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

EIGHTY-THIRD SESSION

In re Bedrikow

Judgment 1666

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Roberto Bedrikow against the International Labour Organization (ILO) on 10 May 1996 and corrected on 28 June, the ILO's reply of 6 August, the complainant's rejoinder of 10 September and the Organization's surrejoinder of 19 December 1996;

Considering Articles II, paragraph 1, and VII, paragraph 1, 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 complainant, a Brazilian citizen who was born in 1962, joined the International Labour Office in October 1989 under a short-term appointment which was renewed several times. He had already worked for the Office for three weeks in 1988. At the material time he was working for the Application of Standards Branch (APPL) at grade P.3.

An extension of appointment he got in July 1995 conferred on him the benefit of Rule 3.5 of the Rules governing conditions of service of short-term officials, known as the "Short-term Rules". According to 3.5 "the terms and conditions of a fixed-term appointment under the Staff Regulations" shall, with only a few exceptions, apply to staff who have been in the Organization's employ for at least one year without interruption. The offer of extension explained that the complainant would be paid repatriation allowance as from 1 August 1994. A covering letter said that the appointment was still short-term.

In a minute of 27 July 1995 the complainant claimed the status of a "non-local" holder of a fixed-term appointment. The Organization not having answered, he lodged an internal "complaint" with the Director-General on 13 December 1995. In a letter of 23 May 1996 the Director of the Personnel Department confirmed, at the Director-General's bidding, the implied rejection of his claim, and that is the impugned decision.

B. In support of his plea that he should be treated as a "non-local" staff member the complainant points out that he was granted the repatriation allowance as from 1 August 1994 and that under Article 11.15 of the Staff Regulations only staff who are not locally recruited qualify for it. He claims non-local status as from 1 August 1994 at the latest. But since the Organization arbitrarily interrupted his appointment at that date so as to dodge Rule 3.5, he believes that he is entitled to repatriation grant and so to non-local status as from 4 October 1993, the date of the termination of his last appointment before that interruption. He further argues that he should be treated as non-local as from 2 October 1989, because it is inconsistent to recruit someone as a "local" staff member in 1989 and later as a "non-local" one. The amount that the ILO owes him as from 1989 in subsistence allowances and travel costs totals 140,000 Swiss francs.

He pleads breach of equal treatment: all the other staff in his unit who were recruited non-locally got the proper benefits. In his case the Office acted dilatorily and in bad faith.

Since Rule 3.5 brought him under the Staff Regulations his appointment became "fixed-term and *sui generis*". The work he was doing was continuous. His claims are set out in detail in 3 below.

C. The Organization submits that the complaint is in part irreceivable because he failed to protest to the Director-General within the time limit in the Short-term Rules.

The personal information forms he filled up show that he had been living in Geneva since 1981 and received most of his university education there. He was resident in Geneva when he got his first appointment in 1988. He signed his second contract, in 1989, on his return to Geneva after a few months' stay in Brazil. He knew full well that the ILO was recruiting him locally since on 5 September 1989 it sent him a telex saying as much. It draws a distinction between "place of recruitment" and "home" and says that there is nothing inconsistent about paying the repatriation grant and conferring local status. It contends that his reckoning of the amounts due is "far-fetched".

He fails to show that the disagreement over how to construe Rule 3.5 caused him injury. So he has no cause of action. The sole purpose of 3.5 is to confer greater entitlements and safeguards by granting the staff member some of the benefits of a fixed-term appointment, albeit without changing the nature of the appointment. Whatever his duties may have been, the complainant still held just a short-term one.

D. The complainant maintains in his rejoinder that he was in Brazil throughout the year preceding recruitment in 1989 and that the ILO is wrong to rely on the personal information forms, which he filled up at least one year before recruitment. The Organization failed to explain just what sort of appointment it was offering.

E. Citing Judgment 1108 (*in re* Dahlqvist), the Organization contends that the complainant is bound by the terms of the contracts he signed and is too late to have them rewritten now.

CONSIDERATIONS

1. The complainant, a Brazilian citizen who was born on 21 October 1962 in São Paulo, lived for some years in Geneva, where his father was employed in an international organisation. He got a law degree at the University of Geneva in October 1986 and a diploma from the University of São Paulo in 1988.

On 7 April 1987 he filled up an ILO "personal information" form in which he expressed interest in working for the Office. He said that he had been living in Geneva since August 1981. The Office got the form on 13 July 1987.

From October 1988 to September 1989 he worked for a firm of lawyers in São Paulo.

The ILO gave him a short-term appointment from 1 to 20 June 1988 to cover the 75th Session of the International Labour Conference. His contract said that he was resident in Geneva.

He got a second short-term appointment from 8 to 24 June 1989 for the 76th Session of the Conference while on leave from the firm in São Paulo. That contract too gave Geneva as "place of residence".

On 2 August 1989 he wrote from São Paulo to the Personnel Department to say that he would like to work for the Office; he would be leaving Brazil in October, or earlier if need be, to go back to Geneva, where he had lived from 1981 to 1988.

On 28 August 1989 he wrote to the chief of the Application of Standards Branch (APPL) to accept an offer of a three-month appointment starting on 2 October 1989. He asked for "details of the type of appointment offered, and the terms and facilities, so that [he could] make arrangements, particularly for travel by air from São Paulo to Geneva".

The Office answered by a telex of 5 September 1989. It noted his acceptance of its offer; his appointment was to be a short-term one from 2 October to 22 or possibly 31 December; it would not be extended; and it would be subject to the Short-term Rules. The telex set out the pay and concluded with the words "Appointment under local recruitment rules".

On 20 September 1989 the ILO sent him at his address in Geneva a standard offer of appointment and he signed it on 2 October 1989. It set out the terms but the item "Travel expenses paid by the ILO" was left blank, the clear implication being that the Organization would not be paying his travel costs. There is no evidence to suggest any disagreement at the time on that score. The offer added that he would get the "post-adjustment" allowance which Rule 2.2(b) grants locally recruited staff.

Thereafter he was given several short appointments, ranging from two weeks to eight months, with breaks of from one to fifteen months, to meet the Office's needs for "seasonal" staff. The contracts always gave Geneva as his place of residence and he was always recruited as a local staff member and got the post adjustment.

From 4 October 1993 he was granted longer appointments as posts fell vacant. He was employed from 4 October 1993 to 4 March 1994, then from 5 March to 30 June 1994. After a break of one month he got an appointment from 1 August 1994 to 30 June 1995; then a last one from 1 July 1995 to 31 December 1995 at grade P.3, step 2.

Disagreement arose over the terms of his last appointment. He maintained, among other things, that he was not a local employee. He was in Brazil when he got from the ILO an offer of extension dated 19 July 1995. It said that he would still be subject to the Short-term Rules; as from 1 July 1995 Rule 3.5 would apply as from 1 August 1994; he was entitled to the pay of a fixed-term official and to repatriation grant; and the other terms and conditions held good. A fax letter of 19 July 1995 told him: "Local status remains unchanged". He answered at length in a minute of 27 July asserting that he had non-local status and that, having a fixed-term appointment, he came under the Staff Regulations, not the Short-term Rules. Having got no answer, he wrote on 1 August saying that he had no choice but to accept the offer as it stood though it was not what he wanted. He was later informed that he would get no further extensions.

2. On 13 December 1995 he lodged a "complaint" with the Director-General claiming, among other things:

"(1) recognition that my current fixed-term appointment warrants applying the Staff Regulations, as Rule 3.5 of the Short-Term plainly requires;

(2) recognition of the arbitrary interruption of my appointment in July 1994;

(3) recognition of my non-local status;

(4) retroactive payment of any entitlements refused because of the arbitrary application of the above-mentioned Rules and Staff Regulations;

...

(9) subsidiarily, recognition that the Staff Regulations (fixed-term appointments) apply to me in full as I have been performing duties of a permanent nature since 2.10.89 despite excessive recourse to short-term appointments even though there were posts vacant in APPL."

A reply was sent to him on the Director-General's behalf on 23 May 1996. The gist of it was that all the contracts of appointment had been entered into by both parties. He did benefit from Rule 3.5, but he mentioned no entitlements thereunder that he had been denied. The grant of any other sort of benefits would require a formal exception to the Staff Regulations. His request concerning the break in contract in July 1994 was irreceivable because it was out of time. He had been "locally" recruited, and rightly so, since all the relevant documents gave Geneva as his place of residence; indeed in 1989 he had stated his intention of returning there even before the ILO had given him an appointment. So for that reason his claim to retroactive payment of entitlements showed no cause of action. And, as to his last claim, if what he wanted was a fixed-term appointment exempt from the Staff Regulations, that was out of the question.

3. On 13 December 1995, however, before getting the Director-General's answer, he had lodged this complaint against the implied rejection. He is claiming:

(1) express recognition of status as a non-locally recruited staff member;

(2) retroactive payment as from 2 October 1989 of all entitlements withheld in the absence of such recognition;

(3) failing (2), retroactive payment as from 4 October 1993;

(4) failing (3), retroactive payment as from 1 August 1994;

(5) recognition of the fixed-term nature of the appointment in force on 13 December 1995.

In sum he contends that the provisions whereby terms of appointment vary according as recruitment is local or non-local amount to binding rules. In his submission the ILO was wrong to refuse him non-local status since, as it well knew, he was living in São Paulo when it made him its first offer. He was, he says, "dismayed" to learn that others who were no better qualified but had been non-locally recruited were earning much more than he. At the time the Organization was remiss in telling him of his entitlements. It must pay them retroactively because the material rules are binding and because it applied Rule 3.5 retroactively to the last of his appointments. By letting him have repatriation grant it implied that he had not been locally recruited. It was arbitrary to go no further back than the starting date of his last contract -- 1 August 1994 -- because the one-month break in his appointment, in July 1994, had been quite arbitrary, the intention being to give him a continuous contract. So the date should have been 4 October 1993 at the latest. It should even go back to the start of the first appointment, in 1989, since he had of course been in Brazil when the ILO had then sought his services. It treated him worse than its non-locally recruited staff. By his reckoning it saved some 140,000 Swiss francs at his expense in unpaid per diem allowances and travel costs. His last contract was a fixed-term, not a short-term, one since the Organization granted him the benefit of Rule 3.5. He has, he says, an interest in the change of status as fixed-term staff may enter internal competitions and challenge non-renewal of appointment.

The Organization submits that his claims are irreceivable on two counts: they are out of time, and he has failed to exhaust the internal means of redress. If he meant to challenge its treatment of him he should have impugned its specific decisions within the time limit of sixty days in Rule 9.1 of the Short-term Rules. He did not do so. There is no need to determine whether his claims are time-barred under Rule 10.3 since they are in any case devoid of merit. According to the case law an organisation may agree with an employee to grant local or non-local status. Besides, there was ample reason to treat the complainant as a local recruit: he had lived in Geneva for years and in the autumn of 1989 he told the ILO that he would be going back to Geneva even before the contract was signed. He thereafter lived in Geneva and consistently said he lived there; so the Organization had no reason not to recruit him locally under later appointments. He was clearly informed at the material time of the terms of his appointment and the written contracts left no doubt as to what they were. If he objected, he should have done so at once. The ILO would -- it goes on -- scarcely have agreed to terms that entailed further costs. Letting him have the repatriation grant when he came under Rule 3.5 did not imply that he had non-local status: he is muddling "home" and "place of recruitment". In any case its recognition of his entitlement to the grant did not alter the terms of a contract both sides had agreed to. The defendant contends that, even supposing it was wrong to award him the grant, he may not derive from the mistake any further benefit he is not entitled to. His claim to recognition of his last appointment as a fixed-term one is irreceivable: it discloses no cause of action.

Receivability

4. (a) A claim to a ruling in law will be receivable only if the complainant shows some cause of action. Generally he may not do so if he may instead challenge a specific decision in support of his claim to redress. Thus a staff member who is challenging his pay may impugn the decision in his pay slip or a rejection of some specific claim he has made.

The complainant makes two claims -- 1 and 5 -- to rulings in law. Claim 1 is about the legal nature of his contract as it affects the place of recruitment. He seems to have made it only to lend substance to his claims -- 2, 3 and 4 -- to redress. It cannot stand on its own since it shows no cause of action that the complainant may have. If he believes that the ruling he seeks might serve in challenging some decision yet to come, he should wait until it does come. His claim 5 is about the legal nature of his contract as it affects duration. He argues that a ruling in law would serve in any future litigation, for example, as to just who may enter on internal competitions or challenge non-renewal. Here again he must await a decision that causes him actual injury.

(b) There is no need to determine whether his other claims are out of time: they are in any event devoid of merit.

The merits

5. (a) The material provisions of the Short-term Rules read:

"Rule 3.2

Local and non-local appointments

A short-term official shall be classified at the time of his appointment as either locally or non-locally recruited. An official recruited inside the area of the duty station shall normally be classified as local.

Rule 3.3

Contract of employment

(a) The terms of appointment of a short-term official shall be governed by a contract which shall consist of an offer of appointment, signed by the Director-General or his authorized representative, and a declaration of acceptance signed by the official.

(b) The offer of appointment shall state -

(1) that the appointment is subject to the provisions of these Rules;

...

(3) the category, grade or position to which the official is appointed and the salary he will receive;

(4) whether he is classified as locally or non-locally recruited;

...

(d) A copy of these Rules and a declaration of acceptance to be signed by the official shall be transmitted together with the offer of appointment."

(b) Precedent has it that it is the contract concluded between the parties that determines whether the staff member's status is local or non-local. He must object to the terms before he signs. Thereafter it is too late to rewrite retroactively a duly concluded contract. Save when the staff member was mistaken, the place of residence cannot be an issue: see for example Judgments 613 (*in re* Fargaly); 1108 (*in re* Dahlqvist), 1189 (*in re* Pinto de Magalhaes No. 3) under 5; 1539 (*in re* Deakin) under 9, 11 and 12.

The complainant was and is bound by the terms of the contracts, which stated that he was locally recruited. The Tribunal is satisfied that he knew what local status meant: he had or could have got hold of the relevant part of the Rules and with his training as a lawyer must have grasped the meaning of the clause. So he was left under no misunderstanding, the less so since the execution of his first contract had made plain just what his rights were.

(c) The Rules allow the parties much freedom in determining by contract the sort of appointment they intend. That is why the second sentence of 3.2 states that only "normally" will 3.2 apply. Indeed the Organisation often has little to go on to determine what the place of residence is.

Yet here it had ample information on that score. The complainant had been living in Geneva for years and was still living there when it concluded the first contract. Even before he signed the third one he had told the ILO that he meant to go back to live in Geneva. Thereafter he said he was still living there.

6. His main plea is that the contract concluded in July 1995 let him have the repatriation grant and, since it is not given to someone with local status, the Organization must have appointed him non-locally from the outset.

(a) Article 11.15(a) of the Staff Regulations is headed "Repatriation grant". It says:

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

And Article 14.6 allows an exception only if it is not prejudicial to the interests of any other official or group

of officials.

(b) It is true that the complainant did not reallly qualify for the grant under Article 11.15 since the Organization was treating him as a local recruit.

But he is wrong to deduce from that that he should not be treated as local. As the Organization contends, once Rule 3.5 applied to him it had to put him on a par with all other staff in the Professional category who were on fixed-term appointments. In their case no distinction is made as to the place of recruitment, they are all entitled to a repatriation grant, and so was the complainant. In other words, the term "any non-locally recruited official" in the rule is irrelevant to the case of such staff. That would hold good even if the complainant had got the grant by way of derogation from Article 11.15. In any event his getting it does not warrant his assuming an acknowledgement by the Organization that it had recruited him as a non-local staff member.

(c) Rule 3.5 is headed "Conditions of service upon extension of appointment". It provides:

"(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 ...

(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."

In its offer of 19 July 1995 to extend his contract from 1 July to 31 December 1995 the Organization said:

"As from 1 July 1995 Rule 3.5 ... will apply. So there will be the following amendments in your contract:

entitlement to family allowance;
retroactive award of step 2 in grade P.3 as from 1 August 1994;
date of yearly increment: August 1995 (P.3/03);
repatriation grant as from 1 August 1994.
All the other terms of your appointment remain unchanged ..."

The complainant accepted that offer.

Nor may it be inferred from 3.5 and from the extension of his appointment that he was entitled to the retroactive grant of non-local status.

The effect of the rule is to bestow retroactively on a short-term official benefits granted to the holder of a fixed-term appointment. If, like the complainant, he belongs to the Progessional category the place of recruitment will have no bearing on the terms of his appointment. So neither does it have any bearing on entitlements granted retroactively.

Besides, the complainant does not argue that the rule affords the only grounds for his claims 2, 3 and 4. He agreed to the offer that gave him retroactively as from 1 August 1994 the higher pay and the repatriation grant.

The conclusion is that his pleas are devoid of merit.

7. He pleads discrimination on the grounds that others who were non-locally recruited were much better paid, though no better qualified. What he is asking for in substance is the same treatment.

The claim fails because he and the other staff members are not in like case: see Judgment 506 (*in re* Hoefnagels). The material distinction is that they concluded fundamentally different contracts with the ILO and that their contracts confer different rights, and the difference is not attributable to any decision that the Organization unilaterally took to discriminate.

The plea fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

Mella Carroll
E. Razafindralambo
Egli
A.B. Gardner

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