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

EIGHTY-SIXTH SESSION

In re Gutiérrez

Judgment 1815

The Administrative Tribunal,

Considering the complaint filed by Mr. Placido Gutiérrez against the International Labour Organization (ILO) on 4 March 1998, the ILO's reply of 15 April, the complainant's rejoinder of 9 June, the Organization's surrejoinder of 28 August, the Registrar's letter of 13 October to the complainant inviting further comment, the complainant's comments of 22 October and the Organization's brief of 2 November 1998;

Considering Article II, 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. By a circular, of 20 July 1985, No. 334 in series 6, the International Labour Office introduced by way of experiment a scheme for "personal promotion". It altered the scheme in 1989 by addendum to the circular and in October 1995 embodied it in Article 6.8.2 of the Staff Regulations:

"1. Officials in the Professional category below the grade of P.5 and officials in the General Service category who have not reached the top grade of their category shall, once only in the course of their entire service with the Office, be eligible for promotion in accordance with either paragraph 2 or paragraph 3 of this article subject (in the case of the Professional category) to paragraph 4.

2. Subject to the criteria, procedures and numerical limits determined by the Director-General after consulting the Administrative Committee, officials referred to in paragraph 1 shall be promoted to the next higher grade of their category if:

(a) their conduct has been fully satisfactory and their performance of duties has been consistently superior to that normally associated with the level of responsibilities of their job, and

(b) they have served or are deemed, in accordance with the criteria established, to have served at least 13 years in their present grade."

The complainant is a Spanish citizen who was born in 1938. The ILO recruited him in 1974 at grade P.2. It promoted him to P.3 on 1 December 1976 on the upgrading of his post and to grade P.4 on 1 August 1983 after he had won an internal competition. It retired him on 31 January 1998. At the material time he was a senior application officer in the Application of Standards Branch (APPL) of the International Labour Standards Department of the Office.

On 17 April 1996 the Personnel Department told him that in accordance with circular 334 he had been put on the list of staff who had qualified in 1995 for consideration for personal promotion. By a minute of 8 November the chairman of the Selection Board informed him that the Director-General had refused the promotion on the Board's recommendation. On 3 December 1996 he applied for review. On 29 August 1997 the director of the Director-General's office told him that, having consulted the Board a second time, the Director-General saw no reason to reverse his decision of 8 November 1996.

On 31 October 1997 the complainant filed a "complaint" against that decision under Article 13.2 of the Staff Regulations. By a letter of 30 January 1998 the Director of the Personnel Department informed him of rejection. That is the decision he is impugning.

B. The complainant makes an interim application for disclosure of the Selection Boards' records.

He has several pleas on the merits.

The Board made blatantly wrong findings. The forms that he and his first-level supervisor put to the Board show that his work was, as circular 334 demanded, "above the normal requirements of the job".

The Board's assessment of him shows a formal flaw in that it took account of an unlawful appraisal of his performance.

It made a mistake of law: though the circular does not require performance to be regularly above par, the Board treated that as a criterion.

By comparing him with other candidates for personal promotion it acted in breach of equal treatment.

He asks the Tribunal to quash the impugned decision and to award him personal promotion as from 1 April 1995. He seeks awards of material damages, of 20,000 Swiss francs in moral damages and of 10,000 francs in costs.

C. The ILO replies that precedent clads the Selection Board's records in privilege. They should "not be disclosed ... unless they are necessary to judicial redress": see Judgment 440 (*in re* Molina) under 2.

On the merits the Organization says that the complainant's performance did not rise above the call of duty. The comments entered by his first-level supervisor on the form that went to the Selection Board were not borne out by the appraisals of his performance in his last job.

He is wrong in saying that to qualify for personal promotion a staff member need not consistently perform above par; the bestowal of praise now and then for particular tasks will not do.

The Board did not take account of the performance appraisal he cites: its summing-up would have been the same whatever that appraisal said. Not until it reviewed his case did it look at the appraisal, and even then only because that was the reason he had given for seeking review.

Since personal promotion is rationed comparison of the candidates for it is lawful: so says the case law. Besides, the complainant was not compared with others.

D. In his rejoinder the complainant submits that the ILO should have treated his nearing retirement "as a point in his favour or as meritorious". It discriminated against him: for another staff member it set a date for reconsidering the matter; for him it did not. He presses his other pleas and rebuts the Organization's arguments.

E. In its surrejoinder the ILO submits that the date of retirement has nothing to do with a scheme of awards for merit. Since the complainant's performance was not regularly above standard, it would have been pointless to reconsider his case the next year.

F. At the Tribunal's instructions the ILO has produced the report of the Selection Board that took up the complainant's request for review. By a letter of 13 October 1998 the Registrar sent the complainant a summary of that report and invited comment. In a letter of 22 October he observed that three members of the Board had voted in his favour and only one against. The ILO's ignoring the Board's recommendation betrays rancour.

G. In observations of 2 November 1998 the ILO explains that the reasons the Board gave for its recommendation ran counter to the "letter and spirit" of the whole scheme. Acceptance would have offended against the rules and the principle of equal treatment for everyone who qualified for promotion.

CONSIDERATIONS

1. The complainant joined the International Labour Office in 1974 on a P.2 post which rose to P.3 on 1 December 1976. He was promoted to P.4 on 1 August 1983. From 1 April 1992 he served in the Application of Standards Branch (APPL) of the International Labour Standards Department as a senior application officer.

On 17 April 1996 the Personnel Department told him that in line with circular 334, series 6, he was on the list of

staff who had qualified in 1995 for personal promotion. He and his first-level supervisor filled up the relevant forms. A Selection Board met to consider everyone on the list. The circular set a quota for personal promotions, and the Board's task was to recommend the best candidates to the Director-General.

In a minute of 8 November 1996 the chairman of the Board told the complainant on the Director-General's behalf that he had been unsuccessful. On 3 December 1996 he applied for review under paragraph 15 of the circular. On 29 August 1997 the director of the Director-General's office answered that the Director-General had consulted another Selection Board but saw no reason to go back on the decision of 8 November 1996. The complainant challenged the new decision in a "complaint" under Article 13.2 of the Staff Regulations. By a letter of 30 January 1998 the ILO rejected it for reasons it gave.

That is the decision he is challenging and his complaint is in time. He claims the quashing of the decision, the grant of the personal promotion, redress for the delay and awards of 20,000 Swiss francs in moral damages and of 10,000 in costs.

The Organization asks the Tribunal to dismiss the complaint.

2. The complainant applies for disclosure of the reports of the Selection Board that met on 25 July and 21 August 1996 and of the one that reviewed his case on 28 January 1997. Though he takes the Organization to task for failing to divulge the membership of the second Selection Board, he lays no claim to disclosure. With his rejoinder he has himself produced a copy of the first report; so on that score his application shows no cause of action.

The Organization observes in its reply that the second report is the "minutes of the Board's meeting". It contends that according to the case law the minutes are privileged and not to be brought forth unless requisite to the Tribunal's ruling; but if they are it will disclose them to the Tribunal.

When there is a process of selection to fill a post or bestow some boon the records are indeed ordinarily privileged: the organisation may not reveal to one candidate information about any of the others. Yet if there is a dispute a candidate has a rightful interest in proving material facts. So the case law prescribes disclosure of any privileged item of evidence that goes to the nub. Precautions may be taken to keep from the complainant's ken immaterial information on a third party such as another candidate. Among the many precedents see, for example, Judgments 556 (*in re* Ali Khan) under 4; 557 (*in re* Ali Khan No. 2); 1223 (*in re* Kirstetter No. 2); 1372, (*in re* Malhotra (Kashmiri Lal)) under 11 and 12; 1436 (*in re* Sala No. 2) under 6; 1513 (*in re* Fauquex) under 6; 1564 (*in re* Malhotra (Kashmiri Lal) No. 5) under 7 and 8; 1687 (*in re* Bedrikow No. 2) under 6; and 1728 (*in re* Swaroop) under 16.

Because of the complainant's charge of abuse of authority and his other pleas the Tribunal wished to learn the Selection Board's reasoning and give the complainant his say as far as need be. So it ordered disclosure to it of the Board's minutes. It then let him have its own capitulation of the passages about him but not of those about anyone else. It asked the Organization to reveal the names of the Board's members - see Judgment 556 under 5 - and, the Organization having done so, passed them on to the complainant.

3. Personal promotion is a means of letting a staff member have a grade higher than the one his post bears: see Judgment 1500 (*in re* Pary No. 4) under 4.

Circular 334 cited above used to say how staff might qualify and what the procedure was. Now there is Article 6.8.2 of the Staff Regulations as well.

Personal promotion is at the Director-General's discretion. The decision is subject to only limited review and will stand unless it shows some formal or procedural flaw or mistake of fact or of law or neglected a material fact or was *ultra vires*, or unless there was misuse of authority or an obviously wrong conclusion was drawn from the evidence: see, for example, Judgment 1500 under 5.

The complainant has the following pleas.

(1) The ILO denied him due process by not letting him see the reports of the two Boards.

(2) It did so again by refusing to name the members of the second one.

(3) The Director-General erred in law by espousing the Board's view that only consistently above-average performance earned personal promotion, a criterion not in the rules.

(4) There was a mistaken finding of fact anyway in holding that he did not meet it: his performance reports and appraisals by his supervisors attested to his consistently going beyond the ordinary call of duty.

(5) There was another mistake of law in breach of equal treatment: all those who qualify for personal promotion should get it, however many they may be and however they may compare with each other.

(6) It was an abuse of authority for the Director-General to refuse him promotion on unstated grounds and on the false pretext that he fell short.

4. As to the first Board's report any breach of due process was purged by his getting hold of it in time to take full account of it in his rejoinder.

Likewise, he has had the gist of the comments on him in the second report and so has been free to rely on them in his pleadings to the Tribunal. Any derogation from due process has again been cured.

5. The ILO refused to let him know who had sat on the Board on the grounds that all he need know was the reasons for its opinion.

The Organization is mistaken. To ensure due process both in internal proceedings and before the Tribunal the staff member must get any items of information material to the outcome. And one such item is the names of the advisory body's members. Who they are may of course affect its reasoning and the weight its report carries, and so the staff member should be allowed at least to comment. That is why the Tribunal will acknowledge a complainant's right to know who sat in his case.

As was said in 2 above, the complainant has been given the names of the Board's members and allowed to comment in a further brief. Again the breach of due process has been put right.

6. Because of the quota set in circular 334 the first Board was able to propose only four promotions. First it discarded any candidates who did not measure up, i.e. whose performance was not - as paragraph 9 of the circular would have it - "regularly performed at a level above the normal requirements of the job". It then compared on merit those who were left.

The Director-General having endorsed the first Board's view that the complainant did not qualify, he did not go forward to the stage of comparison.

The complainant submits that paragraph 9 does not require consistently above-average performance. The Organization retorts that such performance affords the whole basis for personal promotion and it cites paragraph 5:

"The objective of the personal promotion system is to offer the possibility of promotion to long-serving officials whose contribution to the Organization goes beyond that normally associated with the level of the position they occupy, as evidenced by their performance over the years ..."

The Organization's view is right: it is grounded in the circular and answers the purpose of personal promotion.

The complainant's plea fails.

7. He submits that in any case he did consistently outdo expectations. He cites his fine record and the appraisal which, as the circular required, his supervisor wrote for the Board and which he thinks should have clinched the matter. He imputes to the Director-General an obvious mistake of fact in overlooking that decisive evidence and following the first Board.

The Organization's reply is that it was up to Board and Director-General to determine at discretion whether on the evidence he answered the dictates of the circular. To tell whether his performance was consistently above what his job called for they had to compare the description of his post and the work he was actually doing. And the evidence was that his performance, though his supervisors were fully satisfied with it, had not consistently surpassed what was expected of him. His first-level supervisor did say:

"In substance his work is outstanding and regularly far beyond ordinary requirements ... particularly as to all matters relating to the submission and ratification of the Conventions he is in charge of."

But the ILO says that that opinion was neither borne out by the reports on his performance in his last posting, in APPL, nor consistent with the description of his duties in the report forms. Nor did it tally with the notice which was published to advertise his post after he had gone and which showed that the holder of his post was in charge of the submission and registration of ratifications.

He argues that the opinion his supervisor wrote for the Board should have determined whether his performance had been consistently above par. He is wrong. According to the circular the supervisor's opinion is just one item that the Board and the Director-General will bear in mind, and in any event they are free to check it.

He contends that that opinion, and not his periodic performance reports, mattered in assessing him. He surmises that the only poor report he got misled the Board and the Director-General. A former chief with whom he had been in bad odour had written it over five years earlier; but it had prompted his transfer and, though it had misjudged him, he had let it go through so as not to forfeit the transfer.

The Organization denies that it had aught to do with the impugned decision. At the first stage of selection the Board merely said that he had not consistently performed beyond expectations, and to reach that conclusion it had not needed to look at the appraisals in his regular reports. Besides, the Organization would have been entitled to rely on a report he had failed to challenge at the time.

The complainant has not shown, and it seems unlikely, that the report had any influence on the impugned decision. The conclusion is that there was neither any mistaken finding of fact nor the mistake of law he sees in pitching the qualifying requirement too high.

8. He pleads discriminatory treatment: personal promotion should go to all who pass muster, however they compare, and without any maximum number.

There he is challenging not so much the application as the substance of circular 334, and he cannot succeed.

Only those who are in the same or like case may claim equal treatment and of course only comparison will tell whether they are.

If the complainant wants the barriers to be lowered to let everyone over he fails to show any justification for that in the rules. As circular 334 explains, the purpose of the ILO's scheme for personal promotion is to put up the pay of staff with an unusually fine record when the rules do not ordinarily allow it. There is nothing discriminatory about such exceptional treatment. It is indeed only reasonable to keep it exceptional by setting high standards and the quota. The rules make the process of selection objective and fair and again conduce to equality of treatment.

The complainant fails too to show discrimination. He cites no instance of the grant of personal promotion to anyone in the same or like case, particularly by the criterion of consistently above-average performance.

9. Lastly, he pleads abuse of authority in that the Director-General was resolved not to promote him and so misapplied the rules.

The burden of proof rests with him and he has failed to discharge it. His argument is implausible anyway. It was the first Selection Board that dropped him, and the Director-General merely followed suit. After referral to the second Board he upheld his decision, gave the reason why - namely that nothing new had come to light and so there was, to quote paragraph 15 of the circular, no "important error of a factual nature" warranting review - and said that the original decision held good.

The minutes of the second Board's meeting show that, though one majority found in his favour, another thought that his performance had not been consistently above normal requirements. That bore out the opinion of the first Board.

The complainant had a good record and is understandably disappointed. But that affords no grounds for declaring unlawful the refusal to grant him an exceptional benefit for which the qualifications are stringent.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner

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