

EIGHTY-SIXTH SESSION

In re Gutiérrez (No.2)

Judgment 1816

The Administrative Tribunal,

Considering the second 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 and the Organization's surrejoinder of 28 August 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. The complainant's career at the International Labour Office is summed up in Judgment 1815, delivered this day on his first complaint.

He was born on 18 January 1938, and for him the age of retirement was sixty. According to ILO circular 433, in series 6, of 4 April 1990 the date of his retirement was to be 31 January 1998. On 25 July 1997 he applied to the Personnel Department for the extension of his appointment by five months beyond that date. By a minute of 9 September the Department answered him that the Director-General had refused. On 31 October 1997 he filed a "complaint" against that decision. In a letter of 30 January 1998 the Director of the Department told him that it was rejected. That is the decision he is impugning.

B. The complainant contends that the ILO broke the rules on extensions of contract beyond the age of retirement. He should have had such extension: he was the only Spanish-speaking member of the Professional category of staff in the Application of Standards Branch (APPL), and his supervisor "showed" that it would not be in the Organization's interests for him to leave at the scheduled date.

To refuse him the extension was arbitrary because some staff did get it.

The Director-General should have given "at least a brief" explanation of his decision.

He asks the Tribunal to quash it and grant him five months' extension or, failing that, an award of damages in the amount he would have earned in the five months, plus interest.

C. In its reply the ILO points out that circular 433 is no longer relevant and the material rules do not now allow anyone to stay on after the age of retirement.

Although the Director-General has made a few exceptions, not to have done so would have harmed the Organization's interests. The post that the complainant held does not require a grasp of Spanish.

Though the explanation of the decision of 9 September 1997 was not as full as it might have been, the decision of 30 January 1998 does dwell at length on the reasons for refusing extension.

D. In his rejoinder the complainant submits that the Personnel Department substituted its own assessment of the Organization's interests for that of his supervisors, who knew best. His post did call for Spanish since it was someone Spanish-speaking who got it.

He changes his claims: he seeks only the award of the amount he would have earned in the extended period, plus interest.

E. In its surrejoinder the defendant denies ignoring its own interests: the recommendation by the complainant's supervisors was not a sufficient condition for extending his appointment. Though the staff member who took over his post is indeed Spanish-speaking, he works in the ILO's three official languages, as the notice of vacancy required.

CONSIDERATIONS

1. The complainant, a Spanish citizen who was born on 18 January 1938, joined the International Labour Office in 1974 at grade P.2. On 1 December 1976 his post was upgraded to P.3. He rose to P.4 on 1 August 1983. On 1 April 1992 he became a senior officer in the Application Branch of the International Labour Standards Department.

January 1998 being the month of his sixtieth birthday, his contract was to run out on the 31st.

By a minute of 25 July 1997 he asked the Personnel Department to extend his contract, by five months, to 30 June 1998. Appended was a favourable recommendation from two supervisors, the head of the branch and the Director of the Standards Department.

The answer made on the Director-General's behalf was no: a rule was a rule and it allowed of no exception.

On 31 October 1997 Mr. Gutiérrez put a "complaint" to the Director-General under Article 13.2 of the Staff Regulations.

A reply came on 30 January 1998 from the Director of Personnel: the Director-General was sorry that he could not but uphold his decision.

The complainant originally sought the quashing of that decision and the grant of the extension or else an award of damages in the amount of his earnings for the duration, plus interest. In his rejoinder of 9 June 1998 he claims only the award.

The nub of the complainant's case is that the Director-General was guilty of abuse of discretion by applying the rules arbitrarily. The complainant was - he says - the only Spanish-speaking member of the branch; so it was in the ILO's interests to let him stay on until 30 June 1998. His supervisors were both agreed on that, and they knew better than the Director-General what the branch needed. The Director-General chopped and changed: first he pleaded a hard-and-fast rule; then he owned up to making some exceptions. The complainant feels discriminated against.

The Organization asks the Tribunal to dismiss the case. In its view extension would have been an unwarranted departure from the rules and not at all in the Organization's interests, of which the Director-General is a better judge than any head of branch or department. The branch did not need a Spanish-speaking official full-time. The post was filled on 1 April 1998 by transfer; the terms of the competition for it did not call for mother-tongue Spanish, even though the complainant's successor is Spanish-speaking; and there is nothing inconsistent about the Director-General's approach: though he began by saying that there were no exceptions he correctly explained later that he had allowed a few, but only where the Organization's interests so demanded; and in the complainant's case they did not.

2. Article 11.3 of the Staff Regulations reads:

"An official shall retire at the end of the last day of the month in which he reaches the age of sixty-two. An official appointed before 1 January 1990 shall retire at the end of the last day of the month in which he reaches the age of sixty. In special cases the Director-General may retain an official in service until the end of the last day of the month in which the official reaches the age of sixty-five. The Administrative Committee shall be consulted before a decision is taken to retain in service an official below the grade of P.5. The Administrative Committee shall be informed of any decision to retain in service any other official. The provisions of this article shall not apply to an official appointed for a fixed term to a technical cooperation project."

The ILO points out that circular 433 in series 6 (Personnel) is no longer in force. What replaced it was circular 526 in series 1 (Director-General's announcement) as confirmed by circular 574, in series 6, of 21 August 1997.

Circular 526 cancels forthwith the concession of extension beyond the ordinary age of retirement and announces a return to "the normal application of Article 11.3" of the Staff Regulations. Circular 574 reaffirms:

"officials who reach retirement age in the course of the period of September 1997 through 1999 cannot be extended beyond the month in which they reach retirement age."

Article 11.3 empowers the Director-General to grant exceptional extensions beyond the ordinary age of retirement. The Tribunal will exercise only limited review over such exercise of discretion. It will interfere only if the decision was *ultra vires* or broke some rule of form or of procedure, or rested on a mistake of fact or of law, or overlooked a material fact, or if there was a clearly wrong finding of fact or abuse of authority: see, for example, Judgment 1143 (*in re Jones*) under 3.

3. Without making it a formal plea the complainant says that the reasons that the ILO gave for the original refusal of extension were inadequate or wrong.

That is immaterial since he later got enough explanation to be able to plead his case properly. Besides, the ILO did account for the decision he is impugning.

4. He challenges either the rule itself or the manner of applying it to himself on the grounds that the Organization is now well enough off to afford a freer approach.

No practice that abides by the wording of Staff Regulations may be deemed unlawful.

Although the staff member may indirectly challenge the lawfulness of a rule, here the complainant neither shows nor even contends that Article 11.3 is in breach of his rights.

The plea fails.

5. The complainant imputes to the Director-General abuse of discretion in denying that the Organization badly needed him to stay on.

That plea too must fail. It is management - here the Director-General - that decides what the ILO needs. It is in the Organization's interests to abide by its own rules, including Article 11.3, which allows of derogation only "in special cases". The Director-General is, as such, a better arbiter of the Organization's broad needs than are heads of particular units. So the complainant is wrong: his supervisors' views did not clinch the matter. Besides, doing for a short spell without a Spanish-speaking official was not much of a threat to the efficiency of the branch, or so at least would suggest the vacancy of the post for two months after he had gone. In the meantime someone could surely, if need be, have readily been brought in from another unit. That the complainant had experience and a fine record afforded no sufficient reason for derogation: after all, so do many on the eve of retirement.

6. The complainant is by implication pleading discriminatory treatment of staff in the grant of derogations under 11.3. That plea requires comparison of the treatment of staff by the Director-General in the exercise of his discretion; so the Tribunal may review his decisions only within the narrow bounds set out in 2 above.

The Director-General admits to granting extension for the sake of the ILO's interests in special cases. Indeed the complainant cites some.

At all events the burden is on him to show that extension was granted in a case like his own. He has failed even to argue as much, let alone discharge that burden.

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.