internal appeal in a letter of 5 January 1994.

B. The complainant's main plea is that the ILO failed to comply with the terms of the vacancy notice on the position in which it employed him under "precarious contracts". The notice promised that an external candidate would, if successful, get a two-year fixed-term appointment. Although the ILO said it was suspending the competition pending "review of the Bulletin", such review was over by the end of September 1992 and by then the Selection Board had informed the Director-General of its preference for the complainant. Instead of acting on the Board's recommendation the Director-General had him perform the duties set out in the vacancy notice, yet refused him the corresponding terms of employment. He has a subsidiary plea that the offer of the external collaboration contract from 5 to 30 April 1993 was a device to enable the ILO to shirk its obligations under Rule 3.5. His working conditions - duties, place of work, degree of supervision and working hours - were the same under both that contract and the short-term ones; so granting him the one for external collaboration was a misuse of authority.

His main claim is to appointment under a fixed-term contract as from 6 April or 1 October 1992. By way of "alternative and subsidiary" redress he seeks the grant as from 5 April 1993 of the terms and conditions, "except as stated in Rule 3.5", of a fixed-term appointment under the Staff Regulations of the Office. He claims 4,000 Swiss francs in costs.

C. In its reply the ILO argues that the complaint is irreceivable on two counts.

For one thing the complainant is pleading no breach of the terms of his appointment or of the material provisions of the applicable regulations.

For another, he has failed to exhaust the internal means of redress open to him. Under Rule 9.1 of the Short-term Rules he had sixty days from the treatment complained of in which to file his internal "complaint". Insofar as he is objecting to the suspension of the competition, and supposing such suspension is challengeable, he should have made his protest within sixty days of the oral notification the Director of Personnel gave him on 29 September 1992. Alternatively, he might have sought a decision refusing to appoint him to the post.

As to his claim to the rights of a fixed-term official as from 5 April 1993, he should have challenged the decision not to renew the short-term contract that expired on 31 March 1993, and to do so he had sixty days from the date of expiry. Instead he signed the external collaboration contract without reservations.

On the merits the ILO denies breach of the terms of the vacancy notice. Neither its own rules nor the case law require that competitions lead to appointment. When the complainant filed his complaint the Director-General had not yet cancelled the competition: he had merely suspended it for reasons of policy.

The rules lay no duty on the ILO to announce the Selection Board's recommendation and there was not yet any result to announce. To let the competition go ahead when the Bulletin's future was in jeopardy would have been ill-advised.

In answer to the charge of evading obligations under Rule 3.5 the ILO contends that where someone has freely entered into a contract - as the complainant did - the parties are bound by it. Besides, outside the period of the external collaboration contract the complainant came under the Short-term Rules, of which Rule 3.4 says that "appointments shall expire automatically and without prior notice on completion of the period of appointment". So it is "completely irrelevant" whether the complainant performed the same duties under the external collaboration contract as under the short-term ones.

D. In his rejoinder the complainant enlarges on his earlier pleas. According to the case law, he says, the Tribunal may rule on a plea of breach of rights and duties arising from a vacancy notice. What he is objecting to is not the initial suspension of the competition but the ILO's failure to carry it to its "due conclusion" once suspension was no longer warranted. The Organization's inaction amounted to continuing breach, against which appeal lies at any time. The material time limit for internal appeal was six months under Article 13.2 of the Staff Regulations, which

applied to him as from 5 April 1993 through application of Rule 3.5. So the ruling on receivability depends on the ruling on the merits.

On the merits he alleges breach of the ILO's duty to act fairly in dealings with staff. He suffered from its "dilatoriness". He says his second head of complaint - the one about Rule 3.5 - stands on its own. The objective conditions under which work is performed outweigh the formal nature of the contract: so the ILO was wrong to "contract out" of its obligations under Rule 3.5. The whole purpose of laying down conditions of service is to protect against such misuse of authority as granting an external collaboration contract so as to get round Rule 3.5.

If the Tribunal dismisses his claim to the grant of a fixed-term appointment for two years from 6 April 1992 or "at least as from 4 March 1993" - the date of the decision to merge the Bulletin with the Review - he seeks an award of damages for the delay in taking a decision on the competition. He no longer wants the Tribunal to treat as "alternative or subsidiary" his claim to the application of Rule 3.5 as from 5 April 1993. He puts his costs at 5,000 Swiss francs.

E. In its surrejoinder the ILO develops its objections to receivability. As to the competition the complainant is not challenging any decision: before charging the Administration with failure to take a decision he should have asked for one. The claim to damages for alleged delay has nothing to do with his earlier claims. Even if Article 13.2 had applied and the complainant had filed a "complaint" under it he was not free to plead breach of Rule 3.5 under a provision about the rights of established or fixed-term officials under the Staff Regulations. In any event his claims to a fixed-term contract and to the application of Rule 3.5 are contradictory and must remain "alternatives".

On the merits the ILO contends that it owed him no duty to extend a contract that was for a limited period only. Although it was not in its interest to extend his contract without a break in service it "allowed [him] to continue his work during the break".

CONSIDERATIONS:

1. The ILO employed the complainant under consecutive short-term contracts which, insofar as they are material to these proceedings, began on 4 March 1991. He worked at grade P.4 as the English-language editor of the Social and Labour Bulletin, which is produced by the Periodicals Branch (EDIPER) of the Editorial and Document Services Department (EDITION).

2. A notice dated 19 February 1991 announced an "internal/external competition" to fill a vacant post for the "supervisory English-language editor/reviser" of the Bulletin. The deadline for applications was 22 April 1991. A parallel competition was announced for a corresponding French-language post. The complainant applied for the English-language post and on 29 August 1991 he and other candidates took a written examination set in the context of both competitions. On 16 June 1992 the Director of the Personnel Department informed his supervisors that the Director-General had suspended all action on the competitions. By a letter of 13 December 1993, after he had lodged his complaint with the Tribunal, a member of the Personnel Planning and Career Development Branch (P/PLAN) informed him that the competition he had entered had been cancelled.

3. From 1 November 1991 until 5 April 1992 the complainant had not been in the service of the Organization. At the invitation of the acting chief of EDIPER he resumed the editorship of the Bulletin on 6 April 1992. He continued to work under short-term contracts. By a minute of 19 March 1993 another officer of P/PLAN told the acting chief of EDIPER that the Staffing Committee of the Office had "approved the extension of the short-term contracts" of the complainant and his French-language counterpart "with the appropriate break in service to avoid their becoming [sic] under Rule 3.5" of the Short-term Rules. Rule 3.5 reads:

"(a)Whenever the appointment of a short-term official is extended by a period of less than one year so that his total continuous contractual service amounts to one year or more, the terms and conditions of a fixed-term appointment under the Staff Regulations of the ILO shall apply to him as from the effective date of the contract which creates one year or more of continuous service:

Provided that ...

(c) For the purpose of this Rule, continuity of service shall not be considered to have been broken by any interruption which does not exceed 30 days."

4. In minutes of 1 October 1992 to the Bureau of Programming and Management (PROGRAM) and of 26 March 1993 to the Deputy Director-General in charge of the General Administration Sector and to the Director-General the Director of EDITION had made it quite clear that, whether the Bulletin was published separately or merged with the Review in 1993, he needed the team to stay on and work without break until August 1993. So the complainant was given what is called an "external collaboration contract" for the period from 5 to 30 April 1993. The purpose of the contract was stated to be "research and scanning for the English version of issue 2/93 of the International Labour Review" and, it said, "Approximately four working weeks will be necessary to complete this task". The acting chief editor signed it on 2 April 1993 and the complainant on 21 April. From 3 May until 31 December 1993 the complainant continued to serve the Organization under short-term contracts, but P/PLAN informed him in a minute of 15 October that there was no possibility of further extension after 31 December.

5. The complainant states, and the ILO does not deny, that while employed under the external collaboration contract he carried out the same duties as before in exactly the same manner; he occupied the same office; he continued to use the library and other support services; and he held consultations with colleagues and worked under the same supervision as before.

6. On 17 August 1993 he lodged an internal appeal under Rule 9.1 of the Short-term Rules. He argued that he had been ranked first in the competition for the English-language editorship of the Bulletin, had returned at the Organization's request to carry out the duties of the post and should have been granted a fixed-term appointment for two years. He maintained that in spite of the interposition of the external collaboration contract he was entitled to the benefit of Rule 3.5 of the Short-term Rules. He claimed the protection of one of the ILO's own instruments, the Termination of Employment Convention, 1982 (No. 158).

7. He lodged this complaint on 6 December 1993, observing that the Organization had failed to take any decision on his internal appeal within sixty days and that he had come to the Tribunal within ninety days thereafter as provided for in Article VII(3) of its Statute.

8. The ILO's answer to his internal appeal came in a letter of 5 January 1994 from the Director of the Personnel Department. The Organization argued that in regard to the competition his claim was irreceivable because the recruitment procedure was governed not by the Short-term Rules, which applied to him, but by the Staff Regulations and because as an external candidate he had no status under those Regulations. The claim was irreceivable for the further reason that the Director-General had taken no final action: the Selection Board could only make a recommendation, whereas it was the Director-General who took the final decision to fill a vacancy. In any event the claim was time-barred. As to his claim in respect of the break in short-term contracts, the Organization contended that it too was time-barred.

9. The complainant knew by June 1992 that the Organization had suspended action on the competition pending review of the future of its two publications, and he knew by September 1992 that the Director-General had decided that from 1994 only the Review would be published, with a new section containing the kind of material previously published in the Bulletin. For financial reasons the Director-General decided in November 1992 to bring the merger forward to 1993.

10. The conclusion is that the suspension and later cancellation of the competition were quite proper: the post advertised for English-language editor of the Bulletin had ceased to exist by the end of 1992. So the complainant's claim to a two-year appointment to that post must fail anyway on the merits, and there is therefore no need to determine whether it is receivable.

11. Under another head of relief the complainant seeks an order that as from 5 April 1993 he became entitled to the terms and conditions of a fixed-term appointment under Rule 3.5 of the Short-term Rules.

12. As the Tribunal held in Judgment 701 (in re Bustos), under 5:

"The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties."

There is overwhelming evidence in this case to warrant looking behind the mere wording of the texts to ascertain the parties' real intention. The interruption of the complainant's appointment by the external collaboration contract was merely a device to deny him the protection of Rule 3.5 without forfeiting the benefit of his services. There being no change in the actual conditions of employment, the real intention was that he should continue to do the

same work as before.

13. The legal consequence of that finding is that the external collaboration contract must be treated like any other of his short-term contracts that ensured continuity of service. So his "total continuous contractual service" amounted to one year by 5 April 1993 and he thus became entitled under the terms of Rule 3.5 to "the terms and conditions of a fixed-term appointment under the Staff Regulations of the ILO".

14. One of those "terms and conditions" was Article 13.2 of the Staff Regulations, which says that an internal appeal shall be lodged "within six months of the treatment complained of". Thus as from 5 April 1993 the time limit of 60 days in Rule 9.1 of the Short-term Rules no longer applied to the complainant. In accordance with the change made necessary by Rule 3.5 he had the longer time limit that is set for appeal in Article 13.2 of the Staff Regulations. His internal appeal was therefore receivable.

15. The conclusion is that the complainant became entitled as from 5 April 1993 to the terms and conditions of a fixed-term appointment as provided by Rule 3.5. Since he has succeeded on that count, he is entitled to an award of costs.

DECISION:

For the above reasons,

1. The complainant is entitled as from 5 April 1993 to the terms and conditions of a fixed-term appointment as provided by Rule 3.5 of the Rules governing conditions of service of short-term officials of the International Labour Office.

2. The Organization shall pay him 4,000 Swiss francs in costs.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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